CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STONYBROOK GARDENS COOPERATIVE, INC. *v.* NEWREZ, LLC
(AC 45904)

Elgo, Moll and Keller, Js.

Syllabus

Pursuant to statute (§ 47-258), an association has a statutory lien on a condominium or cooperative unit for any assessment attributable to that unit, and, in all actions brought to foreclose a lien under that section, the lien is prior to first or second security interests encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent to the extent of an amount equal to the common expense assessments, based on the periodic budget of the association, which would have become due in the absence of acceleration during the nine months immediately preceding the institution of an action to enforce the association's lien as well as the association's costs and reasonable attorney's fees in enforcing its lien.

The plaintiff, a unit owners association that had previously foreclosed a statutory lien in 2021 on a certain unit, which it thereafter purchased at a foreclosure sale, commenced the present omitted party action against the defendant pursuant to statute (§ 49-30). The defendant was the holder of a mortgage on the unit and had a first security interest but had been omitted from the plaintiff's 2021 foreclosure action. The plaintiff sought its common charges as foreclosed, court costs and legal fees of all current and past court actions, and the costs it incurred in remediating the unit as a redemption amount on the unit. The trial court defaulted the defendant for failure to appear and granted the plaintiff's motion for a judgment of strict foreclosure, setting the redemption amount at $34,410.56. The defendant subsequently filed an appearance

and a motion to open and vacate the judgment, in which it alleged, inter alia, that, had the plaintiff correctly named it in the 2021 foreclosure action, its redemption amount would have been $8868.47 and that it would be inequitable and contrary to the requirements of § 49-30 to require it to pay any additional amounts to exercise its right of redemption. After hearing argument on the defendant's motion, the court denied the motion to open but reduced the redemption amount by approximately $5000. Although the court recognized the applicability of § 47-258 (b) and its nine month priority period, it determined that the equities of the case warranted the inclusion of other expenses incurred by the plaintiff, but not contemplated by § 47-258 (b), in the redemption amount. On the defendant's appeal to this court, *held* that the trial court abused its discretion in denying the defendant's motion to open the judgment of strict foreclosure for the purpose of correcting the redemption amount to the extent that it was inconsistent with § 47-258 (b): in § 47-258 (b), the legislature established a specific priority scheme and delineated which liens may take priority over assessment liens and the extent to which assessment liens may take priority over even those priority liens, and the plaintiff's lien did not have priority for any assessments other than those common expense assessments that would have been due in the nine months preceding the commencement of the 2021 foreclosure action, as authorized under the applicable statutory scheme, and the costs and reasonable attorney's fees that the plaintiff incurred in enforcing its lien; moreover, § 49-30 did not have any bearing on the amount of the plaintiff's priority debt or authorize the court to exercise its equitable discretion in a manner inconsistent with § 47-258 (b); accordingly, this court reversed the judgment as it pertained to the redemption amount and remanded the case for the purpose of correcting the redemption amount to the extent it was inconsistent with § 47-258 (b).

Argued November 15, 2023—officially released April 23, 2024

Procedural History

Action to foreclose any legal interest held by the defendant in a certain unit in a cooperative owned by the plaintiff, brought to the Superior Court in the judicial district of Fairfield, where the defendant was defaulted for failure to appear; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; subsequently, the court denied the defendant's motion to open and vacate the judgment, and the defendant appealed to this court. *Reversed in part*; *further proceedings*.

John P. Fahey, for the appellant (defendant).

Juda J. Epstein, for the appellee (plaintiff).

Opinion

MOLL, J. In this omitted party action commenced pursuant to General Statutes § 49-30,[1] the defendant, NewRez, LLC (NewRez), formerly known as New Penn Financial, LLC, doing business as Shellpoint Mortgage Servicing, appeals from the judgment of the trial court denying its motion to open and vacate the judgment of strict foreclosure rendered in favor of the plaintiff, Stonybrook Gardens Cooperative, Inc., a unit owners' association, in connection with NewRez' mortgage on a unit in Stonybrook Gardens Cooperative in Stratford. On appeal, NewRez claims that the court incorrectly determined the amount that NewRez was required to pay to exercise its right of redemption on the basis of a flawed application of § 49-30 and General Statutes § 47-258[2] and, therefore, improperly denied its motion to

[1] General Statutes § 49-30 provides: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in or holding an encumbrance on such real estate subsequent or subordinate to such mortgage or lien has been omitted or has not been foreclosed of such interest or encumbrance because of improper service of process or for any other reason, all other parties foreclosed by the foreclosure judgment shall be bound thereby as fully as if no such omission or defect had occurred and shall not retain any equity or right to redeem such foreclosed real estate. Such omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

[2] General Statutes § 47-258 provides in relevant part: "(a) The association has a statutory lien on a unit for any assessment attributable to that unit or fines imposed against its unit owner. Unless the declaration otherwise provides, reasonable attorneys' fees and costs, other fees, charges, late charges, fines and interest charged . . . and any other sums due . . . are enforceable in the same manner as unpaid assessments under this section. . . .

"(b) Notwithstanding any provision in the declaration or bylaws to the contrary, a lien under this section is prior to all other liens and encumbrances on a unit except (1) liens and encumbrances recorded before the recordation

open and vacate the foreclosure judgment. We conclude that the court's calculation of NewRez' redemption amount is inconsistent with § 47-258 (b) because it includes amounts other than those expressly permitted thereunder in calculating the plaintiff's priority debt. Accordingly, we reverse the judgment of the trial court as it pertains to the redemption amount.

The following facts and procedural history are relevant to our resolution of this appeal. In March, 2021, the plaintiff commenced an action seeking foreclosure of its statutory lien on a unit in the cooperative located at 26 Baird Court (unit) for outstanding common charges, interest, late fees, and costs owed to the plaintiff pursuant to § 47-258. See *Stonybrook Gardens Cooperative, Inc.* v. *Walker*, Superior Court, judicial district

of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to, (2) a first or second security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent, or, in a cooperative, a first or second security interest encumbering only the unit owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent, and (3) liens for real property taxes and other governmental assessments or charges against the unit or cooperative. In all actions brought to foreclose a lien under this section or a security interest described in subdivision (2) of this subsection, the lien is also prior to all security interests described in subdivision (2) of this subsection to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association pursuant to subsection (a) of section 47-257 which would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce either the association's lien or a security interest described in subdivision (2) of this subsection, excluding any late fees, interest or fines which may be assessed by the association during the nine-month period, and (B) the association's costs and reasonable attorney's fees in enforcing its lien. A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection. This subsection does not affect the priority of mechanics' or materialmen's liens or the priority of liens for other assessments made by the association. . . ."

Section 47-258 was amended by No. 23-119, § 1, of the 2023 Public Acts, which made changes to the statute that are not relevant to this appeal. Accordingly, unless otherwise indicated, we refer to the current revision of the statute.

of Fairfield, Docket No. CV-21-6105220-S (2021 action). The named defendants were the heirs and beneficiaries of the unit's owner, Pamela Walker,[3] all of whom failed to appear and were defaulted.[4] On July 28, 2021, the trial court, *Spader*, *J.*, rendered a judgment of foreclosure by sale, in which, inter alia, it (1) determined that the fair market value of the unit was $45,000 and (2) appointed a foreclosure committee (committee). The plaintiff was the successful bidder at the ensuing foreclosure sale for $26,000, and, thereafter, the court approved the sale. On January 26, 2022, the court ratified the conveyance of the unit to the plaintiff and found that the plaintiff's lien was prior in right to the liens or claims of all named defendants. The court found that the total amount due from those defendants to the plaintiff was $24,258.33.

The plaintiff then commenced the present omitted party action against NewRez on May 3, 2022. In its complaint, the plaintiff alleged as follows. On March 26, 2020, Walker executed a mortgage on the unit as security for a debt owed to JPMorgan Chase Bank, N.A., in the amount of $42,750, which was recorded on the Stratford land records. NewRez subsequently became the holder of the mortgage by way of an assignment dated December 2, 2020, and recorded in the Stratford land records. Although NewRez has a first security interest in the unit due to this prior assignment, it had been omitted from the 2021 action. The plaintiff, therefore, brought the present omitted party action "to foreclose out any legal interest held by [NewRez]" in the unit. Finally, the plaintiff alleged that, "[i]f [NewRez] wishes to redeem the debt (common charges)," then "the plaintiff is seeking its common charges as foreclosed, court costs and legal fees of all current and past

[3] Walker was the victim of a homicide that occurred at the unit in 2020.

[4] The complaint in the 2021 action also named a John Doe defendant, but the plaintiff subsequently withdrew the action against him.

court action[s] and the costs it incurred in remediating the [unit]."

On July 7, 2022, the plaintiff filed a preliminary statement of debt, along with an affidavit of debt, stating that, "for the purposes of redemption," the amount owed to the plaintiff totaled $34,410.56 based on the sum of "unpaid common charges and assessments" from July 28, 2021, to July 31, 2022, plus the bill of costs and court-awarded attorney's fees from the 2021 action.[5] The plaintiff specified that its proposed redemption amount was "not inclusive of fees/costs of this action and remediation costs." On July 25, 2022, after NewRez had been defaulted for failure to appear, the court granted the plaintiff's motion for a judgment of strict foreclosure, determining that the fair market value of the unit was $40,000, setting the redemption amount at $34,410.56, and ordering the law days to commence on August 23, 2022.

On August 16, 2022, NewRez filed an appearance and a motion to open and vacate the July 25, 2022 judgment of strict foreclosure (motion to open), to which the plaintiff filed an objection. In the motion to open, NewRez asserted the following: (1) the plaintiff failed to name or serve NewRez in the 2021 action despite the March 26, 2020 mortgage; (2) had the plaintiff correctly named NewRez, the redemption amount for NewRez would have been $8868.67;[6] and (3) as a result of the

[5] According to the plaintiff's calculations, the $34,410.56 amount comprised (1) $4511 in unpaid common charges and assessments as of the July 28, 2021 judgment of foreclosure by sale, (2) $25,008.89 in unpaid common charges and assessments incurred between July 28, 2021, and July 31, 2022, (3) $1515.67 in costs, and (4) $3375 in court awarded attorney's fees.

[6] According to NewRez' calculations, the $8868.67 amount comprised (1) $3978 in common expense assessments entitled to priority (by calculating nine months of common charges at a rate of $442 per month in 2021), (2) $3375 in court-awarded attorney's fees, and (3) $1515.67 in costs. We would observe that, although the rate of common charges set by the association in 2020 was different from the 2021 rate, NewRez does not dispute the amount of common expense assessments entitled to priority.

plaintiff's failure to name NewRez in the 2021 action, "[i]t would be both inequitable and contrary to the requirements of . . . § 49-30 to require" NewRez to pay any additional amounts to exercise its right of redemption. In its objection to the motion to open, the plaintiff argued, inter alia, that (1) the committee's prior title search did not find NewRez' assignment, (2) the costs and fees incurred in connection with the unit's sale should be included in the redemption amount, and (3) the plaintiff is entitled in equity to recover costs for "cleaning, removing and safeguarding the unit . . . ."

On August 22, 2022, the court heard argument on the motion to open and issued an order extending the law days to commence on October 18, 2022. On August 29, 2022, the court made a preliminary finding "that the mortgage and assignment were fairly obvious to find [online]. . . . The default in the payment of common charges and the mortgage is unfortunately obvious to the court, as well, based on other pending matters in the courthouse and public news accounts of the occurrences at the [unit] in the summer of 2020. The plaintiff may have legitimate related expenses and [NewRez] would have knowledge of the inability of the original defendant to pay cooperative charges while also unable to pay down the mortgage long before the 2021 action was brought by the plaintiff." In addition, the court directed the parties to submit documentation[7] for it to consider in making its ruling. The parties thereafter complied with the order and submitted the additional documents.

[7] The plaintiff was ordered to file (1) a copy of the title search obtained by the committee in connection with the 2021 action and (2) the ledger reflecting the balance of unpaid common charges, assessments, fees, and costs incurred by the plaintiff as described in the plaintiff's affidavit of debt dated July 7, 2022. NewRez was ordered to file a copy of the title search relating to a lis pendens filed "after title vested in the [plaintiff] that purports to indicate that [NewRez'] title search may have missed the committee deed recorded [on] December 21, 2021 . . . ."

On September 8, 2022, the court issued a memorandum of decision in which it denied the motion to open but, upon further review of the debt, reduced the amount that NewRez was required to pay to exercise its right to redeem to either $28,503.18 or $28,954.18.[8] The court found that NewRez was an "omitted party" under § 49-30 and that, had the plaintiff named NewRez in the 2021 action, "it is likely that NewRez would have requested a law day and redeemed on its law day, or, in the event of a sale (which is what occurred), it clearly would have satisfied the judgment prior to the foreclosure sale." The court determined, however, that (1) the unpaid common expense assessments that were entitled to priority pursuant to § 47-258 (b) were those assessments incurred from March through December, 2021, and (2) NewRez was required to pay the unpaid common expense assessments, as well as the plaintiff's "legal fees and costs from the [2021] action and preservation fees," in order to redeem.

Although the court recognized the applicability of § 47-258 (b) and its nine month priority period, it determined that the equities of the case warranted the inclusion of other expenses incurred by the plaintiff, but not contemplated by § 47-258 (b), in the redemption amount.[9] As the court summarized, "the plaintiff here missed serving [NewRez] in [the 2021] action and has gone two years without payment of assessments and incurring legal fees and costs and preservation costs. [NewRez] has gone over two years without payments on its mortgage . . . and took no earlier steps to protect its interests. Only the committee had a decent

[8] The court stated that, "[t]o redeem this action, [NewRez] must pay $28,503.18 by September 30, 2022, or $28,954.18 after September 20, 2022, but before its law day on October 18, 2022 (adding the October, 2022 assessment) . . . ." (Emphasis omitted; footnote omitted.)

[9] The court characterized the case as one that "is at the crossroads of law and equity" and stated that it "weigh[ed] the equitable factors heavily in reaching [its] decision."

usable title search, and [the committee] failed to advise anybody of issues in the [2021] action. . . .

"It would be inequitable to allow a mortgage holder to take no action and just cap their obligations to an association at [nine] months of debt when they . . . sat back on enforcing their rights. It is also inequitable to let an association continue accruing debt that was avoidable had it provided proper notice to the mortgage holder in the first place. The neighboring members of the association are being harmed by the nonperforming nature of this unit."

The court concluded that "[the plaintiff] should be allowed to collect preservation fees and costs and its legal fees and costs from enforcing its debt and the posttitle vesting assessments," reasoning that "[m]any of the expenses [the plaintiff] incurred . . . are expenses that the mortgage holder would have incurred once [Walker] could no longer maintain the property" and NewRez was "served . . . in May [of 2022] and took no action to defend itself earlier." On September 19 and 27, 2022, NewRez filed two motions to reargue and reconsider the denial of its motion to open, both of which the court denied.[10] This appeal followed.

[10] In both motions to reargue and reconsider, NewRez asserted that, prior to commencing the 2021 action, the plaintiff failed to comply with the notice requirements of § 47-258 (m), which provides, inter alia, that costs or attorney's fees shall be excluded from the priority amount if an association fails to send written notice of default to the holders of all security interests prior to commencing an action to foreclose its lien on a unit. In denying the September 19, 2022 motion, the court stated: "While the court agrees that it is entirely likely that the plaintiff did not provide notice of default to [NewRez] prior to commencing the [2021] action (as it admits to not knowing there was a mortgage), foreclosures are equitable in nature, and the court also found that [NewRez] did not actively enforce its rights upon the borrowers' default. The court issued a decision after careful consideration of the equities of all of the parties. The issue of § 47-258 (m) was not raised in the . . . motion [to open] by [NewRez] and is being raised for the first time in this motion to reconsider. Upon review of the memorandum of decision and the equitable factors of this case, the motion to reconsider that decision is denied." The court summarily denied the substantively identical September 27, 2022 motion. NewRez has not appealed from the court's

On appeal, NewRez claims that the court improperly denied its motion to open on the basis of an incorrect application of §§ 47-258 and 49-30. NewRez argues that the court's determination of the redemption amount is inconsistent with § 47-258 (b), which expressly limits the amount of the plaintiff's debt that is entitled to priority over NewRez' mortgage. In essence, NewRez asserts that, as the holder of a first security interest on the unit, it is required only to pay the plaintiff's priority debt in order to exercise its statutory right to redeem. The plaintiff, while recognizing that "[t]he amount the court ordered [NewRez] to pay included sums that were greater than the nine month priority [debt]," asserts that the court was permitted to exercise its broad equitable powers even in contravention of the statute. We agree with NewRez.

The following standard of review and legal principles are relevant to our resolution of NewRez' claim. "In reviewing the denial of a motion to open a judgment of strict foreclosure, we are limited to determining whether the court abused its discretion in so ruling or based its ruling on some error of law. If neither such error is established, the court's ruling must be upheld." *USAA Federal Savings Bank* v. *Gianetti*, 197 Conn. App. 814, 820, 232 A.3d 1275 (2020).

We recognize the long-standing principle that a "[f]oreclosure is peculiarly an equitable action, and the court may entertain such questions as are necessary to be determined in order that complete justice may be done. . . . [B]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider

denials of its motions to reargue and reconsider and will not be able to revisit this issue upon remand. Moreover, counsel for NewRez made clear during oral argument before this court that it was not seeking to avoid liability for the plaintiff's fees and costs incurred in the 2021 action and the present action.

all relevant circumstances to ensure that complete justice is done. . . . [E]quitable remedies are not bound by formula but are molded to the needs of justice. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court." (Citation omitted; internal quotation marks omitted.) *Milford* v. *Recycling, Inc.*, 213 Conn. App. 306, 310, 278 A.3d 1119, cert. denied, 345 Conn. 906, 282 A.3d 981 (2022).

The court's equitable powers, however, are not unfettered. "The law governing strict foreclosure lies at the crossroads between the equitable remedies provided by the judiciary and the statutory remedies provided by the legislature. . . . In exercising its equitable discretion, however, the court must comply with mandatory statutory provisions that limit the remedies available to a foreclosing mortgagee [or lien holder]. . . . It is our adjudicatory responsibility to find the appropriate accommodation between applicable judicial and statutory principles. Just as the legislature is presumed to enact legislation that renders the body of the law coherent and consistent, rather than contradictory and inconsistent . . . [so] courts must discharge their responsibility, in case by case adjudication, to assure that the body of the law—both common and statutory—remains coherent and consistent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Jajer*, 244 Conn. 251, 256–57, 708 A.2d 1378 (1998).

Mindful of these principles, we turn to § 47-258, titled "Lien for assessments and other sums due association. Enforcements." That statute "establishes the priority of liens with respect to foreclosures involving condominiums [and cooperatives]. As our Supreme Court noted in *Hudson House Condominium Assn., Inc.* v. *Brooks*, 223 Conn. 610, 614, 611 A.2d 862 (1992), '[l]iens

for delinquent common expense assessments on individual units within an association are creatures of statute' and the governing statute, § 47-258 (b), sets forth the priority of these liens with respect to other liens. Our Supreme Court also recognized that this legislative scheme departs from the common law rule of first in time equals first in right. Id. Section 47-258 (b) establishes a specific priority scheme and delineates which liens may take priority over assessment liens and the extent to which assessment liens may take priority over even those priority liens. This court must respect the intricate priority scheme that the legislature has established." *Dime Savings Bank of New York, FSB* v. *Muranelli*, 39 Conn. App. 736, 739, 667 A.2d 803 (1995), cert. denied, 236 Conn. 902, 670 A.2d 321 (1996).

Specifically, § 47-258 (b) provides in relevant part: "In all actions brought to foreclose a lien under this section or a security interest . . . the lien is also prior to all [first or second] security interests . . . to the extent of (A) an amount equal to the common expense assessments based on the periodic budget adopted by the association . . . which would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce either the association's lien or a security interest . . . excluding any late fees, interest or fines which may be assessed by the association during the nine-month period, and (B) the association's costs and reasonable attorney's fees in enforcing its lien. A lien for any assessment or fine specified in subsection (a) of this section shall have the priority provided for in this subsection in an amount not to exceed the amount specified in subparagraph (A) of this subsection."

Section 47-258 (b) thus "establishes a super priority lien, as against a first or second security interest, for those assessments that 'accrued during the [nine] months

immediately preceding the commencement of the foreclosure action . . . .' *Hudson House Condominium Assn., Inc.* v. *Brooks*, supra, 223 Conn. [612]. The intricacies of the scheme are evident. The statute specifies which liens shall have priority and makes all others, including, for example, judgment liens, inferior. This scheme establishes the order in which the lienholders shall be paid from the available equity in the subject real property." *Dime Savings Bank of New York, FSB* v. *Muranelli*, supra, 39 Conn. App. 740. Moreover, costs and reasonable attorney's fees incurred in the enforcement of the lien are included in the debt entitled to priority. See General Statutes § 47-258 (b); see also *Hudson House Condominium Assn., Inc.* v. *Brooks*, supra, 617 n.4 (noting that amendment to prior revision of § 47-258 (b) "clarified that attorney's fees and costs are included in the priority debt").

The plaintiff argues that the court's decision to exceed the parameters of § 47-258 (b) by including sums beyond the plaintiff's priority debt in the redemption amount was an exercise of its equitable discretion "to offset the benefits to both [NewRez] and [the plaintiff] that would have accrued on account of the failure to name [NewRez] in the [2021 action]." In particular, the plaintiff asserts that it spent "significant costs to remodel and improve the severely damaged [unit]" and, therefore, the court's decision "prevent[ed] inequitable gains by either party." For the reasons that follow, we conclude that the court improperly crafted an equitable remedy in a manner that contravenes the priority scheme established by the legislature.

"The legislature already considered the position of . . . associations with respect to other lienholders, and, had it wanted to enhance the association's priority further, it would have done so. The statute states that the association's interest, except for the super priority, shall be subordinate to the first and second security

interest." *Dime Savings Bank of New York, FSB* v. *Muranelli*, supra, 39 Conn. App. 741.

Further, as our Supreme Court has explained, "[w]hen the statute is clear . . . the appropriate rule is that one cannot be *unjustly* enriched by a statutory enactment. . . . While the plaintiff may disagree with the equities of limiting the § 47-258 (b) priority . . . this is a matter not for the judiciary, but rather for the legislature that enacted the statute." (Citation omitted; emphasis in original.) *Hudson House Condominium Assn., Inc.* v. *Brooks*, supra, 223 Conn. 615–16; see id., 614–16 (rejecting claim that common expense assessments accrued during pendency of action were entitled to priority under General Statutes (Rev. to 1989) § 47-258 (b)).

Simply put, the plaintiff's lien does not have priority for any assessments other than those common charges authorized under the applicable statutory scheme and the costs and reasonable attorney's fees that the plaintiff incurred in enforcing its lien. Pursuant to § 47-258 (b), the plaintiff's debt has priority over NewRez' mortgage interest only to the extent of an amount equal to the common expense assessments that would have been due in the nine months preceding the commencement of the 2021 action, plus costs and reasonable attorney's fees authorized under the statute, and excluding any late fees, interest, or fines assessed during that period. See, e.g., *Sunrise Common Condominium Assn., Inc.* v. *Bello*, Superior Court, judicial district of Fairfield, Docket No. CV-12-6028307-S (March 21, 2014) (57 Conn. L. Rptr. 746, 748) ("[Section 47-258 (b)] is clear that common expenses are the association's budgeted expenses . . . . [E]xpenses entitled to [super priority] are not expenses related to water damage to a unit, which expenses are occurrence related and not budget expenses.").

Finally, although it may be correct that, as the plaintiff indicates, the present omitted party action "differs from the usual condominium lien foreclosure," we cannot discern § 49-30 to have any bearing on the amount of the plaintiff's priority debt, or to authorize the court to exercise its equitable discretion in a manner inconsistent with § 47-258 (b). "[T]he . . . language [of § 49-30] unambiguously declares that it provides for a *cure* for the omission of an encumbrancer. 'In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language . . . .' General Statutes § 1-1 (a). In common parlance as well as case law, 'cure' means to restore to a prior state of health or soundness. . . . [T]he legislature intended [§ 49-30] to provide a means of restoring the title to the condition that would have existed had the encumbrancer not been omitted." (Citations omitted; emphasis in original.) *Federal Deposit Ins. Corp.* v. *Bombero*, 37 Conn. App. 764, 771, 657 A.2d 668 (1995), appeal dismissed, 236 Conn. 744, 674 A.2d 1324 (1996). Here, had NewRez not been improperly omitted from the 2021 action, it would have been required only to pay the amount prescribed by § 47-258 (b) to exercise its right of redemption.

In sum, we conclude that, pursuant to § 47-258 (b), the amount that NewRez was required to pay to redeem the unit was limited to the plaintiff's priority debt, meaning the common expense assessments that would have been due in the nine months preceding the commencement of the 2021 action, plus costs and reasonable attorney's fees as authorized by the statute. Therefore, we further conclude that the court abused its discretion in denying the motion to open the July 25, 2022 judgment of strict foreclosure for the purpose of correcting the redemption amount to the extent that it is inconsistent with § 47-258 (b).

The judgment is reversed only as to the calculation of the redemption amount and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM WEBBER (AC 46150)

Bright, C. J., and Clark and Prescott, Js.

Syllabus

Pursuant to statute (§ 54-255 (c)), "[a]ny person who . . . (5) has been convicted or found not guilty by reason of mental disease or defect of any crime between October 1, 1988, and September 30, 1998, which requires [sexual offender] registration . . . and (A) served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect, (B) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which would require [sexual offender] registration . . . and (C) has registered with the Department of Emergency Services and Public Protection [as required]; may petition the court to order the Department of Emergency Services and Public Protection to restrict the dissemination of the registration information to law enforcement" and "not make such information available for public access . . . provided the court finds that dissemination of the registration information is not required for public safety."

The acquittee appealed to this court from the trial court's denial of his petition to restrict the dissemination of his sexual offender registration information pursuant to § 54-255 (c) (5). In May, 1984, the acquittee was found not guilty by reason of mental disease or defect of two counts of sexual assault in the first degree, and, after a hearing, the court determined that he was mentally ill to the extent that his release would constitute a danger to himself or others. He was committed to the custody of the Commissioner of Mental Health for a maximum period of forty years. In July, 1985, the acquittee was placed under the jurisdiction of the Psychiatric Security Review Board. The board conditionally released the acquittee from confinement in July, 2007, after which he registered as a sexual offender pursuant to Megan's Law (§ 54-250 et seq.). The board terminated the acquittee's conditional release in October, 2012, and, in December, 2019, the board again conditionally released the acquittee from confinement. Three years later, the acquittee filed the petition at issue, arguing that, with the exception of the date that he was found not guilty by reason of mental disease or defect, he met

all of the other statutory criteria in § 54-255 (c) (5), and distinguishing between him and the eligible offenders who fell within the statutory time frame would be arbitrary and contrary to the legislature's intention of mitigating the retroactive effects of Megan's Law and inconsistent with the equal protection clause of the United States constitution. The trial court denied the petition, concluding that, because the acquittee was acquitted outside of the date range set forth in § 54-255 (c) (5), the court either lacked jurisdiction or did not have the ability to grant the relief that he sought. On appeal, the acquittee claimed that the trial court erred in concluding that it lacked jurisdiction over his petition and over his equal protection claim. In response, the state argued, inter alia, that, even if this court were to find that the trial court had jurisdiction over the acquittee's claims and that the date range criterion of § 54-255 (c) (5) lacked any rational basis, the acquittee's confinement in a hospital for psychiatric disabilities constituted jail or prison time served as a result of the finding of not guilty by reason of mental disease or defect, and, accordingly, the court's denial of the acquittee's petition could be upheld on the alternative ground that he failed to satisfy the criterion in § 54-255 (c) (5) (A). *Held*:

1. The trial court erred in concluding that it lacked jurisdiction over the acquittee's petition and his equal protection claim; the plain language of § 54-255 (c) clearly indicates that the trial court has statutory authority to grant the petition of any person who satisfies the statutory criteria, provided that the court also makes the requisite public safety finding, and, accordingly, the statutory criteria are not prerequisites to the court's jurisdiction to consider a petition but, instead, are essential facts that must be proven to invoke the court's statutory authority to order relief pursuant to § 54-255 (c) (5).
2. The acquittee could not prevail on his claim that the trial court improperly denied his petition, this court having found that, even if it were to agree with him on his equal protection argument, he still would not meet all of the requisite statutory criteria under § 54-255 (c) (5):

   a. Contrary to the acquittee's argument that the terms "jail" and "prison" as used in § 54-255 (c) are plain and unambiguous and clearly do not include an acquittee confined to a hospital, this court concluded that, when properly read in context, the phrase "jail or prison time" in § 54-255 (c) (5) (A) is most reasonably construed to include confinement in a hospital for psychiatric disabilities: the legislature has not defined "prison" or "jail" in § 54-255 or § 54-250 but has, in the statute (§ 1-1 (w)) defining certain words and phrases used in the construction of statutes, defined "state prison" and "jail" as a correctional facility administered by the Commission of Correction but excluding a hospital for psychiatric disabilities, and, although the acquittee's interpretation was not unreasonable when the phrase "jail or prison time" is read in isolation from the remaining language in § 54-255 (c) (5) (A), the acquittee's interpretation ignored the fact that § 54-255 (c) (5) (A) does not disqualify

only individuals who have been convicted of certain crimes and have served jail or prison time as a result of the conviction but also disqualifies individuals who have served jail or prison time as a result of a finding of not guilty by reason of mental disease or defect; moreover, at the time that the legislature amended § 54-255 to add the statutory language at issue, a court's authority to confine a person found not guilty by reason of mental disease or defect was limited to confinement in a hospital for psychiatric disabilities pursuant to statute (§ 17a-582), the current revision of the statute retains that limitation, and the legislature is presumed to have been aware when drafting § 54-255 (c) (5) (A), and when making subsequent amendments without revising that language, that it is not legally possible for a person found not guilty by reason of mental disease or defect to serve time in a jail or prison, as those terms are defined in § 1-1 (w), as a result of such finding; furthermore, given the limitation on the confinement of acquittees in § 17a-582, rigidly interpreting "jail or prison time" in the manner advanced by the acquittee would mean that anyone found not guilty by reason of mental disease or defect of an offense requiring registration under Megan's Law would necessarily satisfy § 54-255 (c) (5) (A), an interpretation belied by the fact that, if the legislature had intended for those terms to have the narrow meaning advanced by the acquittee, it would have had no reason to include the phrase "as a result of such . . . finding of not guilty by reason of mental disease or defect" in § 54-255 (c) (5) (A), and, because this court must presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous, "jail or prison time" within § 54-255 (c) (5) (A) must be construed to include confinement in a psychiatric hospital pursuant to § 17a-582 (e) (1), as this is the only construction of the statutory language that gives effect to the text of § 54-255 (c) (5) (A) in its entirety.

b. This court's interpretation that the phrase "jail or prison time" in § 54-255 (c) (5) includes confinement in a psychiatric hospital is also consistent with the relevant legislative history and with the policy that the statute was designed to implement: concerns regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex offenders led the legislature to require the registration not only of persons convicted of certain sexual offenses or offenses against minors but also of persons found not guilty by reason of mental disease or defect of such crimes, and, significantly, with one exception, the legislature has made no distinction in the registration requirements or the penalties for not complying with such requirements between convicted persons and those found not guilty by reason of mental disease or defect; moreover, the legislative history of various public acts amending Megan's Law, together with the plain language of § 54-255 (c), indicate that the legislature intended to allow offenders who had committed less serious, nonviolent offenses and were required to register, regardless of whether they were convicted or found not guilty by reason of mental disease

or defect, to petition to restrict the dissemination of their registration information pursuant to that statute where the public dissemination of the offender's registration information was not required for public safety, and the legislative intent underlying the eligibility criteria in § 54-255 (c) (5) is thus most consistent with a broad construction of "jail or prison time" to include confinement in a hospital for psychiatric disabilities, as to construe that phrase to mean only confinement in a correctional facility would potentially allow persons who committed the most serious and most violent sexual offenses to be removed from the public registry because they were confined in a hospital instead of in a correctional facility, a result that the legislature clearly did not intend.

c. The acquittee's argument that other statutory mechanisms prevent the release of acquittees who pose a public safety risk, and that it is therefore unnecessary to the public safety purpose of Megan's Law to include those persons within the scope of § 54-255 (c) (5) (A), was unavailing: although the acquittee pointed to the fact that the state may petition pursuant to statute (§ 17a-593) for the continued commitment of acquittees perceived to pose a danger to the public and that those ordered released by the board would have already been determined by providers to not pose a threat to oneself or others, the acquittee disregarded the fact that an acquittee who is conditionally released from confinement, rather than discharged, is by definition a person whose final discharge would constitute a danger to himself or others but who can be adequately controlled with available supervision and treatment on conditional release, and the legislature's decision to require the registration of persons found not guilty by reason of mental disease or defect following their release from confinement indicates that the legislature was indeed concerned about the public safety risk that those persons posed upon their release despite the existence of the statutory mechanisms to which the acquittee referred; moreover, the acquittee's argument that the requirement that courts must make a public safety finding to grant a petition under § 54-255 (c) (5) similarly alleviates the public safety concern associated with restricting the public dissemination of acquittees' registration information could also be made as to persons who served jail or prison time as a result of a conviction of a crime requiring registration under Megan's Law, and the legislative history reflects that the legislature concluded that individuals who had been confined, whether in a correctional facility or in a hospital, posed an inherently greater risk to public safety upon release, such that courts should not have discretion to make their own findings regarding the necessity of publicizing such offenders' registration information, which finds support in the legislature's choice to depart from the language in an earlier revision of § 54-255 that more broadly authorized courts to release a sexually violent offender from the registration obligation whenever that person had maintained his or her registration for at least ten years and the court found that he did not suffer from a mental abnormality

or personality disorder that made him likely to engage in sexually violent offenses; furthermore, although the acquittee attempted to distinguish offenders who are acquitted and confined from offenders who are convicted and confined, there is no indication in the legislative history that the legislature believed that offenders who were confined in a hospital for psychiatric disabilities were inherently less dangerous than those who were confined in a correctional facility such that, assuming all other statutory criteria are satisfied, only the former should be eligible to petition to restrict the dissemination of their registration information, and, instead, the legislature's clear reference in § 54-255 (c) (5) (A) to conviction or finding of not guilty by reason of mental disease or defect evidences an intent that the criterion to have served no jail or prison time would be effective as to both classes of offenders; additionally, this court was not persuaded by the acquittee's argument that adopting the state's interpretation of the statute would lead to the absurd result of conflating punishment with treatment and blurring the lines between the Department of Correction and the board, as the Supreme Court has recognized that the registration requirement is regulatory and not punitive in nature and, thus, prohibiting offenders from petitioning to restrict the dissemination of their registration information if they do not meet the statutory criteria is not a punishment but instead serves to advance the legislature's nonpunitive goals of protecting the public and facilitating future law enforcement efforts.

3. Because the issue of whether the trial court properly denied the acquittee's petition could be resolved on statutory grounds, this court did not reach the merits of the acquittee's constitutional claim.

Argued November 6, 2023—officially released April 23, 2024

Procedural History

Petition to restrict the dissemination of the acquittee's sexual offender registration information, brought to the Superior Court in the judicial district of New Haven, where the court, *Harmon, J.*, rendered judgment denying the petition, from which the acquittee appealed to this court. *Affirmed.*

James E. Mortimer, assigned counsel, for the appellant (acquittee).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Rocco A. Chiarenza*, senior assistant

state's attorney, and *Melissa R. Holmes*, assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, C. J. The acquittee,[1] William Webber, appeals from the judgment of the trial court denying his petition to restrict the dissemination of his sexual offender registration information pursuant to General Statutes § 54-255 (c) (5).[2] On appeal, the acquittee claims that (1) the court erred in concluding that it lacked jurisdiction over his petition and (2) the statutory exclusion of his petition violates the equal protection clauses of the federal and state constitutions. Although we agree with the acquittee that the court had jurisdiction over his petition, we nonetheless conclude that the court properly denied his petition because, even if we were to agree with him on his equal protection argument, he still would not meet all of the requisite statutory criteria under § 54-255 (c) (5). Accordingly, we affirm the judgment of the trial court on this alternative ground.

The record reveals the following undisputed facts and procedural history. On May 23, 1984, the court, *Norcott, J.*, found the acquittee not guilty by reason of mental disease or defect[3] of two counts of sexual assault

[1] " 'Acquittee' means any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." General Statutes § 17a-580 (1).

[2] "Section 54-255 authorizes a trial court to restrict the dissemination of registration information pertaining to persons who are convicted or found not guilty by reason of mental disease or defect of certain sex offenses and offenses against minors, upon the granting of the offender's petition to restrict the dissemination of such information." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 721, 6 A.3d 763 (2010).

[3] "Prior to 1981, a criminal defendant who prevailed on an insanity defense was deemed to be 'acquitted on the grounds of mental disease or defect.' Public Acts 1981, No. 81-301, § 2, changed this standard to 'guilty but not criminally responsible on the grounds of mental disease or defect.' This standard was changed again in 1983 to its present form, 'not guilty by reason of mental disease or defect,' by Public Acts 1983, No. 83-486, § 2. . . . This

in the first degree pursuant to General Statutes (Rev. to 1983) § 53a-70.[4] Following a hearing before the court, *Kinney*, *J.*, on August 27, 1984, the court found that the acquittee was "mentally ill to the extent that his release would constitute a danger to himself or others" and committed him to the custody of the Commissioner of Mental Health (now the Commissioner of Mental Health and Addiction Services) for a maximum period of forty years pursuant to General Statutes (Rev. to 1983) § 53a-47 (a) and (b).[5] In July, 1985, the acquittee

change became effective on October 1, 1983 . . . ." *State* v. *Putnoki*, 200 Conn. 208, 211 n.2, 510 A.2d 1329 (1986). In the present case, "[p]rior to the receipt of evidence, the court agreed with counsel for the [acquittee] that, given the fact that the events in question took place on August 7, 1983, the legal standard of insanity to be applied to this case was that standard as set forth in . . . General Statutes [Rev. to 1983] § 53a-13 . . . ." For the sake of clarity and because it does not affect our analysis, we use the terminology from the current revision of the statute.

[4] General Statutes (Rev. to 1983) § 53a-70 (a) provides: "A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."

[5] General Statutes (Rev. to 1983) § 53a-47 provides in relevant part: "(a) (1) When any person charged with an offense is found guilty but not criminally responsible on the grounds of mental disease or defect, the court shall order such person to be temporarily confined in any of the state hospitals for mental illness for a reasonable time, not to exceed ninety days, for an examination to determine his mental condition . . . . (3) Within sixty days of the confinement pursuant to subdivision (1), the superintendent of such hospital and the retained psychiatrist, if any, shall file reports with the court setting forth their findings and conclusions as to whether such person is mentally ill to the extent that his release would constitute a danger to himself or others. . . . (4) Upon receipt of such reports, the court shall promptly schedule a hearing. If the court determines that the preponderance of the evidence at the hearing establishes that such person is mentally ill to the extent that his release would constitute a danger to himself or others, the court shall confine such person in a suitable hospital or other treatment facility.

"(b) Whenever a person is committed for confinement pursuant to subdivision (4) of subsection (a), his confinement shall continue until he is no longer mentally ill to the extent that his release would constitute a danger to himself or others, provided the total period of confinement, except as

was placed under the jurisdiction of the Psychiatric Security Review Board (board). The board conditionally released the acquittee from confinement on July 17, 2007, after which the acquittee registered as a sexual offender with the Department of Emergency Services and Public Protection (department) pursuant to Megan's Law, General Statutes § 54-250 et seq.[6] After learning that the acquittee was in possession of pornography, the board revoked the acquittee's conditional release in May, 2012. Following a hearing, the board terminated the acquittee's conditional release and returned him to confinement on October 1, 2012, on the basis that he would be most safely treated in an inpatient hospital setting. On December 10, 2019, the board again conditionally released the acquittee from confinement.

On August 8, 2022, the acquittee filed a petition with the court, *Harmon*, *J.*, pursuant to § 54-255 (c) (5), seeking an order directing the department to restrict the dissemination of his registration information for

provided in subsection (d), shall not exceed a maximum term fixed by the court at the time of confinement, which maximum term shall not exceed the maximum sentence which could have been imposed if the person had been convicted of the offense. . . ."

[6] In particular, the acquittee registered pursuant to General Statutes § 54-252 (a) (2), which provides in relevant part: "Any person who has been convicted or found not guilty by reason of mental disease or defect of a sexually violent offense, and . . . is released into the community on or after October 1, 1998, shall, within three days following such release . . . register such person's name, identifying factors and criminal history record, documentation of any treatment received by such person for mental abnormality or personality disorder, and such person's residence address and electronic mail address, instant message address or other similar Internet communication identifier, if any, with the Commissioner of Emergency Services and Public Protection on such forms and in such locations as said commissioner shall direct, and shall maintain such registration for life. . . ."

Although § 54-252 has been amended since the acquittee was first required to register in 2007; see Public Acts, Spec. Sess., June, 2007, No. 07-4, § 91; Public Acts 2011, No. 11-51, § 134 (a); Public Acts 2015, No. 15-211, § 6; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

law enforcement purposes only, such that it would no longer be available for public access. In support of his petition, the acquittee argued that, with the exception of the date that he was found not guilty by reason of mental disease or defect, he meets all of the other statutory criteria to petition for the restriction of the dissemination of his registration information, including that he (1) has served no jail or prison time as a result of the finding of not guilty by reason of mental disease or defect, (2) has not subsequently been convicted or found not guilty by reason of mental disease or defect of any crime that would require registration under Megan's Law, and (3) has registered with the department as required by Megan's Law. The acquittee also noted that "under the terms of his conditional release, [he] does not present a threat to public safety requiring the dissemination of his registration information." The acquittee acknowledged that § 54-255 (c) (5) is "arguably not directly applicable" to him because he was acquitted prior to October 1, 1988, and not between October 1, 1988, and September 30, 1998, as the statutory remedy requires. Nonetheless, he maintained that, because he meets all of the other statutory criteria, distinguishing "between [him] and the eligible offenders [who fall] within the statutory time frame would be arbitrary and contrary to the legislature's intention of mitigating the retroactive effects [of Megan's Law] and inconsistent with the equal protection clause . . . of the United States constitution."

The court held a hearing on the acquittee's petition on December 1, 2022. The state opposed the petition, arguing that the court could not grant the acquittee any relief under the current statutory framework. The court agreed with the state, concluding that, because the acquittee was acquitted outside of the date range set forth in § 54-255 (c) (5), the court either lacked jurisdiction or did not "have the ability" to grant the relief that

he sought. Accordingly, the court denied the petition.[7] This appeal followed.

I

The acquittee first claims that the trial court erred in concluding that it lacked jurisdiction over his petition to restrict the dissemination of his registration information and over his claim that the statutory exclusion of his petition to restrict the dissemination of his registration information violates his right to equal protection. According to the acquittee, the court had jurisdiction over his petition and his equal protection claim because "§ 54-255 (c) explicitly vests with the court the power to restrict the dissemination of registration information to law enforcement" and "the fourteenth amendment to the United States constitution and article first, § 20, of the Connecticut constitution provide courts with the authority to strike down laws that violate their respective equal protection provisions."

In response, the state argues that the acquittee's failure to satisfy two of the criteria set forth in § 54-255 (c) (5)—namely, the requirements to have been found not guilty by reason of mental disease or defect between October 1, 1988, and September 30, 1998, and to have served no jail or prison time as a result of such finding—deprived the court of jurisdiction to entertain the petition. Additionally, the state argues that the court's inherent authority to strike down laws that violate constitutional principles does not confer jurisdiction on the court to consider an equal protection claim raised in a petition that the court lacked jurisdiction to consider in the first place. Therefore, according to the state, the court should have dismissed rather than denied the petition. We agree with the acquittee that the court had jurisdiction to consider his petition.

[7] The court circled "denied" on the order page of the acquittee's petition.

"As a preliminary matter, we note that [i]t is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . When reviewing an issue of subject matter jurisdiction on appeal, [w]e have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 770, 143 A.3d 578 (2016).

In the present case, the court concluded, on the basis of the date range criterion in § 54-255 (c) (5), that it "lack[ed] jurisdiction to change . . . the information being only available to the police department versus the general public at this time, and . . . [did not] have the ability to grant [the acquittee] the relief that [he was] seeking . . . ." Despite the court's statement as to jurisdiction, it denied, rather than dismissed, the acquittee's petition.

We previously have noted "the ongoing confusion as to whether the failure to plead or prove an essential fact [for purposes of invoking a statutory remedy] implicates the [tribunal's] subject matter jurisdiction or its statutory authority. . . . [O]nce it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . [T]he question of whether the action

belongs to the class of cases that the tribunal has authority to decide is [s]eparate and distinct from . . . the question of whether a [tribunal] . . . properly exercises its statutory authority to act. . . . A challenge to the tribunal's statutory authority raises a claim of statutory construction that is not jurisdictional. . . . [A] claim that a party has failed to allege or to establish an element of a statutory remedy implicates the tribunal's statutory authority and the legal sufficiency of the complaint, not the tribunal's subject matter jurisdiction." (Citation omitted; internal quotation marks omitted.) *Bridgeport* v. *Freedom of Information Commission*, 222 Conn. App. 17, 39–40, 304 A.3d 481 (2023), cert. denied, 348 Conn. 936, 306 A.3d 1072 (2024).

Pursuant to § 54-255 (c), any person who meets the criteria set forth in subdivision (5) "may petition the court to order the [department] to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access." The court then "may order the [department] to restrict the dissemination of the registration information . . . provided the court finds that dissemination of the registration information is not required for public safety." General Statutes § 54-255 (c). The statute's plain language clearly indicates that the trial court has statutory authority to grant the petition of any person who satisfies the statutory criteria, provided that the court also makes the requisite public safety finding. We conclude that the statutory criteria are not prerequisites to the court's jurisdiction to consider a petition but instead are essential facts that must be proven to invoke the court's statutory authority to order relief pursuant to § 54-255 (c). See *Bridgeport* v. *Freedom of Information Commission*, supra, 222 Conn. App. 41 (whether essential fact that goes to merits of complaint has been established does not implicate tribunal's jurisdiction); see also *New England Retail*

Properties, Inc. v. *Maturo*, 102 Conn. App. 476, 481–82, 925 A.2d 1151 (under statute prohibiting commencement of suit unless and until legal claim is rejected by estate, defendant's claim that estate had not rejected plaintiff's legal claim did not implicate court's subject matter jurisdiction but, rather, its statutory authority), cert. denied, 284 Conn. 912, 931 A.2d 932 (2007). Accordingly, in the present case, because the court determined that the acquittee simply failed to satisfy the statutory criteria under § 54-255 (c) (5), the court incorrectly stated that it lacked jurisdiction to entertain the petition.

II

The acquittee next claims that the statutory exclusion of his petition to restrict the dissemination of his registration information violates the equal protection clauses of the federal and state constitutions. In particular, the acquittee claims that the date range criterion set forth in § 54-255 (c) (5) violates his right to equal protection because there is no rational basis for the statutory distinction between offenders who were convicted or found not guilty by reason of mental disease or defect between October 1, 1988, and September 30, 1998, and otherwise similarly situated offenders like himself who were convicted or found not guilty by reason of mental disease or defect prior to October 1, 1988. According to the acquittee, "[b]ut for the date of [his] conduct, he would be eligible to petition the court" to restrict the dissemination of his registration information.

The state argues that we should not reach the acquittee's equal protection claim because, even if we were to agree that the date range criterion lacks any rational basis, the court's denial of the acquittee's petition can be upheld on the alternative ground that he does not satisfy the criterion in § 54-255 (c) (5) (A)—that is, that he "served no jail or prison time as a result

of [the] . . . finding of not guilty by reason of mental disease or defect . . . .'' See *Pequonnock Yacht Club, Inc.* v. *Bridgeport*, 259 Conn. 592, 599, 790 A.2d 1178 (2002) (''[w]e . . . may affirm the court's judgment on a dispositive alternate ground for which there is support in the trial court record'' (internal quotation marks omitted)).

We agree with the state that we should address the acquittee's constitutional claim only if we first determine that he meets the other statutory requirements for the court to grant his petition. We ''do not engage in addressing constitutional questions unless their resolution is unavoidable.'' *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002). Accordingly, ''[i]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the [c]ourt will decide only the latter.'' (Internal quotation marks omitted.) *State* v. *Graham S.*, 149 Conn. App. 334, 343, 87 A.3d 1182, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014). We thus turn to the interpretation of the statutory criteria.

''The interpretation of a statute, as well as its applicability to a given set of facts and circumstances, presents a question of law over which our review is plenary.'' (Internal quotation marks omitted.) *Village Apartments, LLC* v. *Ward*, 169 Conn. App. 653, 659, 152 A.3d 76 (2016), cert. denied, 324 Conn. 918, 154 A.3d 1008 (2017). In construing § 54-255, ''our fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering

such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretative guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *State* v. *Drupals*, 306 Conn. 149, 159, 49 A.3d 962 (2012).

"[W]e consider the statute as a whole with a view toward reconciling its parts in order to obtain a sensible and rational overall interpretation." (Internal quotation marks omitted.) *Wiseman* v. *Armstrong*, 269 Conn. 802, 813, 850 A.2d 114 (2004). "We are . . . guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . [T]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have upon any one of them." (Internal quotation marks omitted.) *500 North Avenue, LLC* v. *Planning Commission*, 199 Conn. App. 115, 130–31, 235 A.3d 526, cert. denied, 335 Conn. 959, 239 A.3d 320 (2020). "Legislation never is written on a clean slate, nor is it ever read in isolation or applied in a vacuum. Every new act takes its place as a component

of an extensive and elaborate system of written laws. . . . Construing statutes by reference to others advances [the values of harmony and consistency within the law]. In fact, courts have been said to be under a duty to construe statutes harmoniously where that can reasonably be done. . . . Moreover, statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . .'' (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 638, 148 A.3d 1052 (2016).

In accordance with § 1-2z, we begin our analysis with the text of the statute and its relationship to other statutes to ascertain whether the statutory language is susceptible to more than one reasonable interpretation. Section 54-255 (c) provides in relevant part: ''Any person who . . . (5) has been convicted or found not guilty by reason of mental disease or defect of any crime between October 1, 1988, and September 30, 1998, which requires registration under sections 54-250 to 54-258a, inclusive, and (A) *served no jail or prison time as a result of such conviction or finding of not guilty by reason of mental disease or defect*, (B) has not been subsequently convicted or found not guilty by reason of mental disease or defect of any crime which would require registration under sections 54-250 to 54-258a, inclusive, and (C) has registered with the [department] in accordance with sections 54-250 to 54-258a, inclusive; may petition the court to order the [department] to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access. . . .'' (Emphasis added.)

It is undisputed that the acquittee satisfies § 54-255 (c) (5) (B) and (C) because, since his acquittal in 1984, he has not been convicted or found not guilty by reason of mental disease or defect of another crime requiring registration under Megan's Law and he has registered

with the department. The parties disagree, however, as to whether the acquittee's confinement in a hospital for psychiatric disabilities constitutes "jail or prison time [served] as a result of [the] . . . finding of not guilty by reason of mental disease or defect" within the meaning of § 54-255 (c) (5) (A) such that he does not satisfy that criterion.

On appeal, the acquittee argues that the terms "jail" and "prison" as used in § 54-255 (c) "are plain and unambiguous and clearly do not include an 'acquittee' confined to a 'hospital.' " In support of this argument, the acquittee cites judicial opinions and other statutes that distinguish between correctional facilities and hospitals for psychiatric disabilities.[8] The state argues, however, that "in order not to frustrate evident legislative intent, and to arrive at a rational and sensible result, the phrase 'jail or prison time' must be construed generally to mean a period of lawfully ordered confinement

[8] Specifically, the acquittee draws our attention to four distinctions that our courts and legislature have made. First, our Supreme Court, in concluding that the phrase "other facility" as used in the patients' bill of rights, General Statutes §§ 17a-540 through 17a-550, was not broad enough to include correctional facilities, recognized that "[n]either hospitals nor clinics are ordinarily considered to be synonymous with prisons or correctional institutions." *Wiseman* v. *Armstrong*, supra, 269 Conn. 813. Second, our Supreme Court has distinguished between the treatment focused purpose of the commitment of an acquittee and the punitive purpose of a criminal sentence. See *Connelly* v. *Commissioner of Correction*, 258 Conn. 394, 404, 780 A.2d 903 (2001) ("commitment, unlike a criminal sentence, is not a sanction or penalty but, rather, a vehicle pursuant to which the court can ensure that [an acquittee] . . . will receive treatment for his or her mental disease or defect"). Third, the definition of "hospital for psychiatric disabilities" under General Statutes § 17a-580 (6) explicitly excludes "any correctional institution of the state . . . ." Last, in other parts of the General Statutes, the legislature has established separate definitions for an inmate or prisoner and an acquittee, the former being defined as "any person in the custody of the Commissioner of Correction or confined in any institution or facility of the Department of Correction . . ."; General Statutes § 18-84; and the latter as "any person found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . ." General Statutes § 17a-580 (1).

or captivity," including in a hospital for psychiatric disabilities. We agree with the state that, when properly read in context, the phrase "jail or prison time" in § 54-255 (c) (5) (A) is most reasonably construed to include confinement in a hospital for psychiatric disabilities pursuant to General Statutes § 17a-582 (e) (1).[9]

The legislature has not defined either "prison" or "jail" in § 54-255 or in § 54-250, which sets forth definitions for other words and phrases used in Megan's Law. In addition, we have found no appellate case law interpreting these terms as they are used in § 54-255. Although neither party has addressed it, the legislature has defined "state prison" and "jail" in General Statutes § 1-1 (w) as "a correctional facility administered by the Commissioner of Correction." This definition plainly excludes a hospital for psychiatric disabilities, which General Statutes § 17a-580 (6) defines as "any public or private hospital, retreat, institution, house or place in which a person with psychiatric disabilities or drug-dependent person is received or detained as a patient, *but does not include any correctional institution of the state* . . . ."[10] (Emphasis added.)

Given the definition in § 1-1 (w), and the other authorities cited by the acquittee; see footnote 8 of this opinion; the acquittee's interpretation is not unreasonable when the phrase "jail or prison time" is read in isolation

[9] General Statutes § 17a-582 provides in relevant part: "(a) When any person charged with an offense is found not guilty by reason of mental disease or defect pursuant to section 53a-13 . . . (d) [t]he court shall commence a hearing . . . . (e) At the hearing, the court shall make a finding as to the mental condition of the acquittee and, considering that its primary concerns are the protection of society and the safety and well-being of the acquittee, make one of the following orders:

"(1) If the court finds that the acquittee is a person who should be confined or conditionally released, the court shall order the acquittee committed to the jurisdiction of the board and . . . confined in a hospital for psychiatric disabilities . . . ."

[10] This statutory definition was the same when the legislature amended § 54-255 to add the statutory language at issue. See General Statutes (Rev. to 1999) § 17a-580 (6) (defining "[h]ospital for mental illness").

from the remaining language in § 54-255 (c) (5) (A). See *Palosz* v. *Greenwich*, 184 Conn. App. 201, 213, 194 A.3d 885 (noting that "the legislature is presumed to be aware of the common law when it enacts statutes" and that "[w]e presume that laws are enacted in view of existing statutes" (internal quotation marks omitted)), cert. denied, 330 Conn. 930, 194 A.3d 778 (2018). Nevertheless, the acquittee's interpretation ignores the fact that § 54-255 (c) (5) (A) does not disqualify only individuals who have been *convicted* of certain crimes and have served jail or prison time as a result of the conviction. It also disqualifies individuals who have served jail or prison time "as a result of such . . . finding of not guilty by reason of mental disease or defect . . . ." General Statutes § 54-255 (c) (5) (A). The question, then, is whether the acquittee's interpretation of the statute renders this clause meaningless if persons found not guilty by reason of mental disease or defect cannot, as a matter of law, be confined in a prison or jail as defined in § 1-1 (w) and as argued by the acquittee. "It is a basic tenet of statutory construction that the legislature did not intend to enact meaningless provisions. . . . Accordingly, care must be taken to effectuate all provisions of the statute." (Internal quotation marks omitted.) *State* v. *Gibbs*, 254 Conn. 578, 602, 758 A.2d 327 (2000); see also *Commissioner of Environmental Protection* v. *Mellon*, 286 Conn. 687, 692 n.7, 945 A.2d 464 (2008) ("[s]ection 1-2z does not require the courts to ignore the fact that the application of a statutory definition would render redundant certain language in the statute under review").

To answer this question, it is necessary to review the statutory scheme that provides for the confinement of persons found not guilty by reason of mental disease or defect. At the time that the legislature amended § 54-255 to add the statutory language at issue,[11] a court's

[11] Section 54-255 was revised to add the statutory language at issue in 1999; see Public Acts 1999, No. 99-183, § 6; and has retained that language following several amendments. See Public Acts 2001, No. 01-211, § 2; Public

authority to confine a person found not guilty by reason of mental disease or defect was limited to confinement in a hospital for psychiatric disabilities. Specifically, General Statutes (Rev. to 1999) § 17a-582 (e) (1) provides in relevant part: "If the court finds that the acquittee is a person who should be confined or conditionally released, the court shall order the acquittee committed to the jurisdiction of the board and either confined in a hospital for psychiatric disabilities or placed with the Commissioner of Mental Retardation [now the Commissioner of Developmental Services], for custody, care and treatment . . . ." The current revision of the statute retains this limitation. See General Statutes § 17a-582 (e) (1). The legislature is presumed to have been aware when drafting § 54-255 (c) (5) (A), and when making subsequent amendments without revising that language, that it is not legally possible for a person found not guilty by reason of mental disease or defect to serve time in a jail or prison, as those terms are defined in § 1-1 (w), as a result of such finding. See *500 North Avenue, LLC* v. *Planning Commission*, supra, 199 Conn. App. 130–31 ("[t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have upon any one of them" (internal quotation marks omitted)).

Given the limitation in § 17a-582, rigidly interpreting "jail or prison time" in the manner advanced by the acquittee would mean that anyone found not guilty by reason of mental disease or defect of an offense requiring registration under Megan's Law would necessarily satisfy § 54-255 (c) (5) (A). Thus, if the legislature had intended for those terms to have the narrow meaning advanced by the acquittee, it would have had no reason to include the phrase "as a result of such . . . finding

Acts 2002, No. 02-89, § 87; Public Acts 2005, No. 05-146, § 6; Public Acts 2011, No. 11-51, § 134; Public Acts 2019, No. 19-189, § 41.

of not guilty by reason of mental disease or defect" in § 54-255 (c) (5) (A). Consequently, the acquittee's interpretation of the statute renders that phrase meaningless. Because "we presume that there is a purpose behind every sentence, clause, or phrase used in an act and that no part of a statute is superfluous"; *Megos* v. *Ranta*, 179 Conn. App. 546, 552, 180 A.3d 645, cert. denied, 328 Conn. 917, 180 A.3d 961 (2018); we conclude that "jail or prison time" within § 54-255 (c) (5) (A) must be construed to include confinement in a psychiatric hospital pursuant to § 17a-582 (e) (1). This is the only construction of the statutory language that gives effect to the text of § 54-255 (c) (5) (A) in its entirety.[12]

In an effort to avoid this conclusion, the acquittee argues that there are two scenarios in which an acquittee could be required to serve time specifically in a jail or prison that would give meaning to the statutory language. First, he argues that "an individual may be found [not guilty by reason of mental disease or defect] of one offense requiring registration but guilty on others, receiving a sentence that provides for a term of incarceration." Second, the acquittee asserts that a person may be confined in a hospital for psychiatric disabilities as a result of being found not guilty by reason of mental disease or defect and, while so confined, commit an offense for which he is convicted and transferred to a correctional facility. The problem with both of these scenarios is that § 54-255 (c) (5) (A) requires that a person must have served no jail or prison time "as a

[12] For the same reason, we also reject the acquittee's argument that, if the legislature had intended for the phrase "jail or prison time" to include confinement of an acquittee in a hospital for psychiatric disabilities, "it would have made mention of 'acquittees committed to a hospital for psychiatric disabilit[ies]' or used analogous language." We reiterate that the legislature's express inclusion of persons found not guilty by reason of mental disease or defect in that provision demonstrates that the legislature did not intend for the phrase "jail or prison time" to be so narrowly construed such that it has no meaning as to those persons.

result of" being found not guilty by reason of mental disease or defect. In the acquittee's two hypothetical scenarios, the jail or prison time is not the result of the not guilty finding. They thus fall outside of the circumstances that the statute is intended to address. For this reason, the acquittee's argument is unavailing.

Our interpretation also is consistent with the relevant legislative history and with the policy that the statute was designed to implement.[13] Although the legislative history does not directly address whether § 54-255 (c) (5) (A) was intended to encompass confinement in a hospital for psychiatric disabilities, it is well established that, "[i]n determining the true meaning of a statute

[13] Although we conclude that the plain text of the statute, when properly read in context, strongly supports the state's interpretation of the statutory language, we also recognize that the acquittee's interpretation is not entirely implausible in light of the definition in § 1-1 (w). See *Commissioner of Environmental Protection* v. *Mellon*, supra, 286 Conn. 693 n.7 ("It is of course true that, when a statutory definition applies to a statutory term, the courts must apply that definition. The question in the present case, however, is whether the statutory definition applies in the first instance." (Emphasis omitted.)). The statutory language is therefore ambiguous in the sense that it is unclear from the text of the statute, and its relationship to other statutes, whether the legislature intended for the statutory definition in § 1-1 (w) to apply to § 54-255. Indeed, the legislature's decision to include the phrase "as a result of such . . . finding of not guilty by reason of mental disease or defect" in § 54-255 (c) (5) (A), for which a person cannot be sentenced to jail or prison, "raises doubt" as to whether the legislature intended for the definition in § 1-1 (w) to apply. *Commissioner of Environmental Protection* v. *Mellon*, supra, 692.

Accordingly, to the extent that any ambiguity remains following our analysis of the plain text and its relationship to other statutes, we may consider extratextual sources in determining the intended meaning of "jail or prison time" in § 54-255. Id., 692–93; see also *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 118–19, 202 A.3d 262 (Although "the plaintiffs' interpretation of the . . . language [in a federal statute] [was] plainly the more reasonable one . . . [the court] recognize[d] that the defendants' interpretation [was] not implausible. Therefore . . . [the court] also review[ed] various extrinsic sources of congressional intent to resolve any ambiguities," which further supported court's interpretation of statutory language.), cert. denied sub nom. *Remington Arms Co., LLC*, v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

when there is genuine uncertainty as to how it should apply, identifying the problem in society to which the legislature addressed itself by examining the legislative history of the statute under litigation is helpful." (Internal quotation marks omitted.) *State* v. *Victor O.*, 320 Conn. 239, 256, 128 A.3d 940 (2016). Our Supreme Court previously has set forth the circumstances that motivated the enactment of Megan's Law. "On July 29, 1994, Megan Kanka, a seven year old child, was abducted, raped, and murdered near her home. The man who confessed to Megan's murder lived in a house across the street from the Kanka family and had twice been convicted of sex offenses involving young girls. Megan, her parents, local police, and the members of the community were unaware of the accused murderer's history; nor did they know that he shared his house with two other men who had been convicted of sex offenses. . . . Statutes such as [§ 54-250 et seq.] are called Megan's Law, after Megan Kanka, [whose] sexual assault and murder . . . sparked enactment of sex offender registration and notification statutes in [the state of New Jersey] and several others. . . . Connecticut's sex offender registration and notification statutes were enacted [i]n response to concerns regarding the harm to society caused by sex crimes and the relatively high rate of recidivism among sex offenders . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Misiorski*, 250 Conn. 280, 290–92, 738 A.2d 595 (1999); see also 41 H.R. Proc., Pt. 11, 1998 Sess., p. 3718, remarks of Representative Michael Lawlor (discussing crimes against Megan Kanka that gave rise to Megan's Law). These concerns led the legislature to require the registration not only of persons convicted of certain sexual offenses or offenses against minors but also of persons found not guilty by reason of mental disease or defect of such crimes. See General Statutes §§ 54-251 through 54-254 (requiring registration of "[a]ny person

who has been convicted or found not guilty by reason of mental disease or defect" of nonviolent sexual offense, criminal offense against minor, sexually violent offense, sexual offense committed in another jurisdiction, or felony committed for sexual purpose). Significantly, with one exception, the legislature has made no distinction in the registration requirements or the penalties for not complying with them between convicted persons and those found not guilty by reason of mental disease or defect.[14]

Similarly, the legislative history of No. 99-183 of the 1999 Public Acts (P.A. 99-183), and the plain language of § 54-255 (c), indicate that the legislature intended to allow offenders who were required to register, regardless of whether they were convicted or found not guilty by reason of mental disease or defect, to petition pursuant to that statute only in limited circumstances where the public dissemination of the offender's registration information was not required for public safety. See General Statutes § 54-255 (c) ("[t]he court may order the [department] to restrict the dissemination of the registration information to law enforcement purposes only and to not make such information available for public access, *provided the court finds that dissemination of the registration information is not required for public safety*" (emphasis added)); 42 H.R. Proc., Pt. 11, 1999 Sess., p. 3883, remarks of Representative Michael Lawlor (§ 54-255 "gives the limited authority to a judge to withdraw the information from the Internet and from

[14] The only exception is in General Statutes § 54-251 (a), which provides in relevant part that "any person who has one or more prior convictions of [a criminal offense against a minor or a nonviolent sexual offense] or who is convicted of a violation of subdivision (2) of subsection (a) of section 53a-70 shall maintain such registration for life," instead of for only ten years. Notably, however, the legislature has not distinguished between those convicted and those found not guilty by reason of mental disease or defect of a sexually violent offense, subjecting both to a lifetime registration requirement. See General Statutes § 54-252 (a).

the public aspect of the registration . . . *if the court makes a finding that the public safety is not in any way in danger*" (emphasis added)). In particular, the legislature appears to have intended that only certain offenders who had committed less serious, nonviolent offenses would have the opportunity to petition the court to restrict the dissemination of their registration information. During the legislative debate in the House of Representatives on P.A. 99-183, Representative Lawlor stated that whether an offender was incarcerated as a result of his or her conviction—the relevant inquiry under § 54-255 (c) (5) (A)—generally is an "indication of how serious the crime was."[15] 42 H.R. Proc., supra, p. 3916. Additionally, in response to a concern raised about a particular individual who was required to register as a sex offender for committing sexual assault in the fourth degree, which is considered a "nonviolent sexual offense" under Megan's Law; see General Statutes § 54-250 (5); Representative Lawlor stated, "that's exactly the situation which is envisioned by the expanded discretion being provided to judges in the bill." 42 H.R. Proc., supra, pp. 3915–16.

[15] Representative Lawlor stated in relevant part: "For persons who have been convicted of crimes and fall under Megan's Law, in other words convictions dating back to 1988, assuming that was their one and only conviction and assuming they have never been subsequent[ly convicted], they were never incarcerated in connection with the original conviction and assuming they meet the other criteria outlined in the bill for future offenders, this gives the limited authority to a judge to withdraw the information from the Internet and from the public aspect of the registration, as long as they come forward and register first.

* * *

"[I]f in fact that was the first and only conviction for a crime and if in fact a person was not incarcerated as a consequence of the conviction—*which is usually a*[*n*] . . . *indication of how serious the crime was*—and assuming the judge makes a finding that this is in the best interest of all involved and would not in any way affect public safety, then under those circumstances—even for the people who have already been required to register—the judge would have the discretion to undo that public aspect of the registration." (Emphasis added.) 42 H.R. Proc., supra, pp. 3883–3916.

The legislative intent underlying the eligibility criteria in § 54-255 (c) (5) is thus most consistent with a broad construction of "jail or prison time" in § 54-255 to include confinement in a hospital for psychiatric disabilities. To construe that phrase to mean only confinement in a correctional facility would potentially allow persons who committed the most serious and most violent sexual offenses, such as sexual assault in the first degree, which is considered a "sexually violent offense" under Megan's Law; see General Statutes § 54-250 (11); to be removed from the public registry because they were confined in a hospital instead of in a correctional facility. This would be true, even when, as in this case, the acquittee's period of confinement lasted for decades. Given that the legislature clearly was concerned with maintaining the public registration of persons who had committed more serious offenses, this cannot be the result that the legislature intended. "We must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 732, 6 A.3d 763 (2010).[16]

To the extent that the acquittee argues that other statutory mechanisms prevent the release of acquittees who pose a public safety risk, and that it is therefore unnecessary to the public safety purpose of Megan's

[16] We acknowledge that the legislative history of P.A. 99-183 refers only to persons "convicted" or "incarcerated." See 42 H.R. Proc., supra, pp. 3882–83 (describing "persons who have been convicted of crimes and fall under Megan's Law" as eligible to petition under § 54-255 if "that was their one and only conviction . . . [and] they were never incarcerated in connection with the original conviction" and noting that lifetime registration requirement applies to "persons convicted of the most serious, most predatory types of sexual misconduct"). Nevertheless, the statute, as adopted, also expressly covers individuals found not guilty by reason of mental disease or defect. Thus, the legislative history must be read with this language in mind.

Law to include those persons within the scope of § 54-255 (c) (5) (A), this does not change our conclusion. According to the acquittee, the state may petition "pursuant to General Statutes § 17a-593 for the continued commitment of acquittees perceived to pose a danger to the public. . . . [Additionally], those ordered released by the board would have already been determined by providers to not pose a threat to oneself or others. . . . Presumably, the legislature was familiar with . . . § 17a-593 (g)."[17] (Citations omitted.) We are not persuaded by the acquittee's argument for two reasons.

First, the acquittee disregards the fact that an acquittee who is conditionally released from confinement, rather than discharged, is a person whose "final discharge *would constitute a danger to himself or others* but who can be adequately controlled with available supervision and treatment on conditional release . . . ." (Emphasis added.) General Statutes § 17a-580 (9). It is therefore untrue that all acquittees released from confinement have been determined to pose no risk to themselves or others. Second, the legislature's decision to require the registration of persons found not guilty by reason of mental disease or defect following their release from confinement indicates that the legislature was indeed concerned about the public safety risk that those persons posed upon their release despite the existence of the statutory mechanisms to which the acquittee refers.[18]

[17] Section 17a-593 (g) allows a court to discharge an acquittee from the board's custody if the court finds that the acquittee's discharge would not "constitute a danger to the acquittee or others." See General Statutes § 17a-580 (11) (defining "person who should be discharged").

[18] The legislative history of No. 95-175 of the 1995 Public Acts, which amended Megan's Law to add persons found not guilty by reason of mental disease or defect to the class of persons required to register as sex offenders, reveals that this amendment was motivated by concerns that arose regarding such persons during the enactment of No. 95-142 of the 1995 Public Acts (P.A. 95-142). See 38 H.R. Proc., Pt. 9, 1995 Sess., p. 3322, remarks of Representative Michael Lawlor ("in the sex offender notification bill which

The acquittee also argues that the requirement that courts must make a public safety finding to grant a petition under § 54-255 (c) (5)—that is, that "dissemination of the registration information is not required for public safety"—similarly alleviates the public safety concern associated with restricting the public dissemination of acquittees' registration information. That same argument, however, could be made as to persons who served jail or prison time as a result of a conviction of a crime requiring registration under Megan's Law—persons whom the acquittee argues are clearly excluded by the plain meaning of § 54-255 (c) (5) (A). The legislative history reflects that the legislature concluded that individuals who had been confined, whether in a correctional facility or in a hospital, posed an inherently greater risk to public safety upon release, such that courts should not have discretion to make their own findings regarding the necessity of publicizing such

was enacted in this House the other day, last week, the question arose regarding persons who had been found not guilty by reason of . . . mental disease or defect of any of the enumerated charges in that bill and whether or not those persons would be required to register for the time period which had been outlined in that bill"). The legislative history of P.A. 95-142 reveals the following concerns: "[A] lot more needs to be done in this area because [sex offenders], for the most part, can't be treated properly. They can't be cured. We have had testimony from the Department of Mental Health that that is the case. We also have had information provided to us that there is a major defect in this bill, which we would hope to close. We are not going to try to do that today . . . but there are circumstances which we will try to close later, for which sexual offenders can't be released to the community. And those instances are in cases where a person is found not guilty by reason of insanity and is under supervision by the [board]." 38 H.R. Proc., Pt. 8, 1995 Sess., pp. 2696–97, remarks of Representative Dominic Mazzoccoli. We recognize that the skepticism expressed in the legislative history in 1995 regarding sex offender treatment has been largely debunked. See *McKune* v. *Lile*, 536 U.S. 24, 33, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) ("[t]herapists and correctional officers widely agree that clinical rehabilitative programs can enable sex offenders to manage their impulses and in this way reduce recidivism"); *Anthony A.* v. *Commissioner of Correction*, 339 Conn. 290, 324, 260 A.3d 1199 (2021) (same). Nevertheless, we are not at liberty to disregard the legislature's stated purpose for adopting the law that it did.

offenders' registration information. This proposition finds support in the legislature's choice to depart from the prior language of General Statutes (Rev. to 1999) § 54-255, which more broadly authorized courts to release a sexually violent offender from the registration obligation whenever that person had maintained his or her registration for at least ten years and the court found "that he [or she] [did] not suffer from a mental abnormality or personality disorder that [made] him [or her] likely to engage in sexually violent offenses."[19]

Finally, the acquittee attempts to distinguish offenders who are acquitted and confined from offenders who are convicted and confined, arguing that "the mere fact that there was an order of commitment, following [a finding of not guilty by reason of mental disease or defect] does not mean that the legislature perceived those [who] have been committed to a term of hospitalization and treatment [to be] as 'dangerous' as those [who] were legally culpable and ordered to serve a term of incarceration, as opposed to treated in a therapeutic setting." There also is no indication in the legislative history, however, that the legislature believed that offenders who were confined in a hospital for psychiatric disabilities were inherently less dangerous than

[19] General Statutes (Rev. to 1999) § 54-255 provides in relevant part: "A person required to register under section 54-252 shall maintain his registration for not less than ten years from the date of his release into the community, after which he may apply to the court in which he was convicted or found not guilty by reason of mental disease or defect for release from the obligation to register. The court shall grant such application and shall notify the Department of Public Safety that the person is no longer subject to registration under sections 54-102g and 54-250 to 54-259, inclusive, provided the person satisfies the court by clear and convincing evidence that he does not suffer from a mental abnormality or personality disorder that makes him likely to engage in sexually violent offenses. The court shall refer the application of such person to a board of experts on the behavior and treatment of sexual offenders, which shall examine the person and make an assessment for the court regarding the person's potential for further violent sexual behavior. . . ."

those who were confined in a correctional facility such that, assuming all other statutory criteria are satisfied, only the former should be eligible to petition to restrict the dissemination of their registration information.[20] Instead, the legislature's clear reference in § 54-255 (c) (5) (A) to "conviction *or* finding of not guilty by reason of mental disease or defect" evidences an intent that the "served no jail or prison time" criterion would be effective as to both classes of offenders. (Emphasis added.) For the same reason, we also are not persuaded by the acquittee's argument that adopting the state's interpretation of the statute will lead to the absurd result of "[conflating] punishment with treatment . . . [and] blur[ring] the lines between the Department of Correction and the [board], each formed and operated under distinct statutory schemes to accomplish very different purposes."[21] Indeed, our Supreme Court has recognized that the registration requirement "is regulatory and not punitive in nature." *State* v. *Kelly*, 256 Conn. 23, 94, 770 A.2d 908 (2001); see also *State* v. *Waterman*, 264 Conn. 484, 496–97, 825 A.2d 63 (2003). Thus, prohibiting offenders from petitioning to restrict the dissemination of their registration information if they do not meet the statutory criteria is not a punishment but instead serves to advance the legislature's

[20] Indeed, our Supreme Court has noted that "the focus of the inquiry with respect to [the confinement of] [an] acquittee is upon *the protection of the community*, the same consideration which is of primary concern in relation to the imprisonment of persons convicted of crimes." (Emphasis added.) *State* v. *Reed*, 192 Conn. 520, 529, 473 A.2d 775 (1984); see also General Statutes § 17a-582 (e) (court's "primary concerns" in ordering confinement, conditional release, or discharge of acquittee are "*the protection of society* and the safety and well-being of the acquittee" (emphasis added)).

[21] Of course, if the legislature shares the acquittee's concerns and wishes to amend the statute to clarify the meaning of the phrase "jail or prison time" within § 54-255 (c) (5) (A) to make it plain that the phrase includes only a term of imprisonment imposed as the result of a conviction, it may do so in accordance with "its role as the policy-making branch of our government." (Internal quotation marks omitted.) *Clark* v. *Waterford*, *Cohanzie Fire Dept.*, 346 Conn. 711, 736, 295 A.3d 889 (2023).

"nonpunitive goals of protecting the public and facilitating future law enforcement efforts." (Internal quotation marks omitted.) *State* v. *Kelly*, supra, 92.

Applying our construction of the statutory language to the facts of this case, we conclude that the acquittee's confinement in a hospital for psychiatric disabilities as a result of him being found not guilty by reason of mental disease or defect of a crime requiring registration under Megan's Law constitutes "jail or prison time" within the meaning of § 54-255 (c) (5) (A). The acquittee therefore does not meet the statutory criteria to petition to restrict the dissemination of his registration information. Because we can resolve the issue of whether the court properly denied the acquittee's petition on this statutory ground, we do not reach the merits of the acquittee's constitutional claim. See *State* v. *Graham S.*, supra, 149 Conn. App. 343. Accordingly, we affirm, although on a different basis, the court's decision to deny the acquittee's petition.

The judgment is affirmed.

In this opinion the other judges concurred.

A. A.-M. *v.* M. Z.*
(AC 46000)

Alvord, Cradle and Clark, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed from the judgment of the trial court resolving several postjudgment motions. Several years after the judgment of dissolution,

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that party's identity may be ascertained.

the plaintiff filed a motion for modification of the custody of the parties' minor child, who was then seventeen years old, and two motions for contempt. The court denied the defendants' motions for contempt, which had alleged that the plaintiff had violated the court's orders with respect to visitation, and it awarded the plaintiff sole legal custody of the child. The defendant appealed to this court, and, shortly thereafter, the child turned eighteen years old. Thereafter, the defendant filed additional motions for contempt, alleging that the plaintiff violated the court's orders by not encouraging the parties' child to see her and placing obstacles in the way of visitation. In January, 2023, the court denied the defendant's motions for contempt with respect to visitation and the defendant's claim that the plaintiff improperly claimed the child on his tax return. The defendant did not amend her appeal to challenge that decision. This court dismissed the portion of the appeal challenging the trial court's rulings related to custody and visitation, and the plaintiff subsequently filed a motion to dismiss the appeal on the basis that the defendant had failed to appeal from the January, 2023 decision. *Held* that the defendant's appeal was dismissed as moot: this court concluded, after a review of the defendant's appellate brief, that the appeal was limited to challenges to the trial court's rulings related to the defendant's rights to custody and visitation with the parties' child and the relevant portions of the defendant's request for relief were entirely dedicated to her access to the child, and, as to these issues, the appeal was rendered moot when the child attained the age of eighteen; moreover; the fact that the present case involved motions for contempt did not necessitate a conclusion that the appeal was not moot because, even if this court were to conclude that the plaintiff had violated orders of the trial court related to access to the child, there was no practical relief that could be afforded to the defendant; accordingly, this court lacked subject matter jurisdiction.

Argued March 6—officially released April 23, 2024

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Prestley*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Caron*, *J.*, awarded the plaintiff temporary custody of the parties' minor child and issued orders with respect to visitation; subsequently, the court, *Hon. Eric D. Coleman*, judge trial referee, awarded the plaintiff permanent custody

of the minor child, issued visitation orders, and denied the defendant's motions for contempt, and the defendant appealed to this court; thereafter, the court, *Allard*, *J.*, denied the defendant's motions for contempt; subsequently, this court, sua sponte, dismissed the appeal in part. *Appeal dismissed.*

M. Z., self-represented, the appellant (defendant).

A. A.-M., self-represented, the appellee (plaintiff).

Opinion

PER CURIAM. The self-represented defendant, M. Z., appeals from the judgment of the trial court resolving several postjudgment motions. Because we conclude that the defendant's appeal is moot, we dismiss the appeal for lack of subject matter jurisdiction.

The following facts and procedural history are necessary to our resolution of this appeal. The defendant and the plaintiff, A. A.-M., were married in 2003, and have one child, who was born in November, 2004. The parties' marriage was dissolved by the court, *Prestley*, *J.*, on September 25, 2007. The judgment of dissolution incorporated by reference the parties' separation agreement dated September 25, 2007 (separation agreement). The agreement provided that "[t]he parties shall share joint legal and the [d]efendant shall have physical custody of their minor child . . . subject to reasonable rights of visitation to the [p]laintiff in accordance with a parenting schedule" set forth in the separation agreement. The separation agreement also provided that "[t]he parties shall exert every reasonable effort to maintain free access and unhampered contact between the child and each of the parties . . . ." On March 12, 2012, the court, *Adelman*, *J.*, issued a postjudgment order that, inter alia, continued the award of joint legal custody and set forth a parenting schedule that afforded the plaintiff additional parenting time (March, 2012 decision).

In October, 2021, the plaintiff filed a motion for modification of custody, seeking sole custody of the parties' child and alleging that the child had been abused by the defendant. Following a hearing on November 4, 2021, the court, *Caron*, *J.*, ordered, on a temporary basis, that the child primarily reside with the plaintiff. The court further ordered that the defendant be permitted to video call the child twice weekly and that the child be permitted to see the defendant "whenever he wants" (November, 2021 decision).

Also on November 4, 2021, the defendant filed a motion for contempt, in which she alleged that the plaintiff had knowingly and wilfully violated orders contained in the 2007 separation agreement and the court's March, 2012 decision. The defendant alleged, inter alia, that the plaintiff had "gone out of his way to eliminate any and all means of communication between the child and the defendant . . . ." On December 28, 2021, the defendant filed another motion for contempt, alleging that the plaintiff had violated the court's November, 2021 order that the plaintiff encourage visits between the child and the defendant and not interfere with telephone access. On January 21, 2022, the defendant filed a motion for modification of visitation and decision-making authority with respect to postsecondary education, seeking, inter alia, "temporary visitation rights" for herself and visitation for the maternal grandparents. A hearing was held on these motions on March 4, 2022.

On September 15, 2022, the court, *Hon. Eric D. Coleman*, judge trial referee, issued a memorandum of decision resolving both parties' motions for modification and the defendant's two motions for contempt (September, 2022 decision). First, the court awarded the plaintiff sole legal custody. Next, the court denied the defendant's motions for contempt. With respect to the November, 2021 motion for contempt, the court found that the defendant had not "established by clear and

convincing evidence that [the child] was not responding to her multiple phone calls of his own volition rather than because of any interference by the plaintiff." As to the December, 2021 motion for contempt, the court stated that "[t]he defendant presented no testimony, evidence or argument regarding any of the issues raised in this motion. Therefore, the defendant has not sustained her burden with respect to the allegations contained in the motion." Finally, with respect to the defendant's motion for modification, the court ordered that the child may see the defendant whenever the child wants; the plaintiff shall encourage the child to see the defendant, and he "shall place no obstacles in the way of" visits; the plaintiff shall not "prevent, hamper, discourage, or obstruct" the defendant's access to their child; the plaintiff shall transport the child to and from any visits the child desires with the defendant unless the defendant can make her own transportation arrangements; and the plaintiff shall not interfere with the defendant's scheduled telephone, FaceTime, or video chat contacts with the child on Tuesdays and Thursdays at 7 p.m.

On October 5, 2022, the defendant filed a motion to reargue the court's September, 2022 decision, which the court denied in an order dated October 21, 2022. The defendant filed this appeal on November 10, 2022, and, shortly thereafter, the parties' child turned eighteen.

On December 6, 2022, the defendant filed with the trial court two additional motions for contempt. In the first motion for contempt, the defendant alleged that the plaintiff violated the court's September, 2022 decision by not encouraging the parties' child to see her and placing obstacles in the way of their visits and communications. In the second motion for contempt, the defendant alleged that the plaintiff improperly had claimed the child on his tax return for 2021, in violation

of the 2007 judgment of dissolution. On January 5, 2023, following a hearing, the trial court, *Allard*, *J.*, issued an order denying the motions for contempt with respect to visits and communication, finding that the defendant had failed to sustain her burden of proof (January, 2023 decision).[1] The court denied the motion for contempt with respect to the plaintiff's improperly claiming the child on his tax return but entered remedial orders requiring the plaintiff to pay $750 to the defendant's accountant. The defendant did not thereafter amend her appeal to challenge the January, 2023 decision.

On February 10, 2023, this court ordered the parties to file memoranda "addressing whether the portion of the appeal challenging the trial court's rulings related to custody and visitation should be dismissed for lack of subject matter jurisdiction because it was rendered moot when the parties' minor [child] reached the age of majority during the pendency of the appeal. See *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 592 n.2, [952 A.2d 115] (2008)." Neither party filed a memorandum addressed to the order. On March 29, 2023, this court dismissed the portion of the appeal challenging the trial court's rulings related to custody and visitation.

On June 21, 2023, the plaintiff filed a motion to dismiss this appeal on the basis that the defendant had failed to appeal from the court's January, 2023 decision, and the defendant filed an opposition. On September 6, 2023, this court denied the motion to dismiss but sua sponte ordered the parties to "address in their briefs on the merits whether this appeal is moot because the defendant has not amended her appeal to include the

[1] In its January, 2023 decision, the court also denied an October 5, 2022 motion for contempt filed by the defendant, which alleged that the plaintiff had violated the orders in the court's September, 2022 decision because he was not encouraging the child to see her, had placed obstacles in the way of her visitation with the child, and had interfered with scheduled telephone contacts.

trial court's January, 2023 decision . . . her appeal is limited to the issues raised in her November 10, 2022 appeal that do not challenge the trial court's rulings related to custody and visitation."

In her appellate brief, the defendant raises a number of claims.[2] First, she claims that the court erred in awarding temporary physical custody to the plaintiff in its November, 2021 decision, and permanent physical custody to the plaintiff in its September, 2022 decision. Second, she claims that the court improperly limited her presentation of evidence and cross-examination during several hearings. Third, she claims that the court improperly denied "ex parte motions, and several caseflow requests, filed by the defendant . . . pertaining to contempt actions, educational decisions, and visitation requests." Fourth, the defendant claims that the court improperly ignored the plaintiff's alleged contempt. Fifth, she claims that the court's September, 2022 decision with respect to custody was not timely issued.

In her request for relief, the defendant requests that this court "(1) reconsider and rectify the trial courts' past erroneous rulings, including the change of both temporary [and] physical custody, the contempt motion ruling, the denial of ex parte motions, and the refusal of the court to accept documents into evidence, that the defendant . . . requested to submit. As a result, the trial court will be able to make appropriate future decisions concerning the educational and financial

[2] The issues identified in this opinion, which are set forth in a different order than the defendant's brief, are based on this court's thorough review of her brief. We note that, in addition to the absence of any standard of review, much of the defendant's brief lacks citation to authorities and substantive discussion of the issues presented. "[When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *McGovern* v. *McGovern*, 217 Conn. App. 636, 637 n.1, 289 A.3d 1255, cert. denied, 346 Conn. 1018, 295 A.3d 111 (2023).

needs of the child. (2) The defendant . . . does not wish to interact with the plaintiff . . . in any form. However, she does need to have access to her child and ensure that she and her child can reach each other with no obstacles nor boundaries, and to resume the counseling with her child, which the plaintiff . . . had intentionally terminated. (3) The defendant . . . is also respectfully asking the court and/or the plaintiff . . . to reverse the contempt motion ruling, and vacate the restraining order,[3] which is currently in place until December 1, 2023, to allow the relationship between the defendant . . . and her child to be restored, which . . . restraining order is now limiting her access to her child, by extension." (Emphasis omitted; footnote added.) The plaintiff responds in his appellate brief that the appeal should be dismissed as moot.

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction." *Wendy V.* v. *Santiago*, 319 Conn. 540, 544, 125 A.3d 983 (2015). "It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer

[3] The restraining order is not at issue in this appeal. On December 1, 2022, the Superior Court, *Allard*, *J.*, in a separate action, issued a one year restraining order, protecting the plaintiff from the defendant. See *A. A.-M.* v. *M. Z*, Superior Court, judicial district of New Britain, Docket No. FA-22-5032706-S. The restraining order subsequently was extended through November 21, 2024. Id. On January 22, 2024, the defendant filed an appeal in the action involving the restraining order.

exists." (Internal quotation marks omitted.) *J. Y.* v. *M. R.*, 215 Conn. App. 648, 661, 283 A.3d 520 (2022); see also *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 12, 287 A.3d 557 (2023) ("[a]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal" (internal quotation marks omitted)). "In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Wendy V.* v. *Santiago*, supra, 545.

We carefully have reviewed the defendant's appellate briefing and conclude that her appeal is limited to challenges to the court's rulings related to her rights to custody and visitation with the parties' child. Moreover, the relevant portions of the defendant's request for relief are entirely dedicated to her access to the child. As to these issues, however, the appeal was rendered moot when the child attained the age of eighteen.[4] See, e.g., *Kennedy* v. *Kennedy*, supra, 109 Conn. App. 592 n.2; see also, e.g., *Nowacki* v. *Nowacki*, 144 Conn. App. 503, 508–509, 72 A.3d 1245 (noting that orders with respect to parties' older child were not at issue on appeal because he reached age of majority while appeal was pending), cert. denied, 310 Conn. 939, 79 A.3d 891 (2013). The fact that the present case involves motions for contempt does not lead to the conclusion that this appeal has not become moot because, even if this court were to conclude that the plaintiff had violated orders of the court related to access to the parties' child, there

[4] The defendant's principal appellate briefing with respect to mootness is limited to the following: "The [defendant's] position is that this appeal is not moot, and is challenging the trial court's custody and visitation, and contempt ruling because (a) the child is still not financially independent, which affects his future financial needs, such as education, transportation, health insurance . . . etc., [and] (b) the longevity, permanency, and preservation of the defendant . . . and minor child's relationship, which is currently [nonexistent], due to the trial court's erroneous rulings."

is no practical relief that can be afforded the defendant. See, e.g., *Cook* v. *Cook*, 38 Conn. App. 499, 503–504, 661 A.2d 1043 (1995) (dismissing as moot appeal from denials of contempt motions where contempt motions were addressed to issue relative to which court could afford no practical relief).

The appeal is dismissed.

CECIL GRANT *v.* COMMISSIONER OF CORRECTION (AC 45569)

Prescott, Cradle and Suarez, Js.*

Syllabus

The petitioner, who had been convicted of the crimes of conspiracy to commit robbery in the first degree, attempt to commit robbery in the first degree and assault in the first degree, sought a writ of habeas corpus. He claimed, inter alia, that his criminal trial counsel, C, had provided ineffective assistance by failing to present testimony from potential alibi witnesses and an expert in eyewitness identification evidence, as well as by failing to investigate certain cell phone records. The petitioner and N had been at D's apartment, where the petitioner, who was armed with a revolver, used D's cell phone at about midnight to order a pizza delivery. The victim, the delivery driver, called the phone number on the order slip and was given directions to D's apartment. When the victim arrived, she was met outside by N and the petitioner, who brandished the revolver and shot at her as she tried to drive away. D and the victim identified photos of the petitioner and N from photographic arrays they were shown by the police. At the petitioner's criminal trial, conflicting evidence was presented as to whether the petitioner had used D's phone to order pizza. C presented an alibi defense that was based on the testimony of the petitioner and V, who stated that V and her two children had driven the petitioner to his home and dropped him off there about one hour prior to the attempted robbery and shooting of the victim. This court upheld the petitioner's conviction on direct appeal. At the habeas trial, C testified that she did not present testimony from an eyewitness identification expert because the available science behind the reliability of such evidence at the time of the criminal trial was relatively new, and the testimony of such an expert would

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

typically not have been admissible at trial. C also testified that she did not investigate D's cell phone records because she already had evidence that his phone had been used to call the pizza establishment, and she feared that the phone records might contain information that would be harmful to the defense. C further stated that she did not investigate V's children as potential alibi witnesses because they would have provided the same evidence as did V and that calling minors to testify could have a potential negative impact on the jury. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that his right to due process was violated because the eyewitness identification evidence presented at his criminal trial was not reliable and the jury instructions on eyewitness identification testimony were inadequate:

a. The habeas court did not err in rejecting the petitioner's challenge to the eyewitness identification evidence, which this court had rejected in his direct appeal from his conviction; the petitioner's claim pertaining to that evidence was not a freestanding due process claim but, rather, was based exclusively on his ineffective assistance of counsel claim, and, although the petitioner contended that those claims were inextricably intertwined because C had failed to create or preserve a record showing that the eyewitness identification evidence was unreliable and unduly suggestive, the petitioner failed to articulate any distinction between his due process claim and his ineffective assistance claim.

b. This court was unable to review the petitioner's claim regarding the trial court's jury instructions on eyewitness identification evidence, as he failed to challenge the habeas court's conclusion that his claim was procedurally defaulted, which was the basis for the court's rejection of his jury instruction claim.

2. The habeas court properly determined that the petitioner failed to establish that C had rendered ineffective assistance:

a. C's decision not to consult with or present testimony from an eyewitness identification expert was reasonable and did not constitute deficient performance, as it was not inconsistent with controlling law at the time of the petitioner's criminal trial, which disfavored such testimony as invading the province of the jury to evaluate eyewitness testimony and held that the reliability of eyewitness identification evidence was within the knowledge of jurors, who generally would not be assisted by such testimony in considering that evidence.

b. Although the habeas court erred in determining that C's decision not to investigate D's cell phone records was sound trial strategy, the petitioner did not prove that C's failure to do so was prejudicial to him, as he could not establish that the result of his criminal trial would have been more favorable to him had C investigated the records: the petitioner overstated the benefit, if any, that may have inured to his defense had the phone records been introduced into evidence at his criminal trial,

as it would be speculative to posit that the records likely would have caused the jury to doubt all of D's testimony, most of which was corroborated by the victim, who identified the petitioner and N as having been involved in the attempted robbery and assault; moreover, although the conflicting evidence as to the phone records may have caused the jury to doubt a portion of D's testimony, the jury reasonably could have credited D's testimony that the petitioner was at the delivery location shortly before the attempted robbery and shooting, that the petitioner and N were planning to rob a delivery driver and that the petitioner was carrying a revolver, all of which the victim's testimony corroborated and none of which the phone records would have directly challenged; furthermore, in light of the infirmities in the petitioner's credibility, it was not a foregone conclusion that the jurors would have credited his testimony, as he claimed, even if they disbelieved the entirety of D's testimony, as the petitioner's testimony at his criminal trial that he had not previously been involved in gun play was contradicted by his admission that he had been shot less than six months prior to the incident at issue and had been involved in an armed robbery.

c. The evidence at the habeas trial supported C's decision not to present V's teenage children as alibi witnesses at the petitioner's criminal trial: although C should have met with and interviewed the children to determine if their testimony would be beneficial, C's explanation that their testimony would have been cumulative of V's testimony was reinforced when V's daughter testified at the habeas trial, as did V at the criminal trial, that she, her brother and V had dropped the petitioner off at his home about one hour prior to the shooting; moreover, even if this court assumed the veracity of the testimony of V and her daughter, that testimony did not establish an alibi for the petitioner, as neither V nor her daughter could account for his whereabouts at the time the shooting occurred, and, based on the testimony of the petitioner, V and V's daughter that it took about fifteen minutes to get to the petitioner's home from the shooting scene, the petitioner could have returned there before midnight when the shooting occurred; accordingly, because the testimony of V's daughter was, at best, cumulative of V's testimony, it was unlikely that the alibi testimony of V and her daughter would have changed the outcome of the petitioner's criminal trial.

3. This court found unavailing the petitioner's claim that the habeas court arbitrarily rejected the testimony of his expert witnesses because it provided no rationale as to why it did not consider or analyze their testimony in its memorandum of decision denying the habeas petition: in the absence of an explicit rejection of the experts' testimony by the habeas court, this court could not conclude that their testimony had been rejected or, if it was, that such a rejection was arbitrary; moreover, this court presumed that the habeas court properly weighed all the evidence in reaching its decision, and the fact that the habeas court came to a conclusion that was inconsistent with the experts' testimony

did not support the petitioner's contention that the court arbitrarily disregarded that testimony.

(*One judge concurring in part and dissenting in part*)

Argued September 19, 2023—officially released April 23, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *M. Murphy, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Evan Parzych, assistant public defender, with whom, on the brief, was *Katharine S. Goodbody*, assistant public defender, for the appellant (petitioner).

Laurie N. Feldman, assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Donna Fusco*, deputy assistant state's attorney, for the appellee (respondent).

Charles D. Ray and *Justyn P. Stokely* filed a brief for The Innocence Project as amicus curiae.

Opinion

CRADLE, J. The petitioner, Cecil Grant, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus, in which he alleged due process violations and ineffective assistance of counsel. On appeal, the petitioner claims that the habeas court improperly (1) concluded that the eyewitness identification evidence presented at his criminal trial did not violate his due process rights; (2) concluded that he had not established that his trial counsel was ineffective for having failed to consult with or offer the testimony of an eyewitness identification expert, for having failed to investigate the issue of

phone calls the petitioner allegedly made from a witness' cell phone immediately prior to the crime, and for having failed to investigate and to present potential alibi witness testimony; and (3) declined to credit the testimony of two expert witnesses at the habeas trial. We affirm the judgment of the habeas court.

The following facts, as set forth by this court in upholding the petitioner's conviction on direct appeal, and procedural history are relevant to our resolution of the petitioner's claims. "At approximately 10 p.m. on April 30, 2011, the [petitioner] and two other individuals, Derek Newkirk and Mike Anderson, were visiting with Gustin Douglas at Douglas' apartment at . . . Mary Shepard Place in Hartford. The [petitioner] and Newkirk told Douglas that they needed money, and the group discussed restaurants in the area that might have delivery persons who retained payments between deliveries. The [petitioner] used Douglas' cell phone to order a pizza from Pizza 101 on Albany Avenue in Hartford. While waiting for the delivery person to arrive, the [petitioner] displayed a revolver, waving it around and passing it between himself and Newkirk before putting it into the pocket of his hooded sweatshirt. Newkirk and the [petitioner] went outside to meet the delivery driver; Douglas and Anderson remained inside.

"At approximately 11 p.m., the victim, a delivery person for Pizza 101, was dispatched to make a delivery to . . . Mary Shepard Place. She initially had trouble finding the address. She called the [phone] number indicated on the order slip, and a man answered and provided her with directions. When she arrived at the address, the [petitioner] approached the front passenger door of the victim's vehicle. Newkirk stood near the [petitioner]. Both men's faces were uncovered and clearly visible to the victim. The [petitioner] spoke with the victim through the open passenger side window, asking her several times if she had change; the victim

responded each time that she did not. The [petitioner] then displayed a revolver, which he placed against the passenger door, stating, '[W]ell, gimme this.' Simultaneously, the [petitioner] attempted to open the front passenger door but was unable to do so.

"After seeing the [petitioner] holding the revolver, the victim started to drive away, at which time the [petitioner] began shooting. Five bullets entered the car, striking the victim in the neck, chin, shoulder and arm. Because Mary Shepard Place is a dead-end street, the victim had to turn her vehicle around and pass by the [petitioner] and Newkirk in order to get away. The victim drove herself to a hospital. The [petitioner] and Newkirk returned to Douglas' apartment. Douglas, who had heard the gunshots, observed that the [petitioner] and Newkirk were acting '[l]ike they were nervous' when they returned, but he did not discuss with them what had happened outside.

"The police were dispatched to the hospital, where they photographed and secured the victim's vehicle. A detective later interviewed the victim about the shooting. The victim described her shooter as a black male of light to medium complexion, short hair, skinny build, five feet, six inches tall, between sixteen and seventeen years old, wearing jeans and a black hooded sweatshirt over a shirt with a design on it. The police investigated the cell phone number that the victim had called to obtain directions prior to the shooting, which eventually led them to speak with Douglas. Douglas provided the police with details about his interactions with the [petitioner] and Newkirk on the night of the shooting, which led the police to consider them as suspects. Douglas also identified photographs of the [petitioner] and Newkirk in police photographic arrays. The police later asked the victim to look at photographic arrays, from which the victim was able to identify both the [petitioner] and Newkirk.

"The [petitioner] was arrested and charged with conspiracy to commit robbery in the first degree, attempt to commit robbery in the first degree, and assault in the first degree. [Following a jury trial on May 14, 15 and 18, 2012], [t]he jury found the [petitioner] guilty of all the charges. [On July 13, 2012], [t]he court . . . sentenced the [petitioner] to a total effective term of sixty years of incarceration, suspended after forty years, followed by five years of probation." *State* v. *Grant*, 154 Conn. App. 293, 296–98, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). At all times during his criminal trial, the petitioner was represented by Attorney Kirstin B. Coffin. Thereafter, the petitioner appealed, and this court affirmed his conviction. See id., 296.

On August 2, 2019, the petitioner filed his operative third amended petition for a writ of habeas corpus in this action, claiming that his due process rights had been violated because (1) "the conviction was based primarily on eyewitness identification evidence now known to be suggestive and/or unreliable . . . [(2)] the jury was deprived of information crucial to its ability to assess the reliability of the identification made by the primary eyewitness, [the victim] . . . [and (3)] the jury instruction regarding eyewitness identification was scientifically unsound."[1] He also claimed that his constitutional right to the effective assistance of counsel had been violated because his trial defense counsel "failed to consult with and/or present an eyewitness identification expert"; "failed to adequately and properly investigate the issue of the phone calls made from . . . Douglas' [phone] on the night of April 30, 2011, to prove or disprove the account provided by . . . Douglas"; and

[1] In his return, the respondent, the Commissioner of Correction, alleged that the petitioner's claim regarding the jury instruction on eyewitness identification was procedurally defaulted. The respondent denied or left the petitioner to his proof as to all of the remaining allegations of his petition.

"failed to adequately investigate and/or present witnesses that confirmed that the petitioner was not at . . . Mary Shepard Place during the night of April 30, 2011, including but not necessarily limited to Vanessa . . . Cooper [and her children]."[2]

Following a trial, the habeas court, *M. Murphy, J.*, issued a memorandum of decision dated April 19, 2022, in which it rejected all of the petitioner's claims and denied his petition. The habeas court thereafter granted the petitioner's petition for certification to appeal to this court. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims a violation of his right to due process under the state and federal constitutions. He claims that his right to due process was violated because the eyewitness identification evidence presented at his criminal trial was obtained through the use of unduly suggestive procedures by the police and was not reliable under the totality of the circumstances. The petitioner also claims that the jury instructions on eyewitness identification testimony at trial were "woefully inadequate." We address each of these claims in turn.

A

The petitioner first claims that his right to due process was violated because the eyewitness identification evidence presented at his criminal trial was obtained by

[2] In his third amended petition, the petitioner also claimed that he was actually innocent and that his trial counsel was ineffective in failing to "investigate and properly present a third-party culpability defense"; in failing to "conduct a timely and adequate investigation, including but not limited to investigating the petitioner's alibi defense, investigating . . . Douglas' involvement, and investigating the physical crime scene"; and in failing to "pursue the testing of DNA evidence or other evidence collected from the victim's automobile." The petitioner explicitly abandoned these additional ineffective assistance of counsel claims in his posttrial brief to the habeas court. As to his claim of actual innocence, the petitioner withdrew it prior to trial.

unduly suggestive procedures and was not reliable under the totality of the circumstances. Specifically, the petitioner argues that "the habeas court erred in concluding that a conviction based on a single eyewitness identification without [the] benefit of expert testimony does not violate due process." Although the petitioner devotes most of his appellate brief in this regard to discussing the science of eyewitness identification evidence and the factors that courts consider in addressing the reliability of that evidence, the petitioner's appellate counsel acknowledged, at oral argument before this court, that this court on direct appeal had addressed the petitioner's claim that the eyewitness identification of him was unreliable and unduly suggestive. Counsel conceded that he was not arguing that the eyewitness identification cases that were decided following the date of the petitioner's conviction applied retroactively to his case.[3] He clarified that the petitioner's due process claim is "intricately intertwined with the ineffective assistance of counsel claim because the record wasn't sufficiently developed, and there wasn't a sufficient record for challenging that on appeal. . . . The due process claim is inextricably tied into the ineffective assistance . . . and he was deprived of due process because counsel was ineffective and did not preserve or pursue or create a record for the due process claim."

Our Supreme Court has explained that, "[i]n habeas corpus proceedings, courts often describe constitu-

[3] Because this court on direct appeal addressed the petitioner's claim that the eyewitness identification of him was unreliable and unduly suggestive, the doctrine of res judicata bars any further consideration of that claim in the absence of an allegation of a new legal ground, new facts or new evidence that was not reasonably available at the time of the petitioner's direct appeal. See *Tatum* v. *Commissioner of Correction*, 211 Conn. App. 42, 49, 272 A.3d 218, cert. granted, 343 Conn. 932, 276 A.3d 975 (2022). When asked at oral argument what had changed since the petitioner's direct appeal as to the due process claim, the petitioner's appellate counsel reiterated his claim that the petitioner's criminal trial counsel had rendered ineffective assistance.

tional claims that are not tethered to a petitioner's sixth amendment right to counsel as freestanding." (Internal quotation marks omitted.) *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 25–26, 272 A.3d 169 (2022). When pressed, the petitioner's appellate counsel failed to articulate any distinction between the petitioner's purported freestanding due process claim and his ineffective assistance of counsel claim. In light of appellate counsel's acknowledgement that the due process claim is not, in fact, freestanding but, rather, is based exclusively on the ineffective assistance of counsel claim, we conclude that the habeas court did not err in rejecting the due process claim. See *Sanchez* v. *Commissioner of Correction*, 203 Conn. App. 752, 760–61, 250 A.3d 731 ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)), cert. denied, 336 Conn. 946, 251 A.3d 77 (2021). We will address the petitioner's ineffective assistance of counsel claims in part II of this opinion.

B

The petitioner also claims that his right to due process was violated in that "the jury instructions on eyewitness identification testimony at [his] trial were woefully inadequate." The respondent, the Commissioner of Correction, contends that this claim is not a due process claim, and, even if it were, the habeas court properly determined that it was procedurally defaulted. We agree with the respondent.

The habeas court explained that, in "[t]he petitioner's due process claim, [he] argues that the jury instructions provided at the underlying criminal trial were constitutionally inadequate because they failed to address additional information regarding the science and research behind eyewitness identification . . . . This claim is subject to procedural default and was not raised at a

prior proceeding. Therefore, the petitioner must demonstrate good cause as to why the claim was not raised and demonstrate any prejudice resulting therefrom. The petitioner claims that cause and prejudice exist for the default because the claim is premised on [Coffin's] failure to retain and utilize an eyewitness expert, which led to a limited record for appellate counsel to rely upon. However, the information regarding the science and research behind eyewitness identification was relied upon in the petitioner's appeal where he challenged both the suggestibility of the identification procedures utilized by the police and the reliability of the victim's identification." Noting the principle that "[t]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default," the court concluded that "[t]he petitioner failed to carry his burden of demonstrating good cause for having failed to raise [this] claim directly." (Internal quotation marks omitted.) The court further concluded that "the petitioner failed to show that he suffered actual prejudice as a result by demonstrating that the alleged impropriety worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis omitted; internal quotation marks omitted.) On those bases, the habeas court concluded that this claim was procedurally defaulted.

On appeal, the petitioner argues that, because the jury "did not have the benefit of expert testimony to contextualize [the victim's] identification of [the petitioner] . . . [t]he trial court . . . should have provided comprehensive and focused jury instructions." (Internal quotation marks omitted.) He contends that, "[t]hough the court's instructions included several buzzwords borrowed from the science of eyewitness identification, they provided hardly any additional context

or information, and failed to inform the jury of the robust science and research supporting this area of inquiry." He continues at length in his appellate brief as to how and why the jury instructions were deficient.

The petitioner fails, however, to challenge the habeas court's conclusion that his claim pertaining to the jury instructions was procedurally defaulted. Because the petitioner has failed to challenge the basis on which the court relied in rejecting this claim, we are unable to afford it review. See *U.S. Bank, N.A.* v. *Armijo*, 195 Conn. App. 843, 846, 228 A.3d 131 (2020).

II

The petitioner next claims that the habeas court improperly rejected his claim that his trial counsel, Coffin, rendered ineffective assistance by failing to consult with an eyewitness identification expert or to offer the testimony of such an expert; to investigate the issue of phone calls the petitioner allegedly made from a witness' cell phone immediately prior to the crime; and to investigate and present potential alibi witness testimony. We disagree.

We set forth the well settled standard of review and law related to claims of ineffective assistance of counsel. "It is well established that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas [court], as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329

Conn. 1, 40–41, 188 A.3d 1 (2018), cert. denied sub nom. *Connecticut* v. *Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

"Under the sixth amendment to the United States constitution, a criminal defendant is guaranteed the right to the effective assistance of counsel. . . . Thus, because [a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair . . . [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. . . .

"To determine whether a defendant is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation, we apply the familiar two part test adopted by the court in *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires [a] showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." (Citations omitted; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 29–30.

To prevail on the first prong, the petitioner "must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . [J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Emphasis omitted; internal quotation marks omitted.) *Morales* v. *Commissioner of Correction*, 220 Conn. App. 285, 305–306, 298 A.3d 636, cert. denied, 348 Conn. 915, 303 A.3d 603 (2023).

Furthermore, "[t]he right to the effective assistance of counsel applies no less to the investigative stage of a criminal case than it does to the trial phase." *Skakel*

v. *Commissioner of Correction*, supra, 329 Conn. 32. Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012). "[A] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. . . . In addition, in contrast to our evaluation of the constitutional adequacy of counsel's strategic decisions, which are entitled to deference, when the issue is whether the investigation *supporting* counsel's [strategic] decision to proceed in a certain manner was itself reasonable . . . we must conduct an objective review of [the reasonableness of counsel's] performance . . . . Thus, deference to counsel's strategic decisions does not excuse an inadequate investigation . . . .

"Although the reasonableness of any particular investigation necessarily depends on the unique facts of any given case . . . counsel has certain baseline investigative responsibilities that must be discharged in every criminal matter. It is the duty of the [defense] lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case . . . .

"Of course, the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste. . . . In other words, counsel is not required to conduct an investigation that promise[s] less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 32–34. However, "common sense dictates that, when the stakes are highest—when the criminal charges are most serious, exposing the defendant to the most lengthy of prison terms—the importance of a thorough pretrial investigation is that much greater." Id., 53.

To satisfy the prejudice prong, "[t]he defendant must establish . . . that counsel's constitutionally inadequate representation gives rise to a loss of confidence in the verdict. In evaluating such a claim, the ultimate focus of [the] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results. . . . Of course, a reviewing court does not conduct this inquiry in a vacuum. Rather, the court must consider the totality of the evidence before the judge or jury. . . . Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . . Furthermore, because

our role in examining the state's case against the petitioner is to evaluate the strength of that evidence and not its sufficiency, we do not consider the evidence in the light most favorable to the state. . . . Rather, we are required to undertake an objective review of the nature and strength of the state's case. . . . In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 38–40. With these principles in mind, we address the petitioner's claims of ineffective assistance of counsel in turn.

A

The petitioner first claims that the habeas court erred in concluding that he had not established that Coffin rendered ineffective assistance when she failed to consult with, or offer the testimony of, an eyewitness identification expert. We are not persuaded.

In rejecting the petitioner's claim, the court recounted Coffin's testimony that "she was aware of the science regarding the reliability of eyewitness identification that was available at that time because she requested a jury instruction on it, but she did not hire or consult with an eyewitness expert . . . [and] that, at the time of the petitioner's case, the science was still relatively new, there was no standard or expectation at that time to call an eyewitness identification expert and such an expert would typically not have been admissible at trial."

The court agreed, explaining that, at the time of the petitioner's criminal trial, "controlling law on the issue of eyewitness identification was *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 (1986), overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), in which our Supreme Court remarked that the reliability of eyewitness identification is within the knowledge of jurors and expert testimony generally would not assist them in determining the question. . . . Such testimony is also disfavored because . . . it invades the province of the jury to determine what weight or effect it wishes to give to eyewitness testimony. (Citation omitted; internal quotation marks omitted.) Id., 477." The habeas court explained that it was not until "[a]fter the petitioner's criminal trial [that] our Supreme Court decided *Guilbert*, which overruled *Kemp*, holding that *Kemp* was out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." (Internal quotation marks omitted.)

The court concluded that the petitioner had failed to prove that Coffin "performed deficiently by failing to present an expert on the issue of eyewitness identification because the law in effect at the time of the petitioner's criminal trial discouraged the use of such expert testimony." The court further concluded that the petitioner had not "proven that the jury in his case would have found the victim's identification to have been unreliable and thus failed to establish . . . a reasonable probability . . . that the outcome of the proceedings would have been different had the jury heard such expert testimony."

On appeal, the petitioner argues that Coffin's decision not to consult with or offer the testimony of an eyewitness identification expert was not a reasonable and informed strategic decision made after a thorough investigation of the law and facts but, instead, was

merely "based on her lack of knowledge regarding the admissibility of eyewitness identification expert testimony . . . ." In so arguing, the petitioner ignores the fact that, at the time of his criminal trial, *Kemp*, which held that expert testimony generally would not assist a jury in considering eyewitness identification evidence, was the controlling law in Connecticut.

Because Coffin's decision not to consult with or present the testimony of an eyewitness expert was not inconsistent with the law at the time of the petitioner's trial, we agree with the habeas court's determination that her decision was reasonable. See *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 462, 880 A.2d 160 (2005) (counsel "performs effectively when he elects to maneuver within the existing law" (internal quotation marks omitted)), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). We, therefore, conclude that the habeas court properly determined that the petitioner had not established deficient performance by Coffin regarding her failure to consult with or offer the testimony of an eyewitness identification expert.[4]

B

The petitioner also claims that the habeas court erred in concluding that he had not established that Coffin rendered ineffective assistance by failing to investigate the issue of phone calls the petitioner allegedly made from Douglas' cell phone immediately prior to the attempted robbery and assault. We agree that the habeas court erred in determining that Coffin's performance was not deficient in this regard but nonetheless

[4] Because we affirm the habeas court's determination that the petitioner failed to prove that Coffin's performance was deficient in not presenting testimony from an eyewitness identification expert, we need not also address the petitioner's challenge to the court's determination that he failed to prove prejudice.

conclude that the petitioner was not prejudiced by Coffin's deficient performance.

In the petitioner's third amended petition for a writ of habeas corpus, he claimed that Coffin's deficient performance violated his constitutional right to the effective assistance of counsel when she failed "to adequately and properly investigate the issue of the phone calls made from . . . Douglas' [phone] on the night of April 30, 2011, to prove or disprove the account provided by . . . Douglas," and that "[t]here is a reasonable probability that—but for . . . counsel's deficient performance . . . the result of the petitioner's criminal trial would have been . . . more favorable to the petitioner."

At the habeas trial, the petitioner offered into evidence the criminal trial transcripts, which included the testimony of Detective William J. Siemionko of the Hartford Police Department. Siemionko had testified at the petitioner's criminal trial that, shortly after the shooting, he obtained Douglas' phone records to determine who owned the phone associated with the phone number on the pizza order slip. Although the state did not offer those records into evidence, Siemionko testified that someone using Douglas' phone "did call Pizza 101 prior to the pizza deliver[y] by [the victim]" and that it had received a phone call from the victim at 12:02 a.m. on May 1, 2011, from the victim's phone.

At the habeas trial, the petitioner also presented the testimony of Michael Udvardy, a private investigator who had reviewed the phone records in the state's file, and offered into evidence Udvardy's report, which was based on his analysis of those phone records. Udvardy testified, and stated in his report, that his analysis of Douglas' phone records revealed that someone using Douglas' phone probably did not call Pizza 101. He also testified that there was a gap in the usage of Douglas'

phone at the time the shooting likely took place, but that he "wouldn't be alarmed by" the usage gap.

Another witness for the petitioner at his habeas trial, Brian S. Carlow, a former Deputy Chief Public Defender, testified that reasonably effective trial counsel "would want to examine the cell phone records to see whether or not what . . . Douglas was testifying to and what he had previously said in statements is either supported by those records or refuted by [them]." As to the usage gap, he characterized it as evidence that would have been "interesting to point out to a jury" but conceded that one reason for the usage gap might have been because Douglas "just simply wasn't coincidentally making any phone calls during that period of time."

Coffin testified that one of her trial defense strategies had been a third-party culpability defense directed at Douglas. She also testified that, at the time of the petitioner's criminal trial, the state had an open file policy but that she had not reviewed Douglas' phone records for fear of harm they might cause the defense and because she already had evidence that Douglas' phone had called the pizza place.[5]

[5] The following colloquy took place during the habeas trial between the petitioner's habeas counsel, Attorney Katharine S. Goodbody, and Coffin:

"[Goodbody]: . . . [S]o, you didn't review the phone records?

"[Coffin]: Right.

"[Goodbody]: Did you consider offering the phone records at trial?

"[Coffin]: . . . [N]o. I'm a little [wary] in general of offering phone records.

"[Goodbody]: And why is that?

"[Coffin]: Sometimes phone records can prove to be dangerous. Once you offer phone records, the state can get all of the records, and those could sometimes—I've had cases before where I've offered phone records, and the state has brought in more phone records and it turned out that it backfired.

"[Goodbody]: . . . [B]ut you didn't even review the phone records here, did you?

"[Coffin]: I don't believe so, no.

"[Goodbody]: Did you consider hiring someone to review the phone records?

"[Coffin]: No, I don't think so.

"[Goodbody]: And why would you not do that?

The habeas court found that the petitioner had failed to sustain his burden of proving that Coffin provided ineffective assistance of counsel as to the phone records. The court recounted that "Coffin testified at the habeas trial that she is generally wary of offering [phone] records as exhibits at trial because the state can then receive all the records, which can ultimately backfire and harm the defense. . . . Coffin further testified that it was her strategic decision to not delve further into Douglas' [phone] records for concern of what they could have revealed, particularly because she already had the evidence presented that the call was made to the pizza shop from Douglas' cell phone, and she cross-examined him on that fact at trial.

"Considering the presumption the court must take that counsel's conduct fell within a wide range of professional assistance, the petitioner has not proven that . . . Coffin's handling of the [phone] records was not sound trial strategy. Furthermore, the petitioner has not proven that he was prejudiced thereby by demonstrating that Douglas' phone records provided any evidence that would have assisted in his defense and created a reasonable probability that the outcome of the case would have been different had they been further investigated or presented into evidence. As a result, this claim must be denied."

On appeal, the petitioner claims that the habeas court erred in concluding that Coffin's decision not to investigate the phone records was sound trial strategy. We agree. A reasonably competent defense attorney should want to know all of the evidence relating to the case—

"[Coffin]: I think the call was—we did have the evidence that the call was made from . . . Douglas' phone, and I think I was just sticking with that. I didn't want any other phone records to come in that could wind up hurting our defense.

"[Goodbody]: Were you aware of any other phone records?

"[Coffin]: No."

inculpatory and exculpatory—in order to make sound strategic decisions and effectively represent the client, including whether to advise the client to accept a plea offer. A fear of discovering evidence that might harm the client is not a proper basis for neglecting to investigate. Moreover, the record reflects that the state was in possession of Douglas' phone records, and, thus, any potentially inculpatory evidence was already in the state's possession. Coffin's concern as to the potential harmfulness was certainly a reason *to* review that evidence, and her failure to do so was deficient. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 35 ("counsel's anticipation of what . . . potential [evidence] would [show] does not excuse the failure to find out; speculation cannot substitute for certainty" (internal quotation marks omitted)).

That does not, however, end our inquiry. As stated herein, to prevail on an ineffective assistance of counsel claim, a petitioner must prove both deficient performance and prejudice. As to prejudice, the petitioner notes that Douglas testified that "his cell phone was used by [the petitioner] to call multiple places to find someone to rob. . . . [The petitioner] testified that he did not do this." (Citation omitted.) The petitioner argues on appeal that "[a] simple review of [Douglas' phone] records would have shown that . . . Douglas was lying about what had occurred that evening. . . . It would have supported . . . [the petitioner's] testimony." (Citation omitted.) The petitioner contends that "[t]he [phone] records reveal that . . . Douglas' phone never [was used to call the victim's] phone or Pizza 101. . . . They further reveal [that someone using the victim's] phone called . . . Douglas' phone once on the night of the incident. . . . Further, during the late evening of April 30, 2011, and the early morning of May 1, 2011, all the calls shown on . . . Douglas' phone records show that, other than the call from [the victim's]

phone, they were to other mobile phones, and these numbers appear on his bill in various other spots and times . . . [a]nd [n]one of these other numbers were associated with Pizza 101 or with any business establishment. . . . This would prove to the jury that Douglas' phone was never used to call Pizza 101, as he testified. Additionally, there was a gap in usage on . . . Douglas' cell phone from 12:02 to 12:15 [a.m. on May 1, 2011]. . . . During that time, [t]here were some incoming . . . [b]ut there [were] no outgoing calls or texts." (Citations omitted; footnote omitted; internal quotation marks omitted.) The petitioner argues that Douglas' phone records in the present case represent neutral evidence that could have resolved conflicting testimony at the criminal trial. We disagree.

Although Douglas' phone records may have shown that Douglas' phone was not used to call multiple places to find a target or to call Pizza 101, they do not contradict the incriminating evidence that Douglas' phone number was given to Pizza 101 when the order was placed. Furthermore, the phone records bolster the evidence that the victim called Douglas' phone to get delivery directions, a fact that was also substantiated by Douglas' own testimony. Indeed, as the respondent argues, the fact that Douglas' phone apparently was not used preliminarily to call pizza restaurants or to place the order with Pizza 101 might reasonably suggest that the petitioner used his own phone to make those calls and gave Douglas' number to Pizza 101 when he placed the order in an attempt to avoid leaving a record of his involvement. Thus, although the discrepancy between the phone records and Douglas' testimony may have caused the jury to doubt a portion of his testimony, it would be speculative to posit that it would have been likely to cause the jury to doubt all of his testimony, most of which was corroborated by the victim, who identified the petitioner and Newkirk as having been

involved in the attempted robbery and assault. The jury reasonably could have credited Douglas' testimony that the petitioner was at Mary Shepard Place shortly before the victim was shot, that the petitioner and Newkirk were making specific plans to rob a delivery driver, and that the petitioner had a revolver that he was carrying in the pocket of his hooded sweatshirt. None of that incriminating testimony would have been directly challenged by the introduction of the phone records. Again, that evidence was corroborated by the victim's account[6] of the attempted robbery and assault that occurred, which also implicated the petitioner and Newkirk.[7] Thus, we are persuaded that the petitioner greatly overstates the benefit, *if any*, that may have inured to the defense if the phone records had been introduced at his criminal trial.

The petitioner's argument that the phone records would have caused the jury to credit his testimony as to the events of the evening in question is also speculative. Although the petitioner testified at his criminal trial that he never had a gun and that he had not been involved in gun play before, he admitted that he had been shot four times in November, 2010. The court also permitted the state to ask the petitioner about prior misconduct, specifically, an armed robbery during which

[6] We note that the victim's initial interaction with the petitioner did not involve the stress of having a gun drawn on her. Initially, when the victim arrived to deliver the pizza, the petitioner approached the passenger side window of the victim's vehicle and asked her if she had change. When she told the petitioner that she did not have change, he asked Newkirk if he had change. After Newkirk told the petitioner that he did not have change, the petitioner again asked the victim if she had change, the victim told him that she did not and then something fell out of the petitioner's pocket. The petitioner picked up the object and put it into his pocket, and the victim did not think anything of it. The petitioner continued to ask the victim for change and when she told him that she did not have change, he then put the gun to the door of the vehicle, and the victim saw it for the first time.

[7] The petitioner testified at trial that he saw Newkirk when he first arrived at Mary Shepard Place that evening.

the petitioner allegedly staked out a liquor store in the area and asked the cashier if he had change before robbing him at gunpoint. In light of these infirmities with the petitioner's credibility, it is not a foregone conclusion that, even if the jurors had disbelieved the entirety of Douglas' testimony, they would have credited the petitioner's testimony.

As this court noted in its consideration of the petitioner's direct appeal, the cross corroboration of the testimony of Douglas and the victim presented a strong case against the petitioner. *State* v. *Grant*, supra, 154 Conn. App. 328–29. We reiterate that, to prove prejudice under *Strickland*, the petitioner must demonstrate that, in the absence of the deficient performance at issue, the likelihood of a different result must be substantial, not just conceivable. "[T]he petitioner must meet this burden not by use of speculation but by demonstrable realities." (Internal quotation marks omitted.) *Madera* v. *Commissioner of Correction*, 221 Conn. App. 546, 556, 302 A.3d 910, cert. denied, 348 Conn. 928, 305 A.3d 265 (2023). We agree with the habeas court that the petitioner failed to meet this burden.

On the basis of the foregoing, we conclude that the habeas court properly concluded that the petitioner had failed to demonstrate that Coffin provided ineffective assistance as to her handling of Douglas' phone records.

C

The petitioner also claims that the habeas court erred in concluding that he had not established that Coffin rendered ineffective assistance by failing to investigate, prepare and present potential alibi witnesses. We disagree.

In the petitioner's third amended petition for a writ of habeas corpus, he claimed that Coffin's deficient performance violated his constitutional right to the

effective assistance of counsel when she failed "to adequately investigate and/or present witnesses that confirm that the petitioner was not at . . . Mary Shepard Place . . . during the night of April 30, 2011, including, but not necessarily limited to Vanessa . . . and/or [her children]," and that, "[t]here is a reasonable probability that—but for . . . counsel's deficient performance . . . the result of the petitioner's criminal trial would have been . . . more favorable to the petitioner."

In rejecting this claim of ineffective assistance, the habeas court recounted that "Coffin testified at the habeas trial that, when she was appointed as the petitioner's counsel, she reviewed the police reports, met with the petitioner, and hired an investigator who examined the scene and met with potential witnesses. [She] testified that she presented an alibi defense to the jury using testimony by [Cooper] and the petitioner. [She] also testified that her decision not to call additional alibi witnesses, such as Cooper's children . . . was strategic because she avoids calling minors to testify if possible due to a potential negative impact on the jury. She further testified that Cooper's children would have provided the same evidence as Cooper, and she believed that the strategic decisions she made at the time accompanied by Cooper's testimony would be enough for a successful alibi defense." The habeas court concluded that, "[c]onsidering the presumption the court must take that counsel's conduct fell within a wide range of professional assistance, the petitioner has not proven that . . . Coffin's investigation into and presentation of the petitioner's alibi defense failed to constitute sound trial strategy. Furthermore, the petitioner has not proven that he was prejudiced thereby by demonstrating that the additional testimony provided evidence that would have . . . created a reasonable probability that the outcome of the case would have

been different had the witnesses been called to testify at the criminal trial."

On appeal, the petitioner asserts that Coffin's decision not to investigate Cooper's children as potential alibi witnesses was unreasonable because "presenting [the petitioner's] alibi was clearly part of her defense." Second, the petitioner contends that Coffin's reasoning "does not stand up to scrutiny" because Cooper's children were teenagers—not young children—and they had important information to establish the defense Coffin was presenting; therefore, "[t]here would be no reason not to put them on [the witness stand] to support that defense." Furthermore, he argues that, even if Coffin's decision was strategic, "the strategy was neither reasonable nor informed" because Coffin had not even investigated the witnesses despite her knowledge of their existence.

Although we agree with the petitioner that Coffin should have, at a minimum, met with and interviewed Cooper's children to ascertain the potential benefit, if any, to having them testify on the petitioner's behalf, the evidence presented at the habeas trial supports Coffin's explanation that their testimony would have been cumulative of Cooper's testimony that she and her son and daughter had dropped the petitioner off at his home before 11 p.m. At the habeas trial, Cooper's daughter testified that they had dropped the petitioner off at his home between 9 and 10 p.m. and that the petitioner "was home by 11 p.m., I know." Even if we assume the veracity of the alibi testimony of both Cooper and her daughter, that testimony did not establish an alibi for the petitioner because the shooting occurred sometime between midnight and 12:15 a.m. Neither Cooper nor her daughter could account for the petitioner's whereabouts at the time the shooting occurred. Based on the testimony of the petitioner, Cooper and Cooper's daughter that it took approximately fifteen

minutes to get to the petitioner's home from Mary Shepard Place, the petitioner could have returned to Mary Shepard Place before midnight. Because the testimony of Cooper's daughter was, at best, cumulative of Cooper's testimony and did not provide the petitioner with an alibi for the time during which the shooting occurred, it is unlikely that the testimony of Cooper's daughter would have changed the outcome of the petitioner's trial. See *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 629, 212 A.3d 678 (2019) ("an alibi witness' testimony has been found unhelpful . . . when the proffered witness would fail to account sufficiently for a defendant's location during the time or period in question" (internal quotation marks omitted)). Accordingly, the habeas court did not err in concluding that the petitioner did not establish that Coffin had rendered ineffective assistance by failing to investigate, prepare and present potential alibi witnesses.

III

Finally, we turn to the petitioner's claim that "[t]here was no legitimate basis on the record for the habeas court's rejection of the unrebutted expert testimony of . . . [Margaret Bull] Kovera [concerning eyewitness identification testimony] and . . . Carlow." The petitioner argues that the habeas court arbitrarily rejected the testimony of both Kovera and Carlow when it gave no rationale for why it did not consider or analyze their testimony. We are not persuaded.

"[A] trier of fact may accept or reject, in whole or in part, the testimony of an expert offered by one party. . . . This principle holds true even when the opposing party offers no rebuttal expert. . . . [I]n its consideration of the testimony of an expert witness, the [trier of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the [person being examined] and to form an opinion, and his thoroughness. It might

consider also the reasonableness of his judgments about the underlying facts and of the conclusions [that] he drew from them. . . . Thus, it is permissible for the trier of fact to entirely reject uncontradicted expert testimony as not worthy of belief. . . .

"We have also recognized, however, that the trier's discretion is not without limits. [T]he trier's freedom to discount or reject expert testimony does not . . . allow it to arbitrarily disregard, disbelieve or reject an expert's testimony in the first instance. . . . [When] the [trier] rejects the testimony of [an] . . . expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief. . . . That said, given the myriad bases on which the trier properly may reject expert testimony and the reviewing court's obligation to construe all of the evidence in the light most favorable to sustaining the trier's [finding or] verdict, it would be the rare case in which the reviewing court could conclude that the trier's rejection of the expert testimony was arbitrary." (Citations omitted; internal quotation marks omitted.) *Menard* v. *State*, 346 Conn. 506, 521–22, 291 A.3d 1025 (2023).

Here, the habeas court never explicitly rejected the expert testimony of Kovera or Carlow. In the absence of such an explicit rejection of their testimony, we cannot conclude that the court rejected it or, if it did, that such a rejection was arbitrary. Rather, we presume that the court properly weighed all of the evidence presented to it in reaching its decision. The fact that the court came to a conclusion that was inconsistent with the expert testimony does not, in itself, support the petitioner's contention that the court arbitrarily disregarded that testimony. See *Evans* v. *Tiger Claw, Inc.*, 141 Conn. App. 110, 121 n.17, 61 A.3d 533 (2013) ("We presume that the court considered the relevant factors. . . . The

correctness of a judgment of a court of general jurisdiction is presumed in the absence of evidence to the contrary. We do not presume error. The burden is on the appellant to prove harmful error." (Internal quotation marks omitted.)) Accordingly, the petitioner's claim is unavailing.

The judgment is affirmed.

In this opinion SUAREZ, J., concurred.

PRESCOTT, J., concurring in part and dissenting in part. In the underlying criminal trial against the petitioner, Cecil Grant, the state's case was predicated almost entirely on two pieces of evidence. First, it relied on the testimony and credibility of Gustin Douglas. He implicated the petitioner in the robbery and shooting at the housing complex where Douglas lived, while simultaneously attempting to minimize or negate his own involvement and culpability in the commission of the charged offenses. Second, the state's case relied heavily on the victim's eyewitness identification of the petitioner as the shooter.

The petitioner testified at trial that he was not present during the commission of the attempted robbery and shooting and that, instead, he had been driven by his brother's fiancée, Vanessa Cooper, along with her children, to his residence in a different part of Hartford shortly before the shooting. Through his trial counsel, he also attempted to assert that Douglas participated in the robbery but had implicated the petitioner in order to minimize or eliminate his own culpability. Finally, the petitioner attempted to challenge the reliability of the victim's eyewitness identification of him as the shooter.

The majority and I apparently[1] agree that the petitioner's trial counsel, Kirstin B. Coffin, rendered constitu-

[1] The majority is not entirely clear regarding whether Coffin's failure to investigate or interview the other potential alibi witnesses amounted to

tionally deficient performance in two ways. First, Coffin's performance was constitutionally inadequate because she failed to review phone records for Douglas' cell phone,[2] which, according to Douglas, the petitioner used to facilitate the commission of the crimes of which the petitioner was convicted. Second, Coffin's performance was constitutionally defective because she failed to investigate and present the testimony of one or more of Cooper's children as alibi witnesses.

Despite these instances of deficient performance, the majority concludes that they did not prejudice the petitioner. In doing so, the majority does not adequately account for the extent to which the phone records undermine the credibility of Douglas' testimony. The majority also does not adequately consider the existence of a number of factors that reduce the reliability of the victim's eyewitness identification testimony. Finally, the majority underestimates the importance that one or more additional alibi witnesses would have had on the strength of the petitioner's alibi defense by simply dismissing them as cumulative.

constitutionally deficient performance. Such a conclusion may be inferred from the majority's statement in part II C of its opinion that, "we agree with the petitioner that Coffin should have, at a minimum, met with and interviewed Cooper's children to ascertain the potential benefit, if any, to having them testify on the petitioner's behalf." That statement is then followed by a determination that the petitioner nonetheless was not prejudiced. See part II C of the majority opinion.

It is equally plausible, however, that the majority merely assumes deficient performance and rejects the petitioner's claim on the prejudice prong of *Strickland*. See *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583, 300 A.3d 607 ("[b]ecause both prongs [of the *Strickland* test] . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong" (internal quotation marks omitted)), cert. denied, 348 Conn. 911, 303 A.3d 10 (2023). Because I would conclude that counsel's performance was deficient with respect to her investigation of additional alibi witnesses, I include that analysis as part of my discussion of the petitioner's claim.

[2] The police identified Douglas' mother as the actual subscriber of the cell phone later associated with Douglas. When questioned by the police, Douglas' mother told them that the cell phone was used by Douglas. For ease of discussion, I refer to the phone as Douglas'.

Accordingly, although I agree with the results reached in parts I, II A and III of the majority opinion, for the reasons that follow, I do not agree with the majority's conclusions in parts II B and C of its opinion that the petitioner failed to demonstrate that he was prejudiced by Coffin's deficient performance under the standard set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).[3] I reach the contrary conclusion and would reverse the judgment of the habeas court and remand the matter for a new criminal trial. Accordingly, I respectfully dissent from the majority's decision to affirm the judgment of the habeas court.

I begin with a brief discussion of the instances of deficient performance, which is necessary for a more thorough understanding of how they prejudiced the petitioner's defense. Common to both aspects of defense counsel's deficient performance was her failure to properly investigate readily available evidence and witnesses, without a reasonable strategic reason for so doing. See *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012) ("counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (internal quotation marks omitted)); *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 721, 789 A.2d 1046 (2002)

[3] In *Strickland* v. *Washington*, supra, 466 U.S. 687, the United States Supreme Court set forth a two-pronged test for evaluating claims of ineffective assistance of counsel: "First, [a petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the [petitioner] by the [s]ixth [a]mendment [to the constitution of the United States]. Second, the [petitioner] must show that the deficient performance prejudiced the defense." (Internal quotation marks omitted.) Id.

("[b]ecause a defendant often relies heavily on counsel's independent evaluation of the charges and defenses, the right to effective assistance of counsel includes an adequate investigation of the case" (internal quotation marks omitted)).

Counsel first rendered deficient performance by failing to review Douglas' cell phone records, which were of particular importance because Douglas asserted that the petitioner had used his cell phone to facilitate the attempted robbery by calling various businesses, including Pizza 101, the victim's employer. The phone records had been obtained by the police prior to trial and were readily available for review by the defense. If defense counsel had reviewed the phone records and investigated the phone numbers contained therein, she would have learned that Douglas' phone was *not* used to call Pizza 101 prior to the robbery and shooting or any other identifiable businesses. Having that information would have allowed defense counsel to directly contradict not only the testimony of Douglas but the corroborating testimony provided by Detective William J. Siemionko of the Hartford Police Department.[4]

It is, of course, axiomatic that, to demonstrate deficient performance, a petitioner must overcome the strong presumption that a "challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689; see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, 188 A.3d 1 (2018), cert. denied sub nom. *Connecticut* v. *Skakel*, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). In the present case, the petitioner met this burden because Coffin's explanation for not pursuing Douglas' phone records was not founded

[4] Siemionko testified at the criminal trial that the phone records showed that the phone associated with Douglas was used to "call Pizza 101 prior to the pizza deliver[y] by [the victim]."

on any sound trial strategy but, rather, was objectively unreasonable.

At the habeas trial, Coffin testified that, at the time of the petitioner's criminal trial, the state had an "open file" policy, meaning that she had easy access to the phone records. Nevertheless, she admitted that she never reviewed the phone records herself, never hired anyone to review them, and thus never considered offering them into evidence at trial. When asked to explain the rationale for her inaction, she stated a general belief that, "[s]ometimes phone records can prove to be dangerous" and that, in this case, "we did have the evidence that the call was made from . . . Douglas' phone, and I think I was just sticking with that." A proper review of the phone records, however, would have proven any such evidence false. She also stated: "I didn't want any other phone records to come in that could wind up hurting our defense." When asked, however, if she had been aware of any other phone records that could have been introduced, she responded, "[n]o."

"[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 680. Here, I agree with the majority's assessment that "fear of discovering evidence that might harm the client is not a proper basis for neglecting to investigate" because a minimally competent defense attorney would want to assess all of the available information about a case, both inculpatory and exculpatory, to formulate and execute an effective defense. See part II B of the majority opinion. I conclude that Coffin, by not even seeking to review the phone records, failed to exercise objectionably reasonable professional judgment, and her inaction amounts to deficient performance.

I now turn to the alibi defense. The petitioner testified at the criminal trial that, although he was at the housing complex on the night of the assault, he had been there visiting with Cooper, his brother's fiancée, and her children, and that they all drove him home prior to the events at issue. In addition to the petitioner's testimony, the defense called Cooper, who testified that the petitioner had visited with them at the housing complex on the relevant date and that she and the children had driven the petitioner home and dropped him off prior to the time the assault occurred. Coffin did not call to testify at trial either of Cooper's children, who were fifteen and seventeen years of age at the time of the shooting, nor did she or her investigator even interview them as potential witnesses. There is no doubt that this failure constituted deficient performance under the facts of this case.

As previously stated, "[i]nadequate pretrial investigation can amount to deficient performance, satisfying prong one of *Strickland*, [because] [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation. . . . Although . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . In other words, counsel has a duty to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 546–47, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

"If counsel makes strategic decisions after thorough investigation, those decisions are virtually unchallengeable . . . . In particular, our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." (Citation omitted; internal quotation marks omitted.) Id., 547.

Although the decision whether to call a particular witness to testify is ordinarily a matter generally left to the discretion of trial counsel as a matter of trial strategy, it can constitute deficient performance not to call a particular witness if that otherwise strategic decision was unreasonable under the facts and circumstances known. This is particularly true in deciding whether to call one or more alibi witnesses. Once Coffin made the decision to pursue an alibi defense, however, she had a duty to adequately investigate, at a minimum, the substance of any potential alibi witness' testimony. That duty necessarily included interviewing Cooper's children as potential witnesses, either herself or through an investigator.

The present case is strikingly similar to our Supreme Court's decision in *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 47–61, in which that court held that trial counsel had rendered deficient performance because, despite alibi having been the primary defense, counsel failed to investigate and present testimony of an easily discoverable, disinterested alibi witness. As the court in *Skakel* stated, "[w]ith specific regard to the duty to investigate a defendant's alibi defense, counsel is obligated to make all reasonable efforts to identify *and interview* potential alibi witnesses." (Emphasis added.) Id., 35–36. The court made clear that simply

deciding not to call an alibi witness without having first interviewed that witness was "objectively unreasonable because it was a decision made without undertaking a full investigation into whether [the witness] could assist in [the petitioner's] defense. . . . By failing even to contact [the witness] . . . counsel abandoned his investigation at an unreasonable juncture, making a fully informed decision with respect to [whether to have the witness testify] impossible." (Internal quotation marks omitted.) Id., 36, quoting *Towns* v. *Smith*, 395 F.3d 251, 259 (6th Cir. 2005). The court also identified a number of nonexclusive factors that a habeas court should consider "in determining whether counsel's failure to investigate and present the testimony of an additional alibi witness or witnesses was reasonable under the circumstances. They include (1) the importance of the alibi to the defense . . . (2) the significance of the witness' testimony to the alibi . . . (3) the ease with which the witness could have been discovered . . . and (4) the gravity of the criminal charges and the magnitude of the sentence that the petitioner faced." (Citations omitted.) *Skakel* v. *Commissioner of Correction*, supra, 37.

Here, Coffin knew from Cooper's statement to the police, which was part of the police file, that her children purportedly were with Cooper and the petitioner when he was driven home. Accordingly, Coffin was aware of at least two additional potential alibi witnesses. Moreover, whereas Cooper arguably had a familial tie to the petitioner through his brother, to whom she was engaged, there was no indication in the record that the children had a familial relationship with the petitioner, and they potentially could have been viewed by the jury as more disinterested than Cooper and thus more believable. It is also entirely possible that the children's testimony regarding the petitioner's alibi may simply have been viewed as more credible than that offered

by Cooper and the petitioner or that Cooper and the children's collective testimony, if relatively consistent, would have rendered the proffered alibi defense overall more credible in the eyes of at least one of the jurors. See id., 51 (multiple alibi witnesses not necessarily cumulative and potentially corroborative not only of alibi generally but also as to credibility of each alibi witness). The younger of the two children testified at the habeas trial, and her testimony generally was consistent with Cooper's account of events. Counsel's failure even to interview the children so as to evaluate their demeanor as witnesses and ascertain the substance of their potential testimony was, as in *Skakel*, an objectively unreasonable strategic decision, especially in light of the importance of the petitioner's alibi defense, which directly countered the victim's and Douglas' identification of him as the perpetrator of the assault. See id., 37.

The majority suggests that Coffin's failure to conduct an adequate investigation of the children as potential additional alibi witnesses either did not amount to deficient performance or did not prejudice the defense because, at best, the witnesses only provided the petitioner with a partial alibi. A partial or incomplete alibi is one in which an alibi witness cannot testify with certainty that a criminal defendant was in his or her sight at the precise time that the crime was committed. I acknowledge that the court in *Skakel* observed that, "as a general rule, partial alibis are unconvincing. Indeed, it has been argued that a partial or incomplete alibi is not really an alibi in the truest sense . . . because it fails to account for a defendant's whereabouts for at least some period of time during which the crime *reasonably* could have been committed by the defendant. Thus, when a true partial alibi is at issue, it is invariably the case that the defendant just as likely could have committed the crime during a period of time

not covered by the alibi." (Citation omitted; emphasis added.) Id., 68. Even a partial or incomplete alibi, however, can be important evidence for the defense; particularly if the jury believes the alibi witness or witnesses presented and has no factual basis for considering whether the petitioner might have been able to commit the crime during a period not directly covered by the alibi testimony. See *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 571 n.27, 138 A.3d 378 (alibi witnesses' testimony concerning accused's whereabouts immediately following crime could be helpful to defense to explain or bolster alibi), cert. denied, 321 Conn. 923, 138 A.3d 284 (2016).

The petitioner testified that it was approximately a fifteen minute drive between the housing complex where the assault occurred and his home, that he was driven home by Cooper accompanied by the children, and that he was probably home by 10:45 p.m. He testified that he remained home *and was home around midnight* when the assault occurred. On the basis of this testimony alone, the petitioner presented a "complete" alibi defense. Although Cooper testified that it was her son who drove when they dropped the petitioner off, she testified, consistent with the petitioner, that he was home shortly before 11 p.m. The majority correctly notes that Cooper's daughter initially testified at the habeas trial that they dropped off the petitioner between 9 and 10 p.m., but she subsequently clarified that it was before 11 p.m. The state sought to discredit the alibi in the eyes of the jurors by highlighting the inconsistencies in Cooper's and the petitioner's versions of events, such as who was driving, and by pointing out that the petitioner claimed to be unaware of the date the assault occurred until he was arrested and yet claimed to recall the events of that day to formulate an alibi. The state never asked the petitioner or Cooper whether he had a car or some other means of returning

to the housing project where the crime occurred after he was dropped off. Moreover, the state in its closing argument did not argue that the alibi defense offered was incomplete or only a partial alibi. In other words, it did not argue to the jury that the petitioner reasonably had an opportunity to commit the crime by returning to the scene after he was dropped off at home. If the state was capable of making such an argument on the available facts, presumably it would have done so. Accordingly, because the majority's "partial alibi" discussion does not account for the petitioner's own testimony and appears to speculate about a scenario unsupported by the record, I find it unpersuasive as a basis for rejecting the petitioner's claim of deficient performance.

As with her decision not to review the phone records, Coffin did not offer an objectively reasonable reason for her failure to investigate the additional alibi witnesses. Coffin testified at the habeas trial that her decision not to call Cooper's children to testify was a strategic decision and that, generally, she avoids calling minors to testify if possible because of what she believed was a potential negative impact on the jury. Coffin stated: "It might look bad in front of the jury if the jury thinks you're hauling in children to testify, and also they'd be—proved to be a little nervous [on the witness] stand or possibility of changing their story." She also testified, however, that she did not know the ages of Cooper's children, both of whom were teenagers at the time of the assault.

"[S]trategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court." *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 31. To warrant such deference, however, a strategic decision must be objectively reasonable under the circumstances. See *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 291–92, 267

A.3d 120 (2021) ("our plenary review requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported [trial counsel's] decisions . . . and, second, to consider whether those reasons were objectively reasonable"). Without knowing the ages of the children, or having spoken to the children, the concerns that Coffin voiced regarding calling minor witnesses to testify amounted to pure speculation here, not an objectively reasonable strategy. Moreover, prior to deciding not to call them as witnesses, Coffin had no way of knowing what the substance of the children's testimony might have been or whether, in fact, their stories would have mirrored that of Cooper. It would have been equally important to make sure they did not have details that could have been used by prosecutors to counter the testimony of the petitioner or Cooper. In other words, Coffin did not have any factual basis on which to make a reasoned decision not to investigate the children as additional alibi witnesses, and her inaction, in my view, constituted deficient performance.

In short, counsel's performance was deficient, egregiously so, in my view. She turned a blind eye to the phone records that could have been used to contradict the testimony given by two important state's witnesses and, despite having elected to pursue an alibi defense, she failed to interview and evaluate two additional potential alibi witnesses. The majority nevertheless concludes that the petitioner failed to demonstrate that either of these deficiencies prejudiced him such that a new trial is warranted. I part ways with the majority's conclusion regarding application of the prejudice prong of *Strickland* and would instead conclude, for the reasons that follow, that counsel's deficiencies, considered in the aggregate, demonstrate prejudice warranting a new trial in this matter.

"An evaluation of the prejudice prong involves a consideration of whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . We do not conduct this inquiry in a vacuum, rather, we must consider the totality of the evidence before the judge or jury. . . . Further, we are required to undertake an objective review of the nature and strength of the state's case. . . . [S]ome errors will have had pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors. . . .

"In other words, [i]n assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . Instead, *Strickland* asks whether it is reasonably likely the result would have been different. . . . The likelihood of a different result must be substantial, not just conceivable. . . . Notably, the petitioner must meet this burden not by use of speculation but by demonstrable realities." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, 222 Conn. App. 713, 730–31, 306 A.3d 1073 (2023), cert. denied, 348 Conn. 953, 309 A.3d 303 (2024).

The majority leans far too heavily on the word "substantial" in the previously cited standard. The "substantial" likelihood requirement has been used by our

Supreme Court and comes from the United States Supreme Court's decision in *Harrington* v. *Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), in which that court stated that "*Strickland* asks whether it is reasonably likely the result would have been different. . . . This does not require a showing that counsel's actions more likely than not altered the outcome, but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case. . . . The likelihood of a different result must be substantial, not just conceivable." (Citations omitted; internal quotation marks omitted.) Id., 111–12. In *Jones* v. *State*, 328 Conn. 84, 102, 177 A.3d 534 (2018), our Supreme Court described the *Strickland* prejudice standard as being "slightly more lenient than the more likely than not standard . . . ." Accordingly, courts considering whether a petitioner has met that burden should be cautious not to place too great a weight on the word "substantial."

In the present case, in which I conclude that the petitioner has demonstrated that counsel's performance was deficient in at least two different ways, it is appropriate in evaluating prejudice to consider the aggregate effect of counsel's deficient performance on a jury's consideration of the evidence as a whole and the reasonable inferences drawn therefrom. Although Connecticut courts have not expressly adopted this type of aggregate error approach in postconviction review; see *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 703, 159 A.3d 1112 (2017) (noting that it is "open question whether [claims of cumulative prejudicial effect of counsel's deficient performance] are cognizable under Connecticut law" and leaving issue unresolved because petitioner failed to show *any* "prejudice to aggregate"); the vast majority of federal jurisdictions and at least some state courts have done so in the

context of conducting a prejudice analysis in accordance with *Strickland*.[5] See *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 9, 272 A.3d 169 (2022) (although federal and state court postconviction jurisprudence is not binding on this court, it is appropriate to look to such sources for guidance). Furthermore, Connecticut already considers the aggregate prejudicial effect of errors in reviewing claims of prosecutorial improprieties and whether those improprieties, considered in total, deprived a defendant of a fair trial.[6] It is

[5] See, e.g., *Dugas* v. *Coplan*, 428 F.3d 317, 335 (1st Cir. 2005) ("*Strickland* clearly allows the court to consider the cumulative effect of counsel's errors in determining whether a defendant was prejudiced" (internal quotation marks omitted)); *Lindstadt* v. *Keane*, 239 F.3d 191, 199 (2d Cir. 2001) ("We need not decide whether one or another or less than all of these four errors would suffice, because *Strickland* directs us to look at the totality of the evidence before the judge or jury, keeping in mind that [s]ome errors . . . have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture. . . . We therefore consider these errors in the aggregate." (Citation omitted; internal quotation marks omitted.)); see also *Phillips* v. *State*, 285 Ga. 213, 218, 675 S.E.2d 1 (2009) ("combined effects of counsel's errors are considered in determining the prejudice prong of a claim of ineffective assistance of counsel"); *State* v. *Allen*, 378 N.C. 286, 304, 861 S.E.2d 273 (2021) (adopting reasoning of lower court that, "because [ineffective assistance of counsel] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel" (internal quotation marks omitted)), rev'd in part on other grounds by *State* v. *Walker*, N.C. , 898 S.E.2d 661 (2024); *State* v. *Thiel*, 264 Wis. 2d 571, 608, 665 N.W.2d 305 (2003) (determining that counsel's performance was deficient in three ways but concluding that "we need not look at the prejudice of each deficient act or omission in isolation, because we conclude that the cumulative effect undermines our confidence in the outcome of the trial").

Only the United States Courts of Appeals for the Fourth and Eighth Circuits have expressly disallowed aggregately assessing an attorney's errors in determining whether there is *Strickland* prejudice. See B. Means, Postconviction Remedies (2023) § 30:3 (discussing cumulative error doctrine in context of ineffective assistance of counsel claims and collecting cases).

[6] "[W]hether the defendant has been prejudiced by prosecutorial [improprieties], therefore, depends on whether there is a reasonable likelihood that the jury's verdict would have been different *absent the sum total of the improprieties*." (Emphasis added; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 556, 212 A.3d 208 (2019); see also *State* v. *Medrano*, 131 Conn. App. 528, 553, 27 A.3d 52 (2011) ("[h]aving

consistent with that existing jurisprudence for our courts also to consider in habeas corpus proceedings the cumulative effect of multiple instances of constitutionally defective performance by criminal defense counsel.

Missing from the majority opinion is any significant discussion of the relative strength, or lack thereof, of the state's case. It is axiomatic that our standard of review in evaluating prejudice requires us to "undertake an objective review of the nature and strength of the state's case." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, supra, 222 Conn. App. 730. In part II B of its opinion, the majority cites to this court's decision on direct appeal and states that "the cross corroboration of the testimony of Douglas and the victim presented a strong case against the petitioner." See *State* v. *Grant*, 154 Conn. App. 293, 328–29, 112 A.3d 175 (2014), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). It is, however, precisely this inextricable connection between the testimony of Douglas and the victim that renders Coffin's deficient performance in the present case particularly harmful.

If Coffin had properly investigated Douglas' phone records, she would have learned that Douglas' phone was not used on the night in question to call and case potential robbery victims, and most certainly not to call the pizza restaurant that employed the victim.[7] This

determined that several of the prosecutor's statements were improper . . . we now turn to whether those improprieties *taken in the aggregate* so infected the trial with unfairness as to make the conviction a denial of due process" (emphasis added; internal quotation marks omitted)), aff'd, 308 Conn. 604, 65 A.3d 503 (2013).

[7] The majority states that Michael Udvardy, the private investigator who reviewed the phone records and provided a report based on his analysis of those phone records, testified that his analysis of Douglas' phone records revealed that "Douglas' phone *probably* did not call Pizza 101." (Emphasis added.) See part II B of the majority opinion. Neither Udvardy's report nor his testimony, however, equivocated about the fact that the phone records associated with Douglas revealed that the phone was not used to call Pizza 101.

evidence would have contradicted Douglas' testimony that the petitioner had used his phone to call and locate a target, which likely would have discredited him in the eyes of the jurors. It also contradicts and thus impeaches the corroborating testimony provided by Siemionko. Demonstrating to the jury that Douglas' testimony about the petitioner using his phone to call various businesses was demonstrably incorrect would have raised substantial doubt as to whether he was being truthful about other events or simply was trying to shift blame away from himself. The phone records also show a gap in the use of Douglas' phone during the time of the assault, which, if the jury did not believe that Douglas had given the phone to the petitioner, supports a reasonable inference that Douglas was one of the assailants and had stopped using the phone during that period of time.

A key defense strategy had been to shift suspicion for the assault to Douglas, whose phone number was the one provided to the victim as a contact and which number the victim called for directions just prior to the assault. Throughout his testimony, Douglas both inculpated and exculpated himself, placing himself in the vicinity of the assault at the time in question while shifting focus to the petitioner and Derek Newkirk. Although the majority appears to rely on the state's argument seeking to limit the import of the phone records by suggesting that the petitioner could have used his own phone to call, this is pure speculation because no evidence was presented at trial that the petitioner used his own phone to call take-out businesses on the night in question. There is no doubt that the petitioner's attempt to raise reasonable doubt would have been substantially improved by using the cell phone records to impeach Douglas' version of events.

Additionally, although the majority properly rejects the petitioner's claim that his due process rights were

violated by the admission of the victim's out-of-court identification or that Coffin rendered deficient performance in the manner in which she challenged the victim's identification of the defendant, that conclusion does not speak to the overall strength or weakness of the identification evidence. In other words, simply because the constitution does not prohibit the admission of evidence pertaining to the victim's identification of the petitioner does not mean that its reliability is unassailable. As our Supreme Court recognized in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), both scientific experts in the field of eyewitness identification and courts recognize that many factors can affect the accuracy of an eyewitness' identification and subsequent testimony. Of particular relevance to the present case is that "there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy . . . the reliability of an identification can be diminished by a witness' focus on a weapon . . . high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events . . . cross-racial identifications are considerably less accurate than same race identifications . . . [and] a person's memory diminishes rapidly over a period of hours rather than days or weeks . . . ." (Footnotes omitted.) Id., 237–38. For a number of reasons, I am persuaded that the record in the present case shows that the victim's identification of the petitioner was not necessarily worthy of the weight placed on it by the majority.

First, as The Innocence Project points out in its amicus brief, circumstances at the time of the assault raise doubts about the victim's ability to make an accurate identification. The victim testified that she had never seen either man before that night. They did not stand near her window on the driver's side of her vehicle, but instead she viewed them only through the passenger

side window of her car. She was only able to observe her assailants for a brief time, two or three minutes at best, before one of them drew a gun and attempted to open the passenger side door. Moreover, she also agreed with defense counsel that, during that brief time, her attention was split between the two men. The assault occurred at night, the lighting around the housing complex was less than ideal,[8] and the closest of the men was five or six feet away, observable only through the passenger window of the vehicle.

Second, there were problems with the victim's out-of-court identification of the petitioner. The victim's identification of the petitioner did not occur until more than fourteen weeks after the assault, which reflects a significant passage of time between the victim's observation of the petitioner and her subsequent identification of him in a photographic array. It is well settled that, because memories fade over time, an extended period of time between a crime and the subsequent identification of the perpetrator can render an identification less reliable, particularly if there was not an ample opportunity to observe the perpetrator. See id., 238 ("a person's memory diminishes rapidly over a period of hours rather than days or weeks"); cf. *State* v. *Ortiz*, 252 Conn. 533, 555, 747 A.2d 487 (2000) ("[t]he three month time period that had elapsed between the crime and the identification was deemed to be "long . . . [but] any negative aspect of both the degree of attention and the time between the crime and the confrontation is far outweighed by the opportunity to view and the level of certainty of the witness' identification" (internal quotation marks omitted)).

There were also problems with the administration of the photographic arrays shown to the victim. Detective

[8] The victim testified that the lighting "was fair."

Anthony Pia of the Hartford Police Department prepared the photographic arrays, each of which consisted of eight photos on a single page. One array contained a photo of the petitioner, and the other a photo of Newkirk, each of whom Pia knew was a suspect. Pia also administered the arrays to the victim. Thus, the police did not follow a double-blind or sequential identification procedure.[9] As our Supreme Court recognized in *State* v. *Guilbert*, supra, 306 Conn. 253, the use of a simultaneous and single-blind identification procedure, as was done in the present case, renders the resulting identification less reliable. This is because double-blind administration procedures "avoid the possibility of influencing the witness, whether intentionally or unintentionally, and thereby tainting the accuracy of any resulting identification." *State* v. *Marquez*, 291 Conn. 122, 167, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). In addition, the victim was Hispanic whereas the petitioner and Newkirk were black. This raises well recognized concerns regarding the reliability of cross-racial identifications. See *State* v. *Guilbert*, supra, 306 Conn. 238 ("cross-racial identifications are considerably less accurate than same race identifications").

Significantly, although the victim identified the photos of the petitioner and Newkirk on the two photographic arrays, she circled each of their photos and wrote on the instruction sheet that accompanied the array that the circled photo "is the guy that shot me," which raises doubts about the accuracy of the victim's

[9] "In a simultaneous array, all of the photographs are shown to the witness at one time. In a sequential array, the photographs are shown to the witness one at a time." *State* v. *Williams*, 146 Conn. App. 114, 129 n.16, 75 A.3d 668 (2013), aff'd, 317 Conn. 691, 119 A.3d 1194 (2015). A double-blind identification procedure means that the person administering the photographic array to the witness also does not know the identity of the suspect. *State* v. *Outing*, 298 Conn. 34, 42, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).

memory of the events.[10] With respect to the petitioner's photo in the array, he was the only person wearing a hoodie, a distinct item of clothing that the victim identified to police immediately after the assault that both assailants were wearing. Furthermore, and significantly, although the police were aware of Douglas' close connection to the assault and the evidence demonstrating that he could have been one of the perpetrators, his photo was never presented to the victim in a photographic array.

Third, with respect to the victim's *in-court identification*, it is reasonable to conclude that it may have been "tainted," and thus rendered less reliable, by many of the problems already identified regarding the out-of-court identification. See generally *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016) (discussing potential that in-court identifications may be tainted by suggestive out-of-court identifications), cert. denied, 582 U.S. 922, 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017). Given all of these issues with the identification of the petitioner, coupled with the lack of any physical or forensic evidence tying the petitioner to the assault, I would conclude that the state's case was not particularly strong and thus far "more likely to have been affected by errors . . . ." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, supra, 222 Conn. App. 730.

With respect to counsel's deficient performance in failing to review Douglas' phone records, the majority minimizes the import of those records. A review of the

[10] I recognize that the state charged the petitioner as both a principal and accessory with regard to the assault, and, therefore, whether he or Newkirk was the shooter would not have mattered with respect to his criminal liability. That fact, however, does not minimize whatever confusion the victim may have exhibited in reviewing the photographic arrays and whether this was a result of a diminishment in her memories of the assault or a lack of certainty regarding her identification of the petitioner.

phone records would have demonstrated that Siemionko incorrectly testified that the records showed that the pizza was ordered using Douglas' phone, a fact that the prosecutor highlighted during his closing argument, and, more importantly, would have provided support for the defense theory that Douglas had testified inaccurately about the petitioner using his phone to shift blame away from himself. Although the state suggests that the petitioner could have used his own phone to place the pizza order but also gave Douglas' number on the order to mask his involvement, it does not account for the reality that the state's theory of the case was that Douglas' credible testimony about the details leading up to the assault helped to bolster the victim's identification of the petitioner and Newkirk. Any impeachment of Douglas' testimony would have been important to the defense efforts to sever this connection in the minds of the jurors.[11]

The respondent, the Commissioner of Correction, and the majority further conclude that Coffin's failure to investigate additional alibi witnesses did not prejudice the petitioner. The majority implicitly accepts Coffin's explanation that her choice to call one alibi witness was strategic, and that any additional witnesses would have been merely cumulative of that testimony and thus unlikely to have changed the outcome of the petitioner's

[11] The majority downplays the significance of the phone records evidence as not *directly* contradicting other aspects of Douglas' testimony and, thus, not likely to have had an impact on the jury. It is true that a jury may "believe all or only part of a witness' testimony . . . [and that the] jury [is] free to credit one version of events over the other . . . ." (Internal quotation marks omitted.) *State* v. *Douglas C.*, 195 Conn. App. 728, 741, 227 A.3d 532 (2020), aff'd, 345 Conn. 421, 285 A.3d 1067 (2022). It is equally true, however, that, if a jury believes that a witness has been untruthful as to one aspect of his testimony, this can raise reasonable doubt as to the credibility of the remainder of his testimony, particularly in a case such as this one in which a key defense theory was that Douglas was attempting to shift blame away from himself to the petitioner.

trial. An alibi defense, however, certainly may be rendered more believable by a jury if more than one alibi witness is presented who can account for the petitioner's whereabouts at or about the time of the crime. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 51. This is particularly true where, as in this case, the sole alibi witness offered, Cooper, was not a disinterested observer but the fiancée of the petitioner's brother and, thus, less likely to be believed by the jury. See id. Here, as previously stated, counsel failed even to interview the other potential alibi witnesses to determine their precise relationship with the petitioner or whether one would be more persuasive than Cooper. Certainly, at some point, a court could exclude, as "*needless*," multiple alibi witnesses as cumulative. (Emphasis added.) Conn. Code Evid. § 4-3. Multiple alibi witnesses, however, are not per se cumulative, as the majority suggests. Nor is it "needless" to offer more than one alibi witness, particularly if, as here, the state was able through cross-examination to highlight some factual differences in the testimony of the petitioner and Cooper as to both the relevant time period that he was with her and the children and who actually drove the car when taking him home.

Coffin's failure to investigate Douglas' phone records compromised her ability to impeach him as a witness and to lessen his credibility in the eyes of the jurors, making it less likely that the jury would regard his testimony and cooperation with the police as self-serving and intended to deflect suspicion from himself. In other words, Coffin's error significantly limited the petitioner's ability to cast Douglas as one of the victim's assailants. Moreover, Coffin's failure to call any additional alibi witnesses weakened the petitioner's closely related defense that he was not even present at the time of the shooting and therefore could not have been one of the perpetrators.

Thus, Coffin's deficiencies, considered in the aggregate, significantly compromised both prongs of the defense strategy, and, given the weaknesses in the state's case, I conclude that the petitioner satisfied his burden of demonstrating that there was a reasonable probability that, in the absence of these errors, at least one juror could have had reasonable doubt respecting his guilt, changing the outcome of the trial.

I respectfully dissent from the decision of the majority to affirm the judgment of the habeas court.