IN RE WENDY G.-R.*
(AC 46641)

Bright, C. J., and Suarez and Seeley, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, W. W was born in Guatemala and immigrated to New Haven in 2018 with the respondent father. In 2019, following a sexual assault by a family member, W was adjudicated neglected and committed to the care of the petitioner, the Commissioner of Children and Families. From mid-2019 through December, 2021, the Department of Children and Families had limited and sporadic contact with the mother, who remained in Guatemala, and between December, 2021, and August, 2022, the mother did not respond to communications from the department. The mother immigrated to New Haven in July, 2022. The department was unaware of this until August, 2022, when the mother appeared, unannounced, at a supervised visit between W and the father. Thereafter, the department referred the mother to various services, with which she was reluctant to engage until early 2023. Trial on the termination of parental rights petition commenced in March, 2023. The petitioner initially alleged that, pursuant to statute (§ 17a-112 (j) (3) (D)), no ongoing parent-child relationship existed between the mother and W. At the conclusion of the evidentiary portion of the trial, the petitioner's counsel orally moved to amend the petition to add the adjudicatory ground of failure to rehabilitate as to the mother, pursuant to § 17a-112 (j) (3) (B) (i), "to conform to the proof elicited at trial." In the absence of any objection or request for a continuation, the trial court granted the motion

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

and, thereafter, terminated the respondents' parental rights, determining, inter alia, that the petitioner proved that the mother had failed to rehabilitate but not that an ongoing parent-child relationship between the mother and W did not exist. *Held*:

1. The respondent mother could not prevail on her claim that she was denied her due process right to the effective assistance of counsel during the termination of parental rights proceeding: contrary to the mother's assertion, the fact that the petitioner sought to amend the petition at the close of evidence was not, in and of itself, a reasonable ground on which her counsel should have objected to the petitioner's motion, as the applicable rule of practice (§ 34a-1 (d)) permitted an amendment at any time prior to a final adjudication; moreover, the mother could not satisfy her burden of demonstrating that her counsel's failure to object to the petitioner's motion to amend the petition could not be explained by one or more possible strategic reasons that were objectively reasonable, as the record was bereft of any evidence of the actual strategy the mother's counsel employed when she did not object to the petitioner's motion, and, instead of developing a record of her counsel's allegedly deficient performance or any resulting prejudice by filing a motion to open or a petition for a new trial, the mother merely claimed that the existing record amply demonstrated that her counsel acted deficiently and that her counsel's lack of competency contributed to the termination of her parental rights; furthermore, the only legally viable ground on which the mother's counsel could have objected to the petitioner's motion to amend the petition, namely, that the amendment amounted to unfair surprise and that she needed additional time to respond adequately to the failure to rehabilitate ground, was not objectively reasonable because the record reflected that, at trial, the petitioner presented evidence related to the failure to rehabilitate ground without objection, including a copy of the specific steps ordered to facilitate the mother's reunification with W, a permanency plan study that supported a finding that the mother had failed to satisfy her specific steps and, accordingly, had failed to rehabilitate, the testimony of a department social worker with respect to numerous issues that could interfere with the mother's ability to safely assume a responsible position in W's life, and the testimony of S, an expert in clinical and forensic psychology, that pertained to the mother's failure to rehabilitate; additionally, throughout the trial, the mother's counsel attempted to undermine such evidence through cross-examination and by presenting evidence of the mother's rehabilitative efforts, and the mother did not assert that her counsel should have presented any additional evidence or that additional time was necessary to prepare stronger arguments to refute the failure to rehabilitate ground; accordingly, this court was not persuaded that the failure of the mother's counsel to object to the petitioner's motion to amend was objectively unreasonable under the circumstances, and, even if the mother could satisfy her burden of demonstrating that such failure was objectively

unreasonable, she failed to demonstrate that she was prejudiced by her counsel's incompetency.

2. The trial court properly determined that the respondent mother was unable or unwilling to benefit from efforts to reunify her with W, and, accordingly, it was unnecessary for this court to consider the merits of the mother's claim that the department failed to make reasonable efforts to reunify her with W: the mother did not challenge any of the trial court's specific subordinate findings as clearly erroneous and, instead, broadly challenged the court's assessment of the degree to which she was receptive to and utilized the services offered as well as its ultimate determination that she was unable or unwilling to benefit from the department's services; moreover, in its findings, the trial court outlined the myriad efforts to reunify her with W that were made by the department despite the challenges posed by a global pandemic and the danger presented by the fact that the mother was residing in Guatemala until July, 2022, and those efforts were, on their face, not so lacking as to preclude a finding that the mother was unable or unwilling to benefit from such services; furthermore, the petitioner demonstrated by clear and convincing evidence that the mother had inconsistent communication with the department when she was in Guatemala, that she failed to timely notify the department of her whereabouts prior to July, 2022, that she was reluctant to engage in services offered by the department prior to 2023, which detrimentally delayed her ability to gain critical and necessary knowledge of how W's needs changed following her immigration to New Haven, and that, at the time of her evaluation by S, the mother still demonstrated a lack of insight into W's traumatic experiences resulting from her relocation to the United States, particularly her sexual abuse, and what was required for the mother to provide W with a safe, nurturing, and supportive environment free from insecurity.

Argued December 6, 2023—officially released May 2, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Conway, J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

** May 2, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant solicitor general, with whom were *Kaelah M. Smith*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

SUAREZ, J. The respondent mother, Mirian R., appeals from the judgment of the trial court terminating her parental rights as to her biological daughter, Wendy G.-R., pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] The respondent claims that (1) she was denied her due process right to the effective assistance of counsel, (2) the court improperly determined that the Department of Children and Families (department) made reasonable efforts to reunify her with Wendy, and (3) the court improperly determined that she was unable or unwilling to benefit from reunification services. We affirm the judgment of the trial court.

In its memorandum of decision, the court set forth the relevant facts and procedural history in this case: In January, 2014, "Wendy . . . was born in Guatemala to . . . [the respondent] and Santos G. [The respondent and Santos] speak only Spanish and understand little to no English. [Santos] attended three years of school in Guatemala and the [respondent attended] four years of school in Guatemala. [The respondent and Santos] read and write very little Spanish. In the fall [of] 2018, [Santos] and Wendy emigrated by bus from Guatemala to the Mexico/Texas border. [The respondent and

[1] In the underlying action, the court terminated the parental rights of both the respondent and Wendy's biological father, Santos G., as to Wendy. Santos has not appealed from that judgment. In this opinion, we refer to Mirian R. as the respondent. Unless necessary to our analysis of the claims raised by the respondent, in this opinion we need not and do not address the court's findings and conclusions with respect to Santos.

Santos] decided to have four year old Wendy accompany [Santos] because it is easier for an adult to successfully cross the border if accompanied by a child. At the border, [Santos] surrendered himself and Wendy to the United States Immigration and Custom[s] Enforcement (ICE) authorities. [Santos and Wendy] were detained for two or three days and then released. [Santos] and Wendy journeyed on by bus to New Haven, initially residing with relatives.

"In January, 2019, [Santos] and his uncle engaged in a physical altercation in New Haven. Both men had been drinking alcohol prior to the altercation. Wendy sustained head contusions during the fight and bystanders observed five year old Wendy walking down the street covered in beer and bleeding through the nose. The petitioner, the Commissioner of . . . Children and Families . . . was contacted and referred [Santos] for a substance abuse evaluation. By June, 2019, [Santos] and Wendy had moved three times and were then sharing a room in a rooming house.

"[Santos] sponsored[2] his Guatemalan cousin's entry into the United States and on or about June 19, [2019], [Santos] picked up his cousin, Juan Carlos G., from the airport. Juan Carlos took up occupancy in [Santos'] and Wendy's room in the rooming house. [Santos] never came home the night of June 22, [2019], and, therefore, Wendy was left alone in the room with Juan Carlos. On the morning of June 23, [2019], Wendy told [Santos that] she was afraid of remaining in their room without him and asked if she could go with him to work. [Santos] declined Wendy's request. Late on June 23, [2019], Wendy's babysitter brought Wendy to the emergency room after Wendy disclosed she had been sexually assaulted by Juan Carlos.[3]

[2] "[Santos] defined sponsorship to mean that [he] was responsible for his cousin, Juan Carlos."

[3] "A medical examination revealed a tear to Wendy's hymen. In a forensic evaluation, Wendy disclosed [that Juan Carlos] had touched her vagina on

"On June 24, [2019], [the petitioner] invoked an administrative, ninety-six hour hold and assumed temporary custody of Wendy. An order of temporary custody . . . soon followed, and, on September 12, 2019, Wendy was adjudicated neglected[4] and committed to the petitioner's care. Wendy has remained continuously in [the petitioner's] care since June 24, 2019.[5]

"On March 9, 2021, the court approved a permanency plan of reunification with the respondent . . . in Guatemala. In January, 2022, [the petitioner] sought and obtained approval to amend the permanency plan [for] termination of parental rights and adoption. On January 11, 2022, given the change in permanency plans and [the respondent's] Guatemalan residency, the court, sua sponte, appointed [the respondent] legal counsel. [The respondent's] court-appointed attorney filed her appearance in the case on January 13, 2022. On March 14, 2022, [the petitioner] filed [a petition to terminate the] parental rights . . . [of the respondent and Santos] Both [the respondent and Santos] were properly served with the . . . [petition][6] and both were represented by [appointed] counsel throughout the termination proceedings.[7]

two occasions with his hands and she reported other provocative statements by Juan Carlos. No arrests were ever made and [the respondent and Santos] report that Juan Carlos 'left' (presumably the New Haven area or the country) in August or November, 2022."

[4] "[In the neglect proceeding, Santos] was defaulted for his nonappearance on September 12, [2019]. In September, 2019, [the petitioner] had yet to effectuate service on [the respondent] in Guatemala, and, therefore, the adjudication of neglect and commitment order entered without prejudice to the respondent . . . . [Santos] credibly testified that he timely informed [the respondent] of Wendy's removal from his care."

[5] "Wendy has lived with her current foster family for the majority of her stay in foster care, except for a brief period of time when, due to the foster parents' medical concerns and the pandemic, Wendy was removed."

[6] "[The respondent] was served via publication and [Santos] was abode served."

[7] "The April 12, 2022 [termination of parental rights] plea hearing was a virtual proceeding and [the respondent] was defaulted for her nonappearance. However, given the [respondent's] out-of-country status, the court

"On May 19, 2022, a competency evaluation of [Santos] was ordered by the court, and on September 22, 2022, [Santos] was found competent. In July, 2022, [the respondent] arrived in New Haven from Guatemala as an undocumented person. [The department] did not learn of [the respondent's] local presence until late July or August, 2022. Trial on the [termination of parental rights petition] commenced on March 8, 2023, continued on March 15, [2023], and [resumed] again to conclusion on March 31, 2023. Both [the respondent and Santos] appeared in person for the multiday . . . trial and both were assisted by court interpreters throughout the . . . trial.[8] The petitioner initially alleged that [Santos] had failed to [achieve a sufficient degree of personal rehabilitation] and that there exists no ongoing parent-child relationship between [the respondent] and Wendy. At the conclusion of the evidentiary portion of the . . . trial, the petitioner orally moved to amend the [petition] to add the adjudicatory ground of failure to rehabilitate as to [the respondent]. Absent objection and any request for a continuation,[9] the oral motion was granted, and, therefore, the adjudicatory date for purposes of the [termination of parental rights petition] is March 31, 2023.[10]" (Footnotes altered; footnotes in original; footnotes omitted.)

appointed [the respondent's] already assigned counsel to also represent [the respondent] for the purposes of the termination of parental rights petition. [The respondent] never appeared in court, in person or virtually, until the first day of the termination trial, March 8, 2023.

"[Santos'] initial [termination of parental rights] plea date was continued due to a lack of a Spanish interpreter. On May 17, 2022, [Santos] appeared and was advised in Spanish of his rights."

[8] "Just prior to the commencement of trial on March 8, 2023, the court advised the [respondent and Santos] of their rights in accordance with *In re Yasiel R.*, 317 Conn. 773, [120 A.3d 1188] (2015)."

[9] "See Practice Book § 31a-1 (d)."

[10] "The termination [petition was] initially filed on March 14, 2022. A written motion to amend other aspects of the [petition] was granted on May 17, 2022."

Thereafter, the court set forth its findings and legal conclusions with respect to the petition to terminate the respondent's parental rights as to Wendy. In the adjudicative phase of the proceeding, the court determined that the department had made reasonable efforts to reunify the respondent and Wendy. Alternatively, the court determined that the respondent was either unwilling or unable to benefit from such reunification efforts. The court also determined that the petitioner proved that the respondent had failed to rehabilitate but that the petitioner had failed to prove that an ongoing parent-child relationship between the respondent and Wendy did not exist. In the dispositional phase of the proceeding, the court, guided by the considerations set forth in § 17a-112 (k), determined that it was in Wendy's best interest to terminate the respondent's parental rights as to her. Thereafter, the respondent appealed from the court's judgment terminating her parental rights as to Wendy.[11] We will set forth the court's analysis in more detail as necessary in the context of the claims raised in this appeal.

I

First, the respondent claims that she was denied her due process right to the effective assistance of counsel during the termination proceeding.[12] We are not persuaded.

[11] We note that the attorney for the minor child filed a statement pursuant to Practice Book § 67-13 indicating that he adopts the brief submitted by the petitioner.

[12] In her brief, the respondent states that she "does not believe that this case requires any further evidentiary findings in that both the deficient performance and prejudice are apparent upon an examination of the record as it exists." Nonetheless, in what she labels a matter for further review, the respondent claims that our Supreme Court's decision in *In re Jonathan M.*, 255 Conn. 208, 764 A.2d 739 (2001), "should be reconsidered to the extent that it established the appropriate options available to a respondent seeking to supplement the record in order to raise an ineffective assistance of counsel claim [in a termination of parental rights proceeding]." The respondent correctly acknowledges, however, that this court is bound by the precedent of our Supreme Court. See, e.g., *In re Kyreese L.*, 220 Conn.

The following additional facts are relevant to this claim. In the operative petition at the time of trial, the petitioner alleged, as grounds for termination of the respondent's parental rights, that there existed no ongoing parent-child relationship pursuant to § 17a-112 (j) (3) (D). On March 31, 2023, at the close of evidence, the court asked counsel: "[J]ust for clarity, what are the adjudicatory grounds that are alleged as to [the respondent]? 'Cause I only have no ongoing parent-child relationship." Counsel for the petitioner stated that she believed that the petition had been amended, but the court stated that it could not "find it." Following a recess, the petitioner's counsel made an oral motion to amend the petition by adding, with respect to the respondent, the ground of failure to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i). The petitioner's counsel stated that the amendment was sought "to conform to the proof elicited at trial." The court asked if anyone wanted to "be heard" with respect to the amendment, to which counsel for the respondent and counsel for the minor child each indicated that they had no objection. Following this acquiescence to the amendment to the termination of parental rights petition, counsel did not further discuss the matter. The court thereafter heard closing arguments. As stated previously in this opinion, in its memorandum of decision, the court explicitly stated that it had granted the petitioner's motion to amend the termination of parental rights petition in the absence of an objection or any request for a continuance in the trial. The court also referred to Practice Book § 31a-1 (d).[13]

App. 705, 720 n.8, 299 A.3d 296 (this court is bound by Supreme Court precedent), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023). Thus, we merely note that the respondent has preserved this issue.

[13] Practice Book § 31a-1 (d) provides: "A petition or information may be amended at any time by the judicial authority on its own motion or in response to the motions of any party prior to any final adjudication. When an amendment has been so ordered, a continuance shall be granted whenever the judicial authority finds that the new allegations in the petition or changes

For the first time on appeal, the respondent argues that her counsel acted deficiently by failing to object to the petitioner's oral motion to amend the termination of parental rights petition with respect to the respondent at the close of evidence, after all the parties had rested, to add an "entirely separate ground for termination," namely, failure to rehabilitate pursuant to § 17a-112 (j) (3) (B) (i). The respondent argues that "no reasonable attorney would have failed to object to the [petitioner] orally amending its petition in such a fundamental manner just prior to closing arguments." In arguing that counsel's conduct fell below the standard of reasonably effective assistance, the respondent contends that "there can be no argument that [her] counsel failed to object for some strategic reason that would insulate her deficient performance from scrutiny."

The respondent also argues that there can be no dispute that she was prejudiced by counsel's deficient performance because the court ultimately concluded that the petitioner had failed to prove the sole ground in the termination petition prior to the amendment—the lack of a parent-child relationship. The respondent argues that, "without the amendment to include the ground of failure to rehabilitate, the respondent's parental rights could not have been terminated." The respondent asserts that a proper objection "would likely have been sustained" at trial and, for this reason, "the respondent is able to meet the burden that the failure to object contributed to the termination of her parental rights." The respondent further contends that her counsel should have objected because principles of due process weigh against permitting the petitioner to essentially engage in "a shell game" by alleging one or more grounds in a petition to terminate parental rights and then, at the close of a trial, seeking to amend a petition

in the information justify the need for additional time to permit the parties to respond adequately to the additional or changed facts and circumstances."

to conform to the evidence presented at trial. According to the respondent, if her counsel had properly objected to and argued against the motion to amend, due process considerations would have compelled the court to have sustained the objection.[14]

We next set forth the principles that guide our review. "Our Supreme Court has recognized that, '[i]n Connecticut, a parent who faces the termination of his or her parental rights is entitled, by statute, to the assistance of counsel. General Statutes § 45a-717 (b).' *In re Alexander V.*, 223 Conn. 557, 569, 613 A.2d 780 (1992). The Supreme Court further has held, consistent with that statutory right, that 'a parent in a termination of parental rights hearing has the right not only to counsel but to the effective assistance of counsel.' " (Footnote omitted.) *In re Danyellah S.-C.*, 167 Conn. App. 556, 567, 143 A.3d 698, cert. denied, 323 Conn. 913, 150 A.3d 228 (2016).

"In *State* v. *Anonymous*, 179 Conn. 155, 160, 425 A.2d 939 (1979), our Supreme Court set forth the following standard for determining whether counsel has been ineffective in a termination proceeding: 'The range of competence . . . requires not errorless counsel, and not counsel judged ineffective by hindsight, but counsel whose performance is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in [that particular area of the] law. . . . The [respondent] must, moreover, demonstrate that the lack of competency contributed to the termination of parental rights.' . . . 'A showing of incompetency without a showing of resulting prejudice . . . does not amount to ineffective assistance of counsel.' . . . *In re Matthew S.*, 60 Conn. App. 127, 132,

[14] In her brief to this court, the respondent agrees with the petitioner, however, that the trial court properly granted the motion in the absence of any objection by her attorney.

758 A.2d 459 (2000). 'In making such a claim, it is the responsibility of the respondent to create an adequate record pointing to the alleged ineffectiveness and any prejudice the respondent claims resulted from that ineffectiveness.' *In re Christopher C.*, 129 Conn. App. 55, 59, 20 A.3d 689 (2011). In the absence of findings by the trial court in this regard, we directly review the trial court record. See *In re Dylan C.*, 126 Conn. App. 71, 90–91, 10 A.3d 100 (2011)." *In re Jah'za G.*, 141 Conn. App. 15, 35–36, 60 A.3d 392, cert. denied, 308 Conn. 926, 64 A.3d 329 (2013); see also *In re Alexander V.*, supra, 223 Conn. 570 (in considering merits of unpreserved claim that counsel in termination of parental rights proceeding rendered ineffective assistance, reviewing court undertook plenary review of trial court record).

We are mindful that "[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 [the] conduct [of trial counsel] falls within the wide range of reasonable professional assistance; that is, [an appellant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Love* v. *Commissioner of Correction*, 223 Conn. App. 658, 668, 308 A.3d 1040, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024).

Although it is undisputed that the respondent did not raise the issue of ineffective assistance before the trial court, we note that, following the court's judgment, the respondent had an opportunity to develop a factual record related to counsel's allegedly deficient performance and any resulting prejudice. Our Supreme Court has explained "that General Statutes § 45a-719 provides

a number of alternatives through which a parent may attempt to open the final judgment of termination and assert a claim of ineffective assistance of counsel. The first option permits a motion to open the judgment in accordance with General Statutes § 52-212 or General Statutes § 52-212a. These provisions allow a four month window from the date of judgment within which such a motion may be brought.

"Second, the principles governing the opening of judgments at common law may also provide an indigent parent a means of gaining a review of the adequacy of trial counsel at the termination proceeding. It is a well-established general rule that even a judgment rendered by the court . . . can subsequently be opened [after the four month limitation] . . . if it is shown that . . . the judgment . . . was obtained by fraud . . . or because of mutual mistake. . . . Thus, when a judgment of termination is predicated on fraud or mutual mistake and the indigent's appointed counsel fails to address these issues, presumably rendering the assistance ineffective, the parent may have a remedy to open the judgment at common law.

"Finally . . . a parent may file a petition for a new trial. See General Statutes § 52-582. Under this option, a parent whose rights have been terminated has three years within which to file a petition. General Statutes § 52-270 provides that the court may grant such a petition for reasonable cause. Although we express no opinion as to whether a colorable claim of ineffective assistance of counsel always will require a court to grant a petition for a new trial under § 52-582, we note that this court has long recognized that [t]he causes for which new trials may be granted . . . are only such as show that the parties did not have a fair and full hearing at the first trial; and the words or for other reasonable cause, mean other causes of the same general character . . . ." (Citation omitted; footnotes omitted; internal

quotation marks omitted.) *In re Jonathan M.*, 255 Conn. 208, 236–39, 764 A.2d 739 (2001).

The respondent did not avail herself of any of the foregoing opportunities to develop a record of her counsel's allegedly deficient performance or the prejudice, if any, that resulted from such performance. As stated previously in this opinion, however, she argues that the record amply demonstrates that counsel acted deficiently and that counsel's lack of competency contributed to the termination of her parental rights. See footnote 12 of this opinion.

Because the claim of ineffective assistance arises from trial counsel's response to the petitioner's motion to amend, we observe that amendments to petitions to terminate parental rights are permitted by our rules of practice. Practice Book § 34a-1 (d) provides: "A petition may be amended at any time by the judicial authority on its own motion or in response to a motion prior to any final adjudication. When an amendment has been so ordered, a continuance shall be granted whenever the judicial authority finds that the new allegations in the petition justify the need for additional time to permit the parties to respond adequately to the additional or changed facts and circumstances." An appellate court reviews a trial court's decision to grant a motion to amend for an abuse of discretion, and discretion is properly exercised when a court appropriately rules on any request made for additional time to respond adequately to new allegations. See, e.g., *In re Carl O.*, 10 Conn. App. 428, 437–38, 523 A.2d 1339 (concluding that trial court did not abuse its discretion in granting petitioner's request to amend termination of parental rights petition when request was made on eve of trial and court had offered to grant respondents continuances for purpose of responding to amendment), cert. denied, 204 Conn. 802, 525 A.2d 964 (1987), and cert. denied, 204 Conn. 802, 525 A.2d 964 (1987).

For the reasons previously discussed herein, the record is bereft of any evidence of the *actual* strategy, if any, that the respondent's counsel employed when she did not object to the petitioner's eleventh hour motion to amend the petition. In this circumstance, we, as a reviewing court, are mindful of the presumption that counsel acted reasonably, and we must contemplate possible strategic reasons that might have supported counsel's challenged actions before considering whether those actions were objectionably reasonable. This is the proper analytical path that governs claims of ineffective assistance of counsel in habeas corpus proceedings in which the record does not contain evidence of the actual trial strategy, if any, underlying trial counsel's challenged conduct. See, e.g., *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 290, 267 A.3d 120 (2021) ("when trial counsel is not available to testify . . . the court must contemplate the possible strategic reasons that might have supported the challenged action and then consider whether those reasons were objectively reasonable"); *Roman* v. *Commissioner of Correction*, 223 Conn. App. 111, 135, 307 A.3d 934 (2023) ("[A]lthough [appellate counsel] did not present arguments about the petitioner's mental health and competence on direct appeal, the petitioner did not call [appellate counsel] to testify at the habeas trial to explain why, and the petitioner did not offer any other evidence of [appellate counsel's] reasons for choosing which claims to raise on direct appeal. In the absence of such evidence, the petitioner did not otherwise meet his burden of overcoming the strong presumption that [appellate counsel] exercised reasonable professional judgment."), cert. denied, 348 Conn. 952, 308 A.3d 1039 (2024); *Godfrey-Hill* v. *Commissioner of Correction*, 221 Conn. App. 526, 543–44, 302 A.3d 923 (when trial counsel cannot recall trial strategy, court must "affirmatively entertain the range of possible reasons [that]

counsel may have had for proceeding as [he] did" (internal quotation marks omitted)), cert. denied, 348 Conn. 929, 304 A.3d 861 (2023); *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 585, 300 A.3d 607 ("although not automatically fatal to a petitioner's claim, failure to elicit testimony from counsel about trial strategy renders it less likely that the petitioner can prevail with respect to his burden to demonstrate deficient performance"), cert. denied, 348 Conn. 911, 303 A.3d 10 (2023); *Bush* v. *Commissioner of Correction*, 169 Conn. App. 540, 550, 151 A.3d 388 (2016) ("There is a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . Just as the decision of trial counsel not to object to certain evidence is a matter of trial tactics, not evidence of incompetency . . . the tactical decision of appellate counsel not to raise a particular claim is ordinarily a matter of appellate tactics, and not evidence of incompetency, in light of the presumption of reasonable professional judgment." (Internal quotation marks omitted.)), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017). We see no reason, and the respondent has not cited any relevant authority to the contrary, why this analytical path should not apply to the present claim of ineffective assistance of counsel.

Contrary to the respondent's arguments on appeal, because Practice Book § 34a-1 (d) permits amendments at any time prior to any final adjudication, the fact that the petitioner sought to amend the petition at the close of evidence was not, in and of itself, a reasonable ground on which to object to the petitioner's motion. The respondent also strongly emphasizes that counsel should have advanced due process concerns as the grounds for objecting to the motion. As the respondent correctly observes, the fundamental pillars of due process encompass adequate notice of the grounds on

which the petitioner relies so that the respondent has "a reasonable opportunity to prepare" and a right to be heard. See *In re P. T.-W.*, 223 Conn. App. 571, 584–85, 309 A.3d 394 (2024) ("[i]t is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard" (internal quotation marks omitted)). Nevertheless, § 34a-1 (d) does not, as the respondent suggests, condone "a shell game . . . ." It permits the petitioner to amend the petition, thereby giving the respondent actual notice of the statutory grounds for termination of parental rights on which it intends to rely.[15] It also provides a clear mechanism to protect the respondent's right to prepare and be heard by requiring the court to afford the respondent additional time to respond adequately to the additional or changed facts and circumstances.[16] See Practice Book § 34a-1 (d).

[15] In this regard, we note that Practice Book § 34a-1 (d) uses the word "shall," thus triggering a mandatory duty on the part of the court to afford a respondent the time necessary to respond adequately to any amendments. See, e.g., *In re Adrien C.*, 9 Conn. App. 506, 509, 519 A.2d 1241 (observing for purposes of statutory interpretation that "the word 'shall' is generally determined to be mandatory"), cert. denied, 203 Conn. 802, 522 A.2d 292 (1987).

[16] As our Supreme Court has observed, "[i]t is well established that a person in jeopardy of having his or her parental rights terminated has a constitutional due process right to adequate notice of the grounds for termination. . . . Notice is not a mere perfunctory act in order to satisfy the technicalities of a statute, but has, as its basis, constitutional dimensions. An elementary and fundamental requirement of due process in any proceeding [that] is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that [a] reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity. . . . [T]here is no violation of due process when a party

With respect to the present claim, the respondent, in order to satisfy her burden of proving that counsel rendered deficient representation, must do more than demonstrate that counsel failed to object to the motion to amend. Instead, she must demonstrate that counsel's failure to object cannot be explained by one or more possible strategic reasons that are objectively reasonable. The respondent cannot satisfy that burden. It appears that the only legally viable ground on which the respondent's counsel might have objected was, as the respondent suggests, on the ground that the amendment amounted to unfair surprise and that she needed additional time to respond adequately to the failure to rehabilitate ground. If counsel pursued such an objection, however, the remedy to which the respondent would have been entitled was additional time.

Such an objection does not appear to be objectively reasonable in the present case because, as the respondent acknowledges before this court, the record reflects that, prior to the motion, the petitioner presented evidence related to the failure to rehabilitate ground. We briefly observe that, at the time of the trial, although the petition set forth the sole ground of no ongoing parent-child relationship, the petitioner nonetheless presented a copy of the respondent's court-ordered specific steps to facilitate the respondent's reunification with Wendy. The petitioner also presented a permanency plan study dated September 30, 2022, which supported a finding that the respondent had failed to satisfy her specific steps and, thus, had failed to rehabilitate. In the absence of any objection, the petitioner presented testimony from a department social worker with respect to numerous unresolved issues that could interfere with the respondent being able to safely assume

in interest is given the opportunity at a meaningful time for a court hearing to litigate the question [at issue]." (Citations omitted; internal quotation marks omitted.) *In re Gabriel S.*, 347 Conn. 223, 232–33, 296 A.3d 829 (2023).

a responsible position in Wendy's life. There was evidence that, in 2022, the respondent's youngest child was found outdoors, at night, in a city street. The petitioner also presented testimonial evidence from a department social worker that was relevant to the issue of the respondent's failure to rehabilitate.

Furthermore, the record reflects that the respondent's counsel challenged the failure to rehabilitate ground through cross-examination and by presenting evidence of the respondent's rehabilitative efforts. For example, during cross-examination of the social worker, the respondent's counsel elicited testimony from the social worker that tended to demonstrate that the respondent's residence was clean and that she had satisfied her specific step requiring her to consistently visit with Wendy. The respondent also testified with respect to the 2022 incident, in which she allegedly had failed to adequately supervise her youngest child. The respondent testified that, while she was cooking food, the child had wandered off briefly and was found at the edge of a city street.

The petitioner presented testimony from Tina Schiappa, an expert in clinical and forensic psychology who had evaluated the respondent. Several portions of Schiappa's examination pertained to the respondent's failure to rehabilitate. Schiappa testified that she had evaluated the respondent's "ability to parent." Without objection, counsel for the petitioner asked Schiappa whether she believed that the respondent "ha[d] rehabilitated to the point where Wendy could be returned to her care today?" Schiappa replied in the negative. Counsel for the petitioner also asked Schiappa, "[G]iven the age and needs of Wendy, do you think [the respondent] should be given more time to achieve . . . that level of understanding that she could get through counseling and classes . . . in order for Wendy to be safely reunified with her?" Schiappa opined that it was not

"fair" for Wendy to have to wait for that and that she did not believe that the respondent should be given additional time. Moreover, during the cross-examination of Schiappa, the respondent's counsel attempted to undermine these opinions in various ways. Counsel for the respondent also asked Schiappa questions that were relevant to the respondent's alleged failure to rehabilitate, such as whether she believed that the respondent should have been afforded "a little bit more time . . . once she got here to do services?"

An examination of the record reflects that, without objection at trial, the petitioner presented evidence that was relevant to the issue of whether the respondent had failed to rehabilitate. The respondent's counsel attempted to undermine this evidence throughout the trial. Unless the respondent's counsel had new evidence to present with respect to the failure to rehabilitate ground, believed that additional examination of the petitioner's witnesses would be beneficial to dispute the new ground, or she simply needed additional time to prepare for closing argument, it would not have been a reasonable trial strategy to object to the motion to amend the petition for the purpose of seeking additional time. The respondent has failed to present any evidence as to what additional steps her counsel could or should have taken had she been given additional time in which to respond to the new ground. In fact, the respondent does not assert that her counsel should have presented any additional evidence or that additional time was necessary to prepare stronger arguments to refute the failure to rehabilitate ground. For these reasons, we are not persuaded that counsel's failure to object to the petitioner's motion to amend was objectively unreasonable under the circumstances of this case.

Even if the respondent could satisfy her burden of demonstrating that it was objectively unreasonable for her counsel not to object to the motion to amend on

the basis of the only ground on which she could object, namely, that she needed more time to defend against the new adjudicative ground, she has failed to demonstrate that she suffered prejudice in that counsel's incompetency contributed to the loss of her parental rights. In the present case, the respondent does not present us with a record to demonstrate what additional evidence or argument her counsel should have presented if she had asked for additional time to respond to the amendment. In fact, she does not even argue that there was anything that her counsel should have done differently to respond to the amendment.[17] Instead, the respondent argues that prejudice is readily apparent in this case because the court ultimately relied on the failure to rehabilitate ground. For the reasons already discussed in this opinion, that argument is fundamentally flawed. The respondent's argument overlooks the fact that our rules of practice permit the petitioner to amend a termination of parental rights petition at any time prior to a final adjudication of the petition, provided that the respondent is afforded additional time as necessary to respond to the amendment. See Practice Book § 34a-1 (d). As we have already concluded, the respondent has

[17] With respect to this type of a claim, a respondent is unable to demonstrate that he or she suffered prejudice simply because the court subsequently rendered an adverse judgment. See, e.g., *In re Gabriel S.*, 347 Conn. 223, 238, 296 A.3d 829 (2023) ("[t]o the extent that the respondent claims that he did not receive adequate notice that his failure to rehabilitate would be one of the grounds for terminating his parental rights when the trial continued because it was possible that the petitioner would proceed under [§ 17a-112 (j) (3) (B) (i)], any constitutional violation was harmless beyond a reasonable doubt because he makes no claim that there was additional evidence on that issue that he would have presented if he had received adequate notice"); *In re Ivory W.*, 342 Conn. 692, 732 n.6, 271 A.3d 633 (2022) (suggesting that, even if trial court improperly denied motion for continuance in termination of parental rights proceeding, denial was harmless because "the respondent [mother never] explained how the testimony that she would have given if the trial court had granted her motion for a continuance would have affected the outcome of the termination proceeding").

not demonstrated that it was objectively unreasonable for her counsel not to request additional time in light of the facts of this case.

On the basis of the foregoing, we reject the respondent's claim that her trial counsel rendered ineffective assistance at the termination of parental rights trial.

II

The respondent next raises two claims of error related to the court's determinations made pursuant to § 17a-112 (j) (1). Specifically, the respondent claims that the court improperly determined that (1) the department made reasonable efforts to reunify her with Wendy, and (2) she was unable or unwilling to benefit from reunification efforts.[18] We conclude that the court properly determined that the respondent was unable or unwilling to benefit from reunification efforts. Given our resolution of this claim, it is unnecessary for us to consider the merits of her claim that the department failed to make reasonable efforts to reunify the respondent and Wendy.[19]

[18] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child . . . has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

[19] Our Supreme Court has stated that, "[b]ecause the two clauses [of § 17a-112 (j) (1)] are separated by the word 'unless,' this statute plainly is written in the conjunctive. Accordingly, the department must prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is

We begin by setting forth additional findings of the court. Even though, as we have stated, we need not consider the merits of the respondent's claim regarding the reasonableness of the efforts made by the department to reunify her with Wendy, we nevertheless set forth the court's findings and conclusions concerning those efforts because those efforts are relevant to the claim that the court improperly determined that she was unable or unwilling to benefit from the department's rehabilitative efforts. "[The department] made reasonable efforts to locate [the respondent]. As noted above, [the respondent] (who was pregnant with Yeni[20] at the time [Santos] and Wendy left Guatemala in 2018) remained behind in Guatemala. [Santos] provided [the department] with [the respondent's] cell phone number in Guatemala and credible testimony revealed that various [department] social workers assigned to the case from mid-2019 to December, 2021, had contact, albeit limited and intermittent . . . with [the respondent], via cell phone or through the use of the WhatsApp app (a free virtual communication platform commonly used to video chat and/or text, particularly overseas).

"[Santos] testified that [the respondent] *always* had access to a cell phone in Guatemala and he would video call [the respondent] during his weekly in-person supervised visitation sessions with Wendy so that [the respondent] and Wendy could visit with one another. [The respondent] also testified that [Santos] would video call her during his weekly visits with Wendy and Wendy and [the respondent] virtually connected with one another. [The respondent] also had some degree of cellular or video communication, independent from

unwilling or unable to benefit from reunification efforts. . . . [E]ither showing is sufficient to satisfy this statutory element." (Emphasis in original.) *In re Jorden R.*, 293 Conn. 539, 552–53, 979 A.2d 469 (2009).

[20] The court found that Yeni is Wendy's younger sister and that Yeni immigrated with the respondent to New Haven in July, 2022.

[the department], with Wendy and Wendy's foster family.

"In July, 2019, Attorney Jennifer Avenia, the Director of Immigration Practice for [the department], was consulted for her expertise on how the [department] could best serve the family. [Avenia's] recommendations in this case included (1) referrals for local services to assist [Santos] and Wendy, (2) securing Wendy special immigrant juvenile status,[21] and (3) exploring the potential reunification of Wendy with [the respondent] in Guatemala.

"The potential reunification of [the respondent] and Wendy in Guatemala required pursuing a study of [the respondent] and the family's Guatemalan home. [The department] reached out to International Social Services (ISS-USA) to conduct the out-of-country study. In December, 2019, ISS-USA shared a completed study with [the department], which recommended [that] Wendy be reunified with [the respondent] in Guatemala.

"The family's home[22] is located in Jocotán, Guatemala. Jocotán is a rural village or municipality in the Chiquimula department of Guatemala. [Avenia] credibly testified [that] Jocotán is not far from the Honduras border, Guatemala experiences a high homicide rate, and Chiquimula has the third highest homicide rate in all of Guatemala. Additionally, Guatemala's rainy season spans from approximately May to October, and roadways in and around Jocotán, Chiquimula are dirt roads which can wash out in the rainy season, thereby making road travel only possible with SUV-like vehicles. [The respondent] does not own a motor vehicle, and, according to the ISS-USA report (which was not placed

[21] "Special juvenile immigration status potentially affords Wendy a path to United States citizenship."

[22] "The family home in Guatemala is a single dirt floor room. The home has no indoor plumbing. Beds are rope woven entities."

in evidence nor shared with the court), [the respondent's] available modes of transportation [are] by foot or horseback. Nonetheless, [the respondent] credibly testified that a bus ride she undertook in 2019 from her Jocotán home to Guatemala City (the country's capital) took twelve hours. An international airport is located just outside Guatemala City. [Avenia] testified that the United States State Department categorizes Guatemala as a country in which travelers from abroad should 'reconsider travel.'[23]

"Given ISS-USA's December, 2019 recommendation of reunification, in early 2020, [the department] attempted to formulate a plan to safely return Wendy to [the respondent] in Guatemala. [Avenia] was told that Wendy's passport was lost or stolen or taken at the Mexico/Texas border. In reality, Wendy was never issued a passport. In an attempt to arrange for Wendy's legal entry back into Guatemala in 2020, [the department] reached out to the Guatemalan consulate seeking a passport for Wendy. However, the Guatemalan government engaged in only minimal contact with [the department]. Ultimately, sometime between April and June, 2020, the Guatemalan government issued Wendy a one-way travel visa into Guatemala.[24]

[23] "The court takes judicial notice of the United States Travel Advisory System, which is comprised of four levels. Level 1 recommends exercising normal precautions, Level 2 recommends exercising increased caution, Level 3 recommends reconsidering travel, and Level 4 recommends do not travel. Guatemala is a Level 3 country."

[24] "[The respondent] testified that, while pregnant with her daughter, Yeni (born [in] 2019), [the respondent] traveled by bus from her Jocotán home to Guatemala City to obtain a passport for Wendy. ([The respondent] was unsuccessful in procuring Wendy a passport.) The [respondent and Santos] sought to obtain a passport for Wendy in 2019 because they wanted Wendy to return to [the respondent's] care in Guatemala (apparently with [Santos] remaining in the United States). [Santos] credibly testified that [he and the respondent] reconsidered that decision as Wendy began speaking and understanding more English than Spanish. [The respondent] expressed to [Santos] a concern that if Wendy were to return to her care in Guatemala, [the respondent] would not be able to understand what Wendy was saying in English.

"Thereafter, [the department] assessed the options of sending Wendy, accompanied by a [department] social [worker], to Guatemala and/or sending six year old Wendy unaccompanied to Guatemala. Formulating a plan to return Wendy to [the respondent] in Guatemala in mid-2020 included navigating the global challenges attendant to the COVID-19 pandemic. After carefully considering the profound health risks associated with traveling abroad in the pandemic, and the State Department's travel advisory warning, and the homicide rate in Guatemala (and, particularly, in the department of Chiquimula), [the department] concluded any attempt to return Wendy to Guatemala in 2020 posed unacceptable health and safety risks to Wendy and [department] staff.[25]

"The Guatemalan government's meager responses to [the department's] overtures and the Guatemalan consulate's 2020 decision to only issue Wendy a one-way visa appears to have been driven, in whole or in part, by the COVID-19 pandemic. It is noteworthy that, had the [respondent and Santos] secured a passport for Wendy prior to the pandemic or prior to Wendy's and [Santos'] 2018 departure from Guatemala, [the department] could have contemplated flying Wendy into Guatemala secure in knowing that if [the respondent] did not timely appear at the Guatemalan airport, Wendy could return to the United States and remain in [the petitioner's] custody."

[25] "A[n] extremely compelling concern for [the department] in 2020 was whether [the respondent] would/could actually timely appear at the Guatemalan airport to assume physical custody of Wendy. In 2020, [the respondent] was not maintaining reliable or consistent contact with [the department]. Per [the respondent], it is a twelve hour bus ride from her home to Guatemala City and, as noted previously, the airport is located just outside of the capital city. [The department] was justified in its decision that it was not appropriate for [department] social workers to travel with Wendy from the Guatemalan airport to Jocotán, assuming road travel was even possible. As noted . . . the Guatemalan government's one-way visa precluded Wendy from returning to the United States once she entered Guatemala. As discussed previously, [the department] had justified concerns about the safety and well-being of their [department] social workers staying indefinitely anywhere in Guatemala, both due to the health risks posed by the pandemic in 2020 and the physical safety of travelers to Guatemala given the State Department's rating. [The department] also vetted a contingency plan of turning Wendy over to Guatemalan child protection officials if [the respondent] did not appear. [The department] appropriately concluded [that] subjecting Wendy to Guatemala's less than robust foster care system, in the midst of a global pandemic,

"In early 2022, [Avenia] recommended the 2019 ISS-USA study be updated/repeated to determine if reunification with [the respondent] in Guatemala was a viable possibility in 2022.[26] When ISS-USA attempted to make contact with [the respondent] in Guatemala in 2022, [the respondent] could not be contacted or located. Unbeknownst to ISS-USA and to [the department], [the respondent] left Guatemala with her younger daughter, Yeni, paying a 'coyote'[27] to secure her and Yeni's passage to the Mexico/Texas border. Although [the respondent] and Yeni arrived in New Haven on or about July 10, 2022, [the department's] first 2022 contact with [the respondent] did not occur until [the respondent] appeared, unannounced, at an in-person supervised father-daughter visit in August, 2022. [The respondent] testified she did not reach out to [the department] prior to her August, 2022 appearance at the father-daughter supervised visit because she did not have a cell phone.[28]

"In September, 2022, [the department] referred [the respondent] to [Integrated Refugee and Immigrant Services (IRIS)]. For an immigrant's first two years in New Haven, IRIS will work with individuals requiring assistance. By November, 2022, [the respondent] had yet to engage with the IRIS worker. The IRIS worker therefore reached out to [the respondent's] counsel. IRIS was

with a military that is known for seeking and obtaining bribes, was not in Wendy's best interests."

[26] "By 2022, the 2019 ISS-USA study had expired."

[27] This court previously has observed that "coyote" is a slang word that refers to "a person paid to guide children . . . and other persons to and across the United States border." *In re Pedro J. C.*, 154 Conn. App. 517, 523 n.4, 105 A.3d 943 (2014), overruled in part on other grounds by *In re Henrry P. B.-P.*, 327 Conn. 312, 173 A.3d 928 (2017).

[28] "Again, according to [Santos], [the respondent] 'always' had cellular and/or virtual platform communication accessibility in Guatemala. It is unknown what [the respondent's] cell phone access was en route to the United States. However, what is known, is that upon arriving in New Haven in mid-July, 2022, [the respondent] and her younger daughter, Yeni, resided with [Santos] and [Santos] had cell phone/virtual platform capability."

able to finally convince [the respondent] to meet and IRIS conducted its first home visit with [the respondent] in December, 2022. [The respondent] continued to be unwilling to share necessary background information with IRIS and [the respondent] would not engage with IRIS. It took [approximately five] months for the IRIS worker to establish a trusting, working relationship with [the respondent].[29] Since February, 2023, IRIS has been assisting [the respondent] and [the respondent] is engaging with the IRIS worker.

"In late August, 2022, New Haven police responded to a call that Wendy's three year old sister, Yeni, had been found unsupervised standing/walking in the streets of New Haven. When [the respondent] appeared at the scene, [the respondent] appeared to be under the influence. She was arrested for risk of injury [to a child].[30]

"After Yeni was found unsupervised in the street, [the department] referred [the respondent] for a substance abuse evaluation and there were no recommendations for follow-up treatment. [The department] also referred [the respondent] to [Intensive Family Preservation (IFP)], an in-home, parenting education and coaching service. The IFP worker continues to partner with IRIS to encourage [the respondent] to engage with IRIS and in obtaining community based social and legal services.

"Since August, 2022, [the respondent] and Wendy have enjoyed weekly supervised visits facilitated by [the department] and/or a supervised visitation center. Both [the respondent and Santos] . . . participate in the family visits with Wendy. At times during the visits, the family requires the assistance of an interpreter.[31]

[29] "The IRIS worker credibly testified that, in her experience, distrust and a reluctance to engage is not uncommon with the population she works with."

[30] "The criminal case was eventually dismissed."

[31] "[Department] social worker [Kelly] Tibault testified that, if a Spanish speak[ing] worker or interpreter is not present at the supervised visits, the Google Translate app is utilized."

[Santos] testified that Wendy speaks a lot more English than she does Spanish. According to [Santos], Wendy's lack of fluency in Spanish played a part in [his and the respondent's] reconsidering sending Wendy back to [the respondent's] care in Guatemala. Reportedly, Wendy understands spoken Spanish more than she can speak it, and she requires a translator for some of her verbal exchanges with [Santos and the respondent]. To enhance communication between [Santos, the respondent] and Wendy, [the department] explored enrolling Wendy in Spanish language classes. Wendy declined Spanish language classes, claiming she learns better (Spanish) listening to her bilingual foster parents (and foster siblings) speak Spanish at home.

"From July, 2022, to February, 2023, [the respondent] and Yeni primarily resided with [Santos] in a rooming house on Kimberly Avenue in New Haven. . . . [T]he rooming house's common area was observed to have sticky floors, bugs, and cockroaches.[32] [The department] attempted to screen the other rooming house tenants and view their individual rooms. Presumably because of the tenants' undocumented status, some refused to interact with [the department] and [the department] could not adequately vet the other occupants or assess the physical structure of the rooming house (as to potential safety or hazardous issues applicable to a three year old). In mid-February, 2023, [the respondent] and Yeni began renting a room from an unrelated male acquaintance in another rooming house in New Haven, which [the department] assesses is appropriate for [the respondent] and Yeni.

"[The respondent] works as an undocumented worker at a Mexican restaurant. [The respondent] and

[32] "The house refrigerator contained mold and had a foul odor. Like [Santos and the respondent], [the department] surmised that the others in the rooming house work in the food service-restaurant business and their dietary needs, in large part, are met with 'take-out' food, presumably from where they work."

Yeni subsist in part on food from the restaurant and food donations from providers such as IRIS. One of the social/parenting issues IRIS and IFP were addressing with [the respondent] as recently as February and March, 2023, is the importance of securing safe and responsible child care for Yeni when [she is] not in [the respondent's] care.[33]

"Wendy was referred for mental health treatment to address the trauma and uncertainties she experienced in her young life, the journey to this country and ICE detention, the physical violence she witnessed and experienced while living with [Santos] in 2019, the sexual assault she endured by Juan Carlos . . . and [Santos'] failure to keep her safe, her removal from [Santos'] care and entry into foster care, and the substantive loss of contact with [the respondent] from the latter part of 2018 to August, 2022. Wendy last discharged successfully from counseling in November, 2022. By all accounts, Wendy is an outgoing, resilient, and healthy child.

"The testimony and evidence reflect that, from 2019 through the end of 2021, [the respondent] had limited, sporadic contact with the various assigned [department] social workers and [the respondent] joined in virtually on [Santos'] and Wendy's supervised visitation sessions. In December, 2021, through August, 2022, [department] social worker [Kelly] Tibault unsuccessfully attempted contact with [the respondent], either directly 'dialing' the cell phone number provided by [Santos] or through the use of the WhatsApp messenger app. . . . Tibault routinely texted [the respondent] through the WhatsApp platform. [The respondent] did not respond.

[33] "In January, 2023, [the petitioner] filed a neglect petition as to Yeni. Said neglect petition remain[ed] pending [at the time of the trial court's judgment]."

"[The department] was unaware of [the respondent's] 2022 emigration from Guatemala until after [the respondent's] July, 2022 arrival to New Haven. It may be [that the respondent's] lack of communication with [the department] in 2022 was tied to her decision to emigrate and the actual journey to Connecticut. Nonetheless, when ISS-USA attempted to connect with [the respondent] to complete an updated and/or second home study in 2022, [the respondent] could not be contacted or located. [The department] did not become aware of [the respondent's] and Yeni's July, 2022 arrival to New Haven until very late July/early August, 2022, and by late August, 2022, [the department] began attempting to engage with [the respondent] and to refer [the respondent] to IRIS, IFP, substance abuse evaluation, and weekly supervised visitation sessions with Wendy.[34]

"Case law is clear [that] reasonable efforts is defined as doing everything reasonable, not everything possible. Clearly, the barriers to reunifying Wendy with [the respondent] in Guatemala could not be mitigated in 2020. However, had [the respondent] responded to [the department's] repeated attempts to communicate with her in 2022, and had [the respondent] made herself available for the second ISS-USA study in Guatemala, returning Wendy to Guatemala in 2022 (as the world emerged from the constraints of the pandemic) may have been possible (assuming a favorable and current ISS-USA study).

"Since [the respondent's] and Yeni's August, 2022 arrival to New Haven, [the department] has attempted to work with [the respondent], both in maintaining Yeni safely in [the respondent's] care and in supporting/nurturing [the respondent's] relationship with Wendy. In

[34] "It is of no moment to the court's reasonable efforts analysis that [the department's] efforts to engage with [the respondent] in August, 2022, were not isolated to just Wendy and [the respondent], but also included services and providers applicable to Yeni and [the respondent]."

addition to weekly supervised parent-child visitation, [the department] has connected [the respondent] to IRIS and to [IFP] services. [The department] has diligently remained cognitive of the significant language and cultural barriers attendant to the case and [the department] has consistently worked around and through both [Santos' and the respondent's] substantive illiteracy and language fluency challenges. Additionally, [the department] sought a court-ordered psychological evaluation and parent-child interactional. Accordingly, the court finds that [the department] made reasonable efforts to reunify [the respondent] and Wendy." (Emphasis in original; footnotes added; footnotes altered; footnotes in original; footnotes omitted.)

With respect to whether the respondent was unable or unwilling to benefit from the reunification efforts made by the department, the court set forth the following findings and conclusions: "[T]he court finds that [the respondent] is unable to benefit from reunification efforts. As noted previously, [the respondent] communicated and/or virtually interacted with Wendy and [Santos] and with the foster family at least from 2019 to the end of 2021.[35] Although [the respondent's] perhaps culturally derived distrust of others (as testified to by the IRIS worker) and her decision to attempt to immigrate to the United States and her journey to Connecticut may have factored into [the respondent's] 2022 incommunicado stance with [the department], that reality rendered [the respondent] unable or unwilling to benefit from reunification efforts.

"The court is not indifferent to the fact that [the respondent] and Yeni undertook an arduous and uncertain journey to reunify with Wendy and [Santos] in

[35] "Although it is not clear, a careful review of [the testimony of the respondent and Santos] suggests [that the respondent] participated in virtual visits with Wendy during [Santos'] supervised visitation sessions beyond the end of 2021."

2022. Unfortunately, [the respondent's] failure to timely inform [the department] of her presence in New Haven, and then her subsequent resistance to engage with providers until just recently, detrimentally delayed [the respondent] in the opportunity [to] gain critical and necessary knowledge and insight as to what constitutes safe and nurturing parenting in an urban American city.[36]

"Inexplicably, [the respondent] does not endorse or accept Wendy's truth of being sexually assaulted by Juan Carlos while in [Santos'] care in 2019. At the January, 2023 court-ordered parent-child interactional conducted by [Schiappa], [the respondent] asked then nine year old Wendy (a sexual assault victim) if she (Wendy) had a boyfriend. To be sure she understood [the respondent's] question, Wendy asked [Schiappa] to translate [the respondent's] question into English. [Schiappa] credibly testified [that] Wendy was shocked at [the respondent's] sincerely and seriously asked question. [The respondent's] boyfriend question is emblematic of [the respondent's] lack of insight into and appreciation for Wendy's past victimization. Until and unless [the respondent was] to exhibit an ability to validate Wendy's traumas (physical abuse, sexual abuse, [Santos'] neglect and failure to protect, removal from [Santos'] care and entry into and protracted stay in foster care), continued reunification efforts are of limited, if any, value.

"The court credits [Schiappa's] testimony that, given that [the respondent] had been living in New Haven for only six months at the time of the January, 2023 psychological evaluations, perhaps [the respondent] could benefit from additional time to gain insight and understanding as to why Wendy had come into foster

[36] "To [the respondent's] credit, she has recently start[ed] receiving positive parenting reports from her IFP worker."

care, and why Wendy remained in foster care, and the foreseeable challenges or issues for Wendy if she were to leave her long-term foster [care] family and [return] home to [the respondent's] care. However, in the additional months since [Schiappa's] evaluation, [the respondent's] lack [of] insight and understanding continues unabated. For all of those reasons, the court finds that, in addition to [the department] having made reasonable efforts to reunify [the respondent] and Wendy, [the respondent] is unable or unwilling to benefit from reunification efforts." (Footnotes altered; footnote omitted.)

The court later set forth additional findings concerning the respondent's inability to benefit from the department's reunification efforts: "When asked what [the respondent] needed to do for reunification to be possible, [Schiappa] credibly testified [that the respondent] would need to (1) provide a sufficient and safe living space for her and her children, (2) demonstrate insight, knowledge and proficiency in safely caring for a nine year old while also caring for a three year old, (3) exhibit meaningful insight about how [the respondent's] decisions and behaviors have impacted Wendy, (4) be accepting of Wendy's truth regarding the sexual assault, [and] (5) acknowledge the other traumatic events Wendy has experienced and how said trauma(s) have impacted Wendy and may continue to impact Wendy in the future."

With respect to the respondent's claim that the court improperly determined, pursuant to § 17a-112 (j) (1), that she was unable or unwilling to benefit from the department's efforts to reunify her and Wendy, we observe that she does not challenge any of the court's specific subordinate findings as clearly erroneous. Instead, the respondent broadly challenges the court's ultimate determination, which was based on those subordinate findings, that she was unwilling or unable to

benefit from the department's reunification efforts. She asserts, contrary to the court's assessment of her conduct, that the evidence demonstrated that, as of the time of the trial, she had "positively engaged" with the services that the department offered to her, which included IRIS, a psychological evaluation, a substance abuse evaluation, and parenting classes. The respondent argues that, "[b]ecause the department did not offer [her] necessary services toward reunification and . . . [she] actively and appropriately engaged in the services the department did offer her, the trial court erred in determining [that she] was unable or unwilling to benefit from services."

This court has observed that, pursuant to § 17a-112 (j) (1), "[t]he [petitioner] must prove [by clear and convincing evidence] *either* that [the department] has made reasonable efforts to reunify or, *alternatively*, that the parent is unwilling or unable to benefit from the reunification efforts. Section 17a-112 (j) clearly provides that the [petitioner] is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original; internal quotation marks omitted.) *In re Corey C.*, 198 Conn. App. 41, 66, 232 A.3d 1237, cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

"[A]lthough it is true that a finding that the department made reasonable reunification efforts is not a necessary predicate to a finding that a parent is unable to benefit from such efforts, this does not mean that a trial court could never view those two issues as interrelated. . . . [T]he question of whether the [department] made reasonable efforts to reunify the respondent with her child is inextricably linked to the question of whether the respondent can benefit from such efforts. . . . Depending on the case, a trial court might well conclude that the department's reunification efforts were so lacking as to preclude both a finding that the

department made reasonable reunification efforts and that a parent is unable to benefit from such efforts. . . . However, the department is only required to prove *either* that it has made reasonable efforts to reunify or, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. Section 17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Citations omitted; emphasis altered; internal quotation marks omitted.) *In re Cameron H.*, 219 Conn. App. 149, 161 n.5, 294 A.3d 50, cert. denied, 347 Conn. 903, 296 A.3d 171 (2023).

We review a trial court's reunification determinations for evidentiary sufficiency. See, e.g., *In re Oreoluwa O.*, 321 Conn. 523, 533, 139 A.3d 674 (2016); *In re Kyreese L.*, 220 Conn. App. 705, 716, 299 A.3d 296, cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023). Pursuant to that standard, "we consider whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We apply the identical standard of review to a trial court's determination that a parent is unable to benefit from reunification services. . . . That is, we review the trial court's ultimate determination that a respondent parent was unwilling or unable to benefit from reunification services for evidentiary sufficiency, and review the subordinate factual findings for clear error. . . . [An appellate court does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . .

"In our review of the record for evidentiary sufficiency, we are mindful that, as a reviewing court, [w]e cannot retry the facts or pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence. . . . Moreover, it is within the province of the trier of fact to accept or reject parts of the testimony of a single witness." (Citations omitted; internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 789–90, 127 A.3d 948 (2015).

The respondent does not challenge the correctness of any of the court's subordinate factual findings concerning the conduct of the department or the respondent in the present case. Instead, the respondent challenges the court's assessment of the degree to which she was receptive to and utilized the services offered as well as its ultimate determination that she was unable or unwilling to benefit from the department's services. Among the court's relevant subordinate findings was that, although the respondent had access to a cell phone while she was living in Guatemala, from mid-2019 to December, 2021, she had only "limited and intermittent contact" with the department. From December, 2021, through August, 2022, the respondent did not respond to communications, whether in the form of telephone calls or texts, from the department. The respondent's failure to let the department know of her whereabouts led to an inability of ISS-USA to conduct an updated home study in 2022. The respondent did not make the department aware of the fact that she intended to immigrate to the United States and did not contact the department in a timely manner when she arrived in New Haven on or about July 10, 2022. Rather, the respondent appeared, unannounced, at a supervised visit between Wendy and Santos in August, 2022.

The court found that, for several months, the respondent was very reluctant to engage with the services the department offered through IRIS. This finding was supported by the evidence that, although the department referred the respondent to IRIS in September, 2022, an agreed upon home visit did not occur until December, 2022. Moreover, the respondent did not fully share information about her living situation with IRIS, and it took until February, 2023, before IRIS workers could develop a working relationship with her.

In August, 2022, the respondent participated in a substance abuse evaluation as well as parenting services provided through IFP. The respondent also submitted to court-ordered psychological evaluation and a parent-child interactional study with Schiappa, a licensed psychologist, in January, 2023. The court relied on the detailed report prepared by Schiappa. Among her findings was that "[the respondent] did not appear to understand why Wendy couldn't just be returned to her care now that she is living in the United States. She does not appear to understand the impact that her behaviors have on her ability to safely parent the children." Schiappa stated that the respondent did not come prepared to the parent-child interactional study, as she had brought her younger daughter, Yeni, but did not bring anything with which to entertain her. She was indifferent to the fact that Yeni attempted to open a packet of medicine from her purse and that the evaluator ultimately had to intervene to prevent Yeni from ingesting the medicine. Schiappa opined that "[the respondent] does not appear to understand the differences in culture or recognize how her behaviors are impacting her ability to parent. [The respondent] minimizes any problems. She was cooperative to the evaluation process but has limited insight and judgment." Schiappa also opined that the respondent lacks "a good understanding of Wendy's needs or the capacity to meet them." She stated

that termination of the respondent's parental rights appears to be in Wendy's best interest, that her biological parents are unable to provide her with a stable and safe home, and that, "[g]iven the amount of time that has passed, it does not appear within an appropriate time frame [that the respondent will be able] to provide stability and permanency for Wendy." Schiappa observed that "[i]t would be impossible for [the respondent or Santos] to be [Wendy's] psychological parents as neither of them have ever really provided the care for her that a parent would. In Guatemala, [Wendy's] grandmother provided this care."

In its detailed findings, the court outlined the myriad efforts to reunify that were made by the department in this case despite the challenges posed by a global pandemic and the danger presented by the fact that the respondent was residing in Guatemala until July, 2022. Mindful of the importance of reunification efforts made by the department,[37] we conclude that the department's reunification efforts were on their face not so lacking as to preclude a finding that the respondent was unable or unwilling to benefit from such services.[38] The petitioner did not prove by clear and convincing evidence

[37] "The requirement of reunification efforts provides . . . substantive protection for any parent who contests a termination action, and places a concomitant burden on the state to take appropriate measures designed to secure reunification of parent and child. . . . This requirement is based on the well settled notion that [t]he right of a parent to raise his or her children [is] recognized as a basic constitutional right." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Devon B.*, 264 Conn. 572, 584, 825 A.2d 127 (2003).

[38] Although it is unnecessary for us to reach the merits of the respondent's claim that the court improperly determined that the department made reasonable efforts to reunify her with Wendy, we nonetheless observe that "[t]he reasonableness of the department's efforts must be assessed in the context of each case. The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . .

that the respondent failed to engage with *all* of the department's services, but such proof was not necessary. The petitioner demonstrated by clear and convincing evidence, and the court found, that the respondent had inconsistent communication with the department when she was in Guatemala, she failed to timely notify the department of her whereabouts prior to July, 2022, and she was reluctant to engage in services offered by the department until early 2023, which supported its finding that the respondent was unwilling to benefit from services offered by the department.

The respondent's failure to timely engage in services offered by the department detrimentally delayed her ability to gain critical and necessary knowledge of how Wendy's needs changed upon her immigration to an American city. The petitioner proved by clear and convincing evidence, and the court found, that, at the time of her evaluation by Schiappa, the respondent still demonstrated a lack of insight into Wendy's traumatic experiences resulting from her relocation to the United States, particularly her sexual abuse, and what was required for her to provide Wendy a safe, nurturing, and supportive environment free from insecurity. Affecting her ability to benefit from services was the fact that the respondent, who did not speak English and was undocumented, required community based services to meet even basic needs for food and shelter for herself and Yeni. Her inability to converse in English with Wendy was an obvious barrier to her being able to meet Wendy's psychological needs. The court also observed that the respondent struggled to parent Yeni, showing a lack of insight as to what was necessary to provide

[R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case." (Internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 589, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

a safe environment for her, as well. The cumulative effect of these findings supported the court's ultimate determination that the respondent, due in part to her lack of understanding of what was required of her to nurture Wendy and her struggles to have basic needs met for herself and Yeni, was unable to benefit from reunification efforts made by the department.

The judgment is affirmed.

In this opinion the other judges concurred.

HAROLD T. BANKS, JR. *v.* COMMISSIONER OF CORRECTION
(AC 43187)

Bright, C. J., and Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted of robbery in the first degree, sought a writ of habeas corpus more than five years after the date on which his judgment of conviction was deemed to be final. Pursuant to statute (§ 52-470 (c) and (e)), the respondent, the Commissioner of Correction, moved for an order to show cause why the petition should not be dismissed as untimely. At a hearing on the motion, the petitioner's habeas counsel, S, argued that the petitioner's history of mental health issues and his filing of his petition immediately after he received certain medical records supported a finding of good cause for the delay, but S did not present any evidence in support of that argument. The habeas court dismissed the habeas petition, concluding that it was untimely and that the petitioner, in failing to present some evidence supporting the reason for the delay, did not rebut the presumption under § 52-470 (c) that no good cause existed to excuse his late filing. Thereafter, on the denial of his petition for certification, the petitioner appealed to this court, claiming that the habeas court had abused its discretion in denying his petition for certification to appeal because S had rendered ineffective assistance and because the habeas court had failed to fulfill an alleged duty to intervene to protect the petitioner's constitutional and statutory rights. Because those claims were not raised before the habeas court or included in his petition for certification to appeal, the petitioner sought review under the plain error doctrine or, alternatively, under *State* v. *Golding* (213 Conn. 233). This court dismissed the appeal, concluding that the certification requirement in § 52-470 (g) barred

appellate review of unpreserved claims in uncertified appeals under both the plain error doctrine and *Golding*. This court reasoned that the habeas court could not have abused its discretion in denying the petition for certification to appeal when the petitioner did not distinctly raise his claims during the habeas proceeding or in his petition for certification to appeal. On the granting of certification, the petitioner appealed to our Supreme Court, which reversed the judgment of dismissal, and remanded the case to this court with direction to consider whether the petitioner had fulfilled his burden of establishing that his unpreserved claims challenging the habeas court's handling of the habeas proceeding itself were not frivolous under the criteria set forth in *Simms* v. *Warden* (230 Conn. 608), namely, whether they involve issues that are debatable among jurists of reason, that a court could resolve in a different manner or that are adequate to deserve encouragement to proceed further. *Held* that the inadequacy of the record as to the petitioner's allegation that S rendered ineffective assistance was fatal to the petitioner's unpreserved and uncertified claims challenging the habeas court's handling of the habeas proceeding, and, accordingly, the appeal was dismissed: although the failure of S to present evidence during the evidentiary hearing to support the petitioner's claim of good cause could have been the product of ineffective assistance rather than sound strategy, the petitioner's claim necessarily depended on whether such evidence existed and whether that evidence had been made available to counsel, and, in the present case, there was no evidence as to why S failed to present evidence at the hearing and no indication that such evidence existed; moreover, an adequate factual record was necessary for an appellate court to review a claim under the plain error doctrine or *Golding*, and the petitioner could not establish a due process violation based on the constructive denial of his statutory right to habeas counsel without first establishing that S rendered ineffective assistance; furthermore, in the absence of any persuasive or binding authority, this court declined to recognize a new duty for the habeas court to act when counsel's legal strategy was not readily apparent to the habeas court or to evaluate counsel's strategic performance, as the record did not disclose whether S had evidence to present or whether the petitioner had agreed to testify at the hearing; additionally, this court concluded that the habeas court did not commit any error by failing to inquire as to the professional judgment of S when he appeared to make a questionable decision during the evidentiary hearing, and, accordingly, it would not have been an abuse of the habeas court's discretion to deny the petition for certification to appeal if the unpreserved claims had been included therein.

Argued January 3—officially released May 7, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where

the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Cradle, Alexander* and *Suarez, Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, former state's attorney, *Jennifer F. Miller*, former assistant state's attorney, and *Lea Hawley*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. This appeal returns to us on remand from our Supreme Court. See *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 361, 297 A.3d 541 (2023). The petitioner, Harold T. Banks, Jr., appealed to this court following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (c) and (e). *Banks* v. *Commissioner of Correction*, 205 Conn. App. 337, 338, 256 A.3d 726 (2021), rev'd, 347 Conn. 335, 297 A.3d 541 (2023). On appeal, the petitioner asserted unpreserved claims that were not included in his petition for certification to appeal, contending that his unpreserved claims were reviewable for plain error and pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *Banks* v. *Commissioner of Correction*, supra, 205 Conn. App. 342. This court dismissed the petitioner's appeal, holding that the certification requirement in § 52-470 (g)

bars appellate review of unpreserved and uncertified claims whether for plain error or pursuant to *Golding*. Id., 343–45.

After granting the petitioner's petition for certification to appeal, our Supreme Court reversed the judgment of this court, holding that "§ 52-470 (g) does not restrict [a reviewing court's] authority to review unpreserved claims under the plain error doctrine or *Golding* following a habeas court's denial of a petition for certification to appeal, so long as the appellants' claims challenge the habeas court's handling of the habeas proceeding itself and the appellant fulfills his or her burden of establishing that the unpreserved claims" are nonfrivolous under *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994). *Banks* v. *Commissioner of Correction*, supra, 347 Conn. 350. Accordingly, our Supreme Court remanded the case to this court with direction to consider "whether the petitioner fulfilled his burden of establishing that his *Golding* and plain error claims challenging the habeas court's handling of the habeas proceeding itself were nonfrivolous under the [*Simms*] criteria." Id., 360–61. Because we conclude that he has not fulfilled his burden, we dismiss the appeal.

Our Supreme Court set forth the following relevant facts and procedural history giving rise to this appeal. "On May 30, 2012, the petitioner was convicted of robbery in the first degree and sentenced to twelve years of incarceration. He did not file an appeal. More than five years later, on December 13, 2017, the self-represented petitioner filed a petition for a writ of habeas corpus challenging his conviction. The respondent, the Commissioner of Correction, filed a motion for an order to show cause why the petition should not be dismissed as untimely under § 52-470 (c), which provides in relevant part that 'there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such

petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2017 . . . .' See also General Statutes § 52-470 (e).

"The habeas court conducted an evidentiary hearing on the respondent's motion, at which the petitioner was represented by Attorney Jonatham M. Shaw. At the evidentiary hearing, Attorney Shaw argued that good cause existed to excuse the petitioner's belated filing because the petitioner had 'a long history of mental health issues . . . .'

"The respondent's attorney objected, stating that '[w]e don't have any evidence of that.' The habeas court responded: 'Understood. I think he's presenting argument. I mean, I'll allow him to do that.' Attorney Shaw did not present any evidence but proceeded to argue that the petitioner 'filed immediately after obtaining [certain medical] records in December of 2017, just a couple months after the deadline, and I believe there is good cause to allow his case to go forward.' The respondent's attorney countered that the petitioner had failed to fulfill his burden of demonstrating good cause for the delay because '[e]very claim that [Attorney Shaw made was] unsubstantiated by any evidence, and the timeframe [spoke] for itself.' " (Footnote omitted.) *Banks* v. *Commissioner of Correction*, supra, 347 Conn. 339–40.

"Attorney Shaw stated that he 'would just leave it to . . . what was stated in [the petitioner's] response to the motion [for an order to show cause].' In that response, Attorney Shaw argued that good cause existed to excuse the petitioner's belated filing because the petitioner previously had filed a timely petition for a writ of habeas corpus, which allegedly was withdrawn

on the advice of counsel. According to Attorney Shaw, '[t]he petitioner wished to refile the present action as soon as possible but needed to obtain medical records from various mental health treatment facilities in the state of New York. . . . The petitioner received his requested records on or about December of 2017. . . . Upon receipt of the . . . records, the petitioner immediately refiled his petition for a writ of habeas corpus.' No evidence was submitted at the hearing in support of these assertions." Id., 339 n.1.

"The habeas court thereafter issued a written memorandum of decision, dismissing the petitioner's petition for a writ of habeas corpus. The habeas court explained that the 'petitioner had until October 1, 2017, to file the present petition; however, it was not filed until December 13, 2017.' Given the statutory rebuttable presumption that no good cause existed to excuse the petitioner's late filing, and the petitioner's failure 'to provide *some* evidence of the reason for the delay,' the habeas court concluded that the petition for a writ of habeas corpus was not timely filed under § 52-470 (c). . . .

"Following the dismissal of his habeas petition, the petitioner filed a petition for certification to appeal, claiming that 'the habeas court erred in finding that there was not good cause to allow [the] petition for [a writ of] habeas corpus to proceed on the grounds that he filed outside of the applicable time limits.' The habeas court denied the petition for certification to appeal." Id., 340. The petitioner appealed to this court, claiming "that the habeas court had abused its discretion in denying his petition for certification to appeal because (1) Attorney Shaw rendered ineffective assistance of counsel, thereby depriving the petitioner of his statutory right to counsel and his constitutional right to due process of law, and (2) the habeas court failed to fulfill an alleged duty to intervene to protect the

petitioner's constitutional and statutory rights. The petitioner acknowledged that these claims were not preserved in the habeas court or included in the petition for certification to appeal but argued that appellate review was available under the plain error doctrine and *Golding*." Id., 341.

This court dismissed the appeal, concluding that "the certification requirement in § 52-470 (g) bars appellate review of unpreserved claims in uncertified appeals under the plain error doctrine and *Golding*." Id. More specifically, we concluded "that, if the petitioner desired appellate review of his claims of ineffective assistance of habeas counsel and/or whether the habeas court had a duty to address counsel's deficient performance to prevent prejudice to the petitioner, he was required to include those issues as grounds for appeal in his petition for certification to appeal." *Banks* v. *Commissioner of Correction*, supra, 205 Conn. App. 345.

Our Supreme Court granted the petitioner's petition for certification to appeal, limited to whether this court properly concluded that review for plain error, or pursuant to *Golding*, "of challenges to the habeas court's handling of the habeas proceedings is unavailable for" claims not raised in the petition for certification to appeal.[1] *Banks* v. *Commissioner of Correction*, 338

[1] The Supreme Court granted the petition for certification to appeal, limited to two issues:

"1. Did the Appellate Court correctly interpret . . . decisions of this court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?

"2. Did the Appellate Court correctly interpret . . . decisions of this court in concluding that review under *State* v. *Golding*, [supra, 213 Conn. 233], of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?" (Citations omitted.) *Banks* v. *Commissioner of Correction*, 338 Conn. 907, 907–908, 258 A.3d 1281 (2021).

Conn. 907, 908, 258 A.3d 1281 (2021). Although the petitioner also sought certification regarding "[w]hether *Lozada* v. *Warden*, 223 Conn. 834 [613 A.2d 818] (1992), affords the Appellate Court jurisdiction to review on direct appeal a claim of ineffectiveness of habeas counsel independent of any limitation on its jurisdiction imposed by . . . § 52-270 (g)," our Supreme Court did not certify that issue and specifically noted that "[t]he petitioner's ineffective assistance of counsel claims, *which do not challenge the habeas court's handling of the habeas proceedings*, [were] outside the scope of the certified issues." (Emphasis added.) *Banks* v. *Commissioner of Correction*, supra, 347 Conn. 342 n.2.

As to the certified issues, our Supreme Court held "that unpreserved claims challenging the habeas court's handling of the habeas proceeding are reviewable under the plain error doctrine and *Golding*, despite the petitioner's failure to include such claims in the petition for certification to appeal denied by the habeas court, if the petitioner can demonstrate, consistent with [*Simms*], that the unpreserved claims involve issues that are debatable among jurists of reason, could be resolved in a different manner, or deserve encouragement to proceed further." Id., 359–60. The court further explained that "the appellant must demonstrate that the unpreserved and uncertified claims are nonfrivolous, which [it] define[d] as raising a colorable claim of plain error or the violation of a constitutional right due to the actions or omissions of the habeas court. Only if the appellant succeeds in surmounting that hurdle will the appellate court review the appellant's unpreserved claims on the merits." (Internal quotation marks omitted.) Id., 350–51.

Accordingly, the court remanded the case to this court to consider whether the petitioner could surmount the hurdle of establishing that his unpreserved and uncertified claim "that the habeas court failed to

fulfill its alleged duty to intervene to preserve the petitioner's constitutional and statutory rights"; id., 360; raises "a colorable claim of plain error or the violation of a constitutional right due to the actions or omissions of the habeas court." Id., 351.

As a preliminary matter, we set forth our standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, [supra, 230 Conn. 612]. First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 74–75, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019). When, as in the present case, the habeas court never considered the unpreserved issues because they were not included in the petition for certification, "[t]he more accurate inquiry . . . is whether it *would have been* an

abuse of discretion to deny the petition for certification to appeal if the unpreserved issue had been included in the petition for certification." (Emphasis in original.) *Banks* v. *Commissioner of Correction*, supra, 347 Conn. 358 n.13.

During oral argument before this court on remand, the petitioner's counsel asserted what she claimed were two distinct arguments challenging the habeas court's handling of the habeas proceeding. Counsel contended that the petitioner claimed that "the state, acting through the habeas court . . . had an obligation to appoint counsel. [It] failed to appoint competent counsel, so [it] failed to fulfill a statutory obligation, and I allege that that is a deprivation of due process, and that's the *Golding* claim. Separately, I say the [habeas] court had an obligation to step in when it was viewing this patently ineffective counsel, and it was plain error for the court not to do so. So, they're separate arguments." When asked how we are supposed to evaluate the habeas court's appointment of Attorney Shaw for purposes of the petitioner's due process claim, counsel responded that it would be based on Attorney Shaw's performance. Counsel also clarified that the petitioner's due process claim is based on the habeas court's alleged duty to intervene when the court realized that Attorney Shaw was not going to present any evidence at the evidentiary hearing. Accordingly, the petitioner's due process and plain error claims are premised on the court's alleged "duty to intervene when it became apparent that Attorney Shaw had decided not to offer evidence at an evidentiary hearing, guaranteeing a dismissal of the habeas petition before the petitioner had an opportunity to demonstrate good cause for its untimely filing."

Although styled as a challenge to the habeas court's handling of the underlying habeas proceeding, the foundation of each of the petitioner's claims is that Attorney

Shaw's "patently ineffective" assistance triggered the habeas court's alleged duty to intervene. Consequently, a review of how and when ineffective assistance of counsel claims typically are addressed by our courts informs our analysis of the petitioner's claims. A claim of ineffective assistance of counsel is "more properly pursued on . . . a petition for a writ of habeas corpus rather than on direct appeal . . . [because] [t]he trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 768, 51 A.3d 988 (2012). "[A] habeas proceeding provides a superior forum for the review of a claim of ineffective assistance because it provides the opportunity for an evidentiary hearing in which the attorney whose conduct is challenged may testify regarding the reasons [for the challenged actions]. . . . A habeas proceeding thus enables the court to determine whether counsel's [deficiency] was due to mere incompetence or to counsel's trial strategy, which would not be possible in a direct appeal in which there is no possibility of an evidentiary hearing." (Internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 431, 147 A.3d 655 (2016).

"[O]n the rare occasions that [our Supreme Court has] addressed an ineffective assistance of counsel claim on direct appeal, [it has] limited [its] review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the *trial court*, rather than by those of his counsel. . . . [The court has] addressed such claims, moreover, only where the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." (Emphasis in original; internal quotation marks omitted.) *State* v. *Taft*, supra, 306 Conn. 768.

The petitioner recognizes this general rule but insists that this is one of those rare occasions when an ineffective assistance claim can be addressed in a direct appeal because "[t]here is no conceivable tactical or strategic reason for Attorney Shaw's omission that could be considered objectively reasonable. Under these circumstances, a collateral proceeding to explore Attorney Shaw's reasons for not offering evidence at an evidentiary hearing would be an empty exercise." The respondent, however, argues that it is possible that there simply "was no evidence to present. . . . Certainly, if no additional evidence existed for [Attorney Shaw] to present or if any such evidence would undermine his claim of good cause, the petitioner would necessarily fail to establish deficient performance." In his reply brief, the petitioner responds that the record is adequate to review his ineffective assistance claim because "[t]his court should *presume* that Shaw acted ethically in representing that the evidence he specifically identified in his written submission and during the good cause hearing actually existed. . . . In the absence of evidence to the contrary, our courts will presume counsel fulfills his ethical obligations." (Citation omitted; emphasis added.) We are not persuaded by the petitioner's contention and conclude that the record is inadequate to review whether Shaw rendered ineffective assistance, which is a necessary predicate of the petitioner's due process and plain error claims.[2]

[2] To be clear, this court previously declined to consider the petitioner's ineffective assistance of counsel claim on the ground that that issue was neither preserved nor included in the petitioner's petition for certification to appeal. During oral argument before this court on remand, counsel for the petitioner conceded that the petitioner's ineffective assistance of counsel claim was foreclosed in light of our Supreme Court's order granting certification limited to the petitioner's *Golding* and plain error claims challenging the habeas court's handling of the underlying habeas proceeding. We agree that any consideration of that claim would fall beyond the scope of our Supreme Court's remand order to this court. Accordingly, we address the reviewability of the petitioner's ineffective assistance of counsel claim only insofar as it relates to the reviewability of his due process and plain error claims challenging the habeas court's handling of the proceedings.

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may [deny] a petitioner's claim if he fails to meet either prong. . . .

"Our Supreme Court has stated that to establish deficient performance by counsel, a [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." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 583–84, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023). "[T]here is a strong presumption in favor of concluding that counsel's performance was competent. . . . In order to overcome that presumption, *the petitioner bears the burden* of proving that counsel's representation fell below an objective standard of reasonableness. . . . [T]he performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*. . . . Thus, the question of whether counsel's behavior was objectively unreasonable is not only one on which the petitioner bears the burden of proof; its resolution turns on a fact intensive inquiry." (Citations

omitted; emphasis in original; internal quotation marks omitted.) *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 603, 188 A.3d 702 (2018).

In the present case, the petitioner asks us to assume, on the basis of a presumption that counsel fulfilled his ethical obligations, that there was evidence of good cause that Attorney Shaw failed to present at the hearing due to his incompetence. At the same time, he asks us to presume that counsel's assistance was unreasonable, which would be contrary to the presumption of competence. In rejecting a similar argument in *State* v. *Jose V.*, 157 Conn. App. 393, 405–406, 116 A.3d 833, cert. denied, 317 Conn. 916, 117 A.3d 854 (2015), this court explained that, "[a]lthough the record may reflect the actions of defense counsel during the [underlying] proceeding, we do not know all of the reasons for those actions. . . . All of the relevant circumstances are not known. Our role . . . is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing in which the reasons for counsel's decision may be elicited, any decision of ours . . . would be entirely speculative." (Internal quotation marks omitted.)

The same reasoning applies in the present case because, although Attorney Shaw's failure to present evidence during an evidentiary hearing to support the petitioner's claim of good cause certainly could be the product of ineffective assistance rather than sound strategy, whether that is true necessarily depends on whether such evidence existed and had been made available to counsel. Not only is there no evidence as to why Attorney Shaw failed to present evidence at the hearing, there is no indication in the record that such evidence existed. See *Crocker* v. *Commissioner of Correction*, supra, 220 Conn. App. 585 ("because [t]he law presumes that counsel is competent until evidence has been introduced to the contrary . . . a petitioner who

fails to call the attorney in question to testify at the habeas trial may face considerable difficulty in overcoming the presumption of competence" (citation omitted; internal quotation marks omitted)). The petitioner recognizes the significance of that evidence because, despite arguing that no further development of the record is required, he correctly notes that "the evidence that should have been offered to rebut the presumption of untimeliness in this case will be offered to prove [that] the petitioner suffered prejudice from [Attorney Shaw's] failure to offer that evidence." Simply put, because all the relevant circumstances are not readily apparent from the record, an evidentiary hearing is necessary to address the petitioner's ineffective assistance of habeas counsel claim.[3] See, e.g., *State* v. *Campbell*, 328 Conn. 444, 468 n.7, 180 A.3d 882 (2018) ("[t]he defendant's ineffective assistance claim is precisely the type of collateral attack that is best resolved in a habeas action, where the defendant will have the opportunity to present evidence in support of his claim that his counsel's performance was deficient and that he was prejudiced by that deficient performance").

The inadequacy of the record for review of the petitioner's allegation that Attorney Shaw rendered ineffective assistance is fatal to the petitioner's unpreserved claims challenging the habeas court's handling of the habeas proceeding. "In *Golding*, our Supreme Court held that a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate

[3] Although the petitioner claims that a new habeas petition alleging ineffective assistance of habeas counsel is unnecessary, he does not claim that that remedy is unavailable to him. See *Crocker* v. *Commissioner of Correction*, supra, 220 Conn. App. 585 ("habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus" (internal quotation marks omitted)).

to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances. . . .

"With respect to the reviewability prong of *Golding*, our Supreme Court stated that [t]he defendant bears the responsibility for providing a record that is adequate for review of his claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim. . . . Subsequently, this court stated that [i]t is axiomatic that this court will not resort to speculation and conjecture in avoidance of an inadequate record." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 373–74, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

Under the plain error doctrine, an appellant must demonstrate "that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . . It is axiomatic that . . . [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that [an appellate] court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial

court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal. . . . An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Cookish* v. *Commissioner of Correction*, 337 Conn. 348, 358–59, 253 A.3d 467 (2020).

Thus, an adequate factual record is necessary for an appellate court to review a claim under *Golding* or to consider it under the plain error doctrine. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 69 n.3, 967 A.2d 41 (2009) ("[b]ecause the record is inadequate for review under *Golding* it is also inadequate for consideration under the plain error doctrine"); see also *State* v. *Cane*, 193 Conn. App. 95, 120 n.23, 218 A.3d 1073 (same), cert. denied, 334 Conn. 901, 219 A.3d 798 (2019).

In the present case, the petitioner cannot establish a due process violation based on the constructive denial of his statutory right to habeas counsel without first establishing that Attorney Shaw rendered ineffective assistance.[4] In other words, because the record is inadequate to review the petitioner's ineffective assistance

[4] Because we conclude that the record is inadequate to review the petitioner's unpreserved due process claim, we simply note that the petitioner failed to brief the due process issue properly. The petitioner's cursory analysis in his principal appellate brief fails to identify, let alone apply "the traditional three part balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine what safeguards the federal constitution requires to satisfy procedural due process." (Internal quotation marks omitted.) *Turn of River Fire Dept., Inc.* v. *Stamford*, 159 Conn. App. 708, 712 n.2, 123 A.3d 909 (2015); see also *In re Jonathan M.*,

of habeas counsel claim, the record also is inadequate to review his due process claim under *Golding*'s first prong. "[I]n the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus . . . we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred." (Internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 581, 916 A.2d 767 (2007).

The petitioner's plain error claims also are premised on the alleged ineffectiveness of Attorney Shaw. Specifically, the petitioner contends that he "identified two errors he alleges constitute plain error; first, the deprivation of due process arising from the constructive denial of habeas counsel in violation of General Statutes § 51-296, and, second, the habeas court's breach of its duty to protect the petitioner's rights by ensuring that the proceedings before it were conducted in conformity with statutory and constitutional requirements. . . . The errors are readily discernible on the face of the record. When Attorney Shaw announced he would rely on the written response to the motion to show cause, the habeas court pointedly asked, '[y]ou're asking the court to just rely on the papers in this matter?' The habeas court obviously understood what Shaw apparently did not—that in the absence of evidence, Shaw might as well have said nothing at all. No further development of the record is necessary."

Again, as we concluded regarding the alleged due process violation, the alleged ineffective assistance of counsel triggering the habeas court's duty to act is not,

255 Conn. 208, 234, 764 A.2d 739 (2001) (applying *Mathews* factors and concluding "that the risk of error and the procedural alternatives that exist weigh against extending the writ of habeas corpus to permit a parent, whose parental rights have been terminated in a prior proceeding, to assert a claim of ineffective assistance of counsel").

as the petitioner maintains, readily apparent on the face of the record. As previously noted in this opinion, the record does not disclose whether Attorney Shaw had evidence to present or whether the petitioner had agreed to testify at the hearing. The petitioner nevertheless argues that this court should notice plain error attributable to the habeas court because "the court could have asked whether counsel had particular evidence he wanted to introduce to support his argument, or whether he perhaps wished to put the petitioner on the stand, or could even have questioned the petitioner himself. The court could have taken a recess and questioned counsel in chambers, and continued the hearing to allow Shaw to produce the evidence he should have been prepared to produce all alon[g]. . . . Any of those small steps might have been sufficient to avert the gratuitous loss of the petitioner's rights." Put differently, the petitioner requests that we recognize a new duty for the habeas court to step in whenever it appears that counsel has no strategic reason for failing to pursue a certain course of action. In the absence of any persuasive, let alone binding, authority to support the petitioner's contention, we decline to do so.

First, we are not persuaded by the petitioner's reliance on cases that have found that a trial court has a duty to intervene in a criminal case in certain circumstances. In particular, the petitioner, in citing cases from the United States Supreme Court, argues that a trial court has a duty to act, sua sponte, "to ensure the integrity and fairness of the proceedings over which it presides." See *Boyde* v. *California*, 494 U.S. 370, 384, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990) ("[a]rguments of counsel which misstate the law are subject to objection and to correction by the court"); *Viereck* v. *United States*, 318 U.S. 236, 248, 63 S. Ct. 561, 87 L. Ed. 734 (1943) (holding that trial court "should have stopped [the prosecutor's prejudicial and improper] discourse

without waiting for an objection"). The petitioner also argues that a trial court has a duty to act, sua sponte, "to inquire into possible conflicts of interests of which it is, or should be, aware"; see *Cuyler v. Sullivan*, 446 U.S. 335, 346, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980) (noting that when "the trial court knows or reasonably should know that a particular conflict exists," it must initiate inquiry as to conflict of interest); and "to prevent the trial of an incompetent defendant." See *Drope* v. *Missouri*, 420 U.S. 162, 181, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) ("trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial").

Making a qualitative judgment as to counsel's performance during the proceeding in which the alleged ineffective assistance is occurring is fundamentally different than correcting misstatements of the law, curtailing prosecutorial impropriety, and inquiring into an apparent conflict of interest or mental incapacity, because evaluating counsel's performance would require that the court inquire as to counsel's strategy for the matter that is still proceeding before the court. The problem with that line of inquiry is that "the trial court risks interfering with the defendant's right to counsel and the attorney-client relationship if the court asks counsel, *during trial*, for a full explanation of his strategy." (Emphasis added.) *State* v. *Castro*, 200 Conn. App. 450, 462 n.10, 238 A.3d 813, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020). Indeed, that is why, "in circumstances in which defense counsel's [conduct] . . . constitutes a violation of the defendant's right to the effective assistance of counsel, the defendant may seek recourse through habeas corpus proceedings." (Internal quotation marks omitted.) Id., 461. Accordingly, the recognized duties of courts to intervene in proceedings referenced by the petitioner are not analogous to the duty

that he seeks to impose on criminal and habeas court judges, and which duty he claims the habeas court breached in the present case.

Second, given that "[o]ur Supreme Court has repeatedly and expressly rejected the proposition that a trial court is required to assess defense counsel's professional judgment before accepting his or her waiver of a constitutional claim"; id., 460; and considering that the petitioner has failed to cite a single decision in which a reviewing court has held that a trial court has a duty to evaluate appointed counsel's strategic performance, we cannot conclude that the habeas court committed any error, let alone an error so obvious that it is not debatable, by failing to inquire as to Attorney Shaw's professional judgment when he appeared to make a questionable decision during the evidentiary hearing. See *State* v. *Campbell*, supra, 328 Conn. 469 n.7 ("[T]he defendant's argument simply recasts an ineffective assistance of counsel claim in an attempt to secure review of unpreserved claims. Just as with any other collateral attacks that are based on ineffective assistance of counsel claims, the defendant's remedy for his claim that his counsel were ineffective for failing to preserve claims on appeal is to file a petition for a writ of habeas corpus.").

In sum, because the record is inadequate to review the petitioner's unpreserved and uncertified claim, either for plain error or pursuant to *Golding*, we conclude that it does not "involve issues that are debatable among jurists of reason, could be resolved in a different manner, or deserve encouragement to proceed further." *Banks* v. *Commissioner of Correction*, supra, 347 Conn. 360. Accordingly, it would not have been an abuse of the habeas court's discretion to deny the petition for certification to appeal if the unpreserved issues had been included therein. See id., 358 n.13.

The appeal is dismissed.

In this opinion the other judges concurred.

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION (AC 43188)

Bright, C. J., and Cradle and Suarez, Js.

Syllabus

The petitioner appealed to this court following the habeas court's denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to statute (§ 52-470). The petitioner's habeas counsel declined the opportunity to present evidence demonstrating good cause for the untimely filing of the petition at the show cause hearing before the habeas court. On appeal, the petitioner argued, inter alia, that the habeas court failed to intervene when his counsel did not present any evidence to support his claim that good cause existed to rebut the presumption of unreasonable delay in filing his petition. This court dismissed the petitioner's appeal, concluding that his unpreserved claims, which he had not included in his petition for certification to appeal, were not reviewable under either the plain error doctrine or *State* v. *Golding* (213 Conn. 233). On the granting of certification, the petitioner appealed to our Supreme Court, which held that this court improperly dismissed the petitioner's uncertified appeal without first considering whether his unpreserved claims challenging the habeas court's handling of the habeas proceeding itself were reviewable under the plain error doctrine or under *Golding* if the petitioner could demonstrate that the claims were not frivolous under the criteria of *Simms* v. *Warden* (230 Conn. 608), namely, whether they involved issues that are debatable among jurists of reason, that a court could resolve in a different manner or that are adequate to deserve encouragement to proceed further. The Supreme Court reversed this court's judgment and remanded the case to this court. . *Held* that this court concluded that the petitioner's unpreserved claims were frivolous under the *Simms* criteria and, accordingly, dismissed the appeal: the petitioner failed to raise a colorable claim of plain error or a violation of a constitutional right because the record was inadequate to review such claims under the plain error doctrine or *Golding*, and, because this court's conclusion in the companion case of *Banks* v. *Commissioner* (225 Conn. App. 234), was dispositive of this appeal, it would serve no purpose to repeat that discussion and analysis; moreover, for the reasons stated in *Banks*, the habeas court

would not have abused its discretion in denying the petition for certification to appeal if the unpreserved issues had been included therein.

Argued January 3—officially released May 7, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Cradle*, *Alexander* and *Suarez*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to the Supreme Court, which reversed this court's judgment and remanded the case to this court for further proceedings. *Appeal dismissed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, *Jennifer F. Miller*, former assistant state's attorney, and *Emily Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, C. J. This appeal returns to us on remand from our Supreme Court. See *Bosque* v. *Commissioner of Correction*, 347 Conn. 377, 297 A.3d 981 (2023). The petitioner, Benjamin Bosque, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (c) and (e). *Bosque* v. *Commissioner of Correction*, 205 Conn. App. 480, 481, 257 A.3d 972 (2021), rev'd, 347 Conn. 377, 297 A.3d 981 (2023). On appeal, the petitioner claimed that "the habeas court abused its discretion in denying his petition for certification to appeal because (1) it should

have been obvious to the court that his habeas counsel had provided constitutionally ineffective assistance and (2) he was denied his constitutional right to counsel because the court had failed to intervene when his counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his petition." Id., 481–82. Although the petitioner conceded that he neither preserved his claims before the habeas court nor included them in his petition for certification to appeal, he contended that his unpreserved and uncertified claims were reviewable under the plain error doctrine or pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *Bosque* v. *Commissioner of Correction*, supra, 205 Conn. App. 486. This court dismissed the appeal, holding that the certification requirement in § 52-470 (g) bars appellate review of unpreserved claims not raised in the petition for certification, whether for plain error or pursuant to *Golding*. Id., 487–89. We concluded "that, if the petitioner desired appellate review of his claims of ineffective assistance of habeas counsel and/or whether the habeas court had a duty to address counsel's deficient performance to prevent prejudice to the petitioner, he was required to include those issues as grounds for appeal in his petition for certification to appeal." Id., 489.

After granting the petitioner's petition for certification to appeal,[1] our Supreme Court reversed this court's

[1] Our Supreme Court granted the petition for certification to appeal "limited to the following issues:

"1. Did the Appellate Court correctly interpret . . . decisions of this court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal?

"2. Did the Appellate Court correctly interpret . . . decisions of this court in concluding that review under *State* v. *Golding*, [supra, 213 Conn. 233], of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification

judgment as to the petitioner's "challenges to the habeas court's handling of the habeas proceedings"; *Bosque* v. *Commissioner of Correction*, 338 Conn. 908, 909, 258 A.3d 1281 (2021); on the basis of its decision in *Banks* v. *Commissioner of Correction*, 347 Conn. 335, 297 A.3d 541 (2023), in which the court "held that unpreserved claims challenging the habeas court's handling of the habeas proceeding itself are reviewable under the plain error doctrine and *Golding*, despite the failure to include those claims in the petition for certification to appeal, if the appellant can demonstrate that the claims are nonfrivolous because they involve issues that 'are debatable among jurists of reason; that a court *could* resolve [them in a different manner]; or that [they] are adequate to deserve encouragement to proceed further.' . . . *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994)." (Emphasis in original.) *Bosque* v. *Commissioner of Correction*, supra, 347 Conn. 379.

Accordingly, in the present case, because this court dismissed the petitioner's appeal "without first considering whether his unpreserved claims are nonfrivolous under the *Simms* criteria," our Supreme Court remanded the case to this court to consider "that issue consistent with the principles set forth in *Banks*." Id. For the reasons stated in the companion case also released today; see *Banks* v. *Commissioner of Correction*, 225 Conn. App. 234, A.3d (2024); we conclude that the petitioner's unpreserved claims are frivolous under the *Simms* criteria and, therefore, dismiss the appeal.

This court previously set forth the relevant facts and procedural history in *Bosque* v. *Commissioner of Correction*, supra, 205 Conn. App. 482–83. "The petitioner was convicted of conspiracy to commit robbery in the

to appeal?" (Citations omitted.) *Bosque* v. *Commissioner of Correction*, 338 Conn. 908–909, 258 A.3d 1281 (2021).

first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (4), burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and four counts of robbery in the first degree in violation of . . . § 53a-134 (a) (4). After unsuccessfully appealing his conviction . . . the petitioner filed his first habeas . . . petition, which was denied following a trial. . . . The petitioner did take an appeal from [the] habeas court's decision, but . . . the appeal was dismissed on February 20, 2013. . . .

"On November 3, 2014, the petitioner filed a second habeas petition, which was subsequently withdrawn on January 29, 2018. On February 26, 2018, the petitioner initiated the underlying action by filing a third habeas petition. The respondent, [the Commissioner of Correction] filed [a] request for an order to show cause [why the petition should be permitted to proceed] on December 6, 2018, asserting that the petitioner had failed to file the present petition within two years of when the [judgment] on his prior habeas [petition] became final. An evidentiary hearing was held on March 8, 2019. Although present, the petitioner declined the opportunity to present testimony or evidence." (Internal quotation marks omitted.) Id.

The entire transcript of the evidentiary hearing is only two pages. During the hearing, after the respondent's counsel elected to rest on her request for the order to show cause, the petitioner's appointed habeas counsel, Attorney Jonathan M. Shaw, argued: "Your Honor, Mr. Bosque did initially file a habeas [petition] within the time limit required. His previous habeas counsel withdrew from the case. He wished to proceed, but his counsel withdrew. So he was not able to. He wasn't capable of proceeding pro se. In the meantime, he had his brother do some investigating. He hired an attorney, and that was essentially the cause for the delay. He

does wish to proceed. He's been actively seeking relief since his conviction became final, and I would ask that you allow the petition to go forward." The following discussion then occurred:

"The Court: And I—just so the record is clear, do you desire to present any witnesses or evidence?

"[Attorney Shaw]: No, Your Honor.

"[The Respondent's Counsel]: On that, if I may be heard briefly, Your Honor. The case law is very clear that a withdrawal does not count as a judgment for purposes of this statute, and we're looking at a delay of six years, four months, and twenty-four days in this case.

"The Court: So noted.

"[The Respondent's Counsel]: And it is not a first habeas, not even a second habeas.

"The Court: Okay. Anything further?

"[Attorney Shaw]: Nothing further. Nothing further, Your Honor.

"The Court: All right. Again, the court will take the matter under advisement, and I'll issue a written decision in due course. Okay.

"[Attorney Shaw]: Thank you."

"In a memorandum of decision dated May 21, 2019, the court, *Newson, J.*, dismissed the habeas petition as untimely under § 52-470 (d) and (e), concluding that the petitioner failed to establish good cause for the delay in filing the petition beyond the statutory deadline. The court found that the petitioner had until March 12, 2015, to file a subsequent habeas petition challenging his conviction and that the petitioner did not present any evidence explaining why his petition was not filed until nearly three years after the deadline. The court

[dismissed] the petition, noting that '[o]nce the rebuttable presumption [that no good cause existed for the delay] arose, the petitioner was obligated to provide *some* evidence of the reason for the delay in filing this petition, which he declined to do.' . . . The court thereafter denied the petition for certification to appeal . . . ."[2] (Emphasis in original.) *Bosque* v. *Commissioner of Correction*, supra, 205 Conn. App. 483.

On remand, the sole issue for this court to decide is whether the petitioner has demonstrated "that the unpreserved and uncertified claims are nonfrivolous, which [our Supreme Court] define[d] as raising a colorable claim of plain error or the violation of a constitutional right due to the actions or omissions of the habeas court. Only if the appellant succeeds in surmounting that hurdle will the appellate court review the appellant's unpreserved claims on the merits." (Internal quotation marks omitted.) *Banks* v. *Commissioner of Correction*, supra, 225 Conn. App. 241.

In *Banks* v. *Commissioner of Correction*, supra, 225 Conn. App. 234, we rejected claims identical to those that the petitioner raises in the present case. Attorney Shaw also represented the petitioner in *Banks* and, as in the present case, declined the opportunity to present evidence demonstrating good cause for the untimely filing of the petitioner's habeas petition at a show cause hearing before the same habeas court. Both petitioners are represented by the same attorney on appeal, Attorney Deren Manasevit, who filed nearly identical appellate briefs on their behalf, asserting the same unpreserved claims that were not included in their petitions for certification to appeal.

[2] The petitioner's "petition for certification to appeal did not include grounds related to any claims regarding ineffective assistance of habeas counsel or the habeas court's alleged duty to intervene in the face of the alleged ineffective assistance." *Bosque* v. *Commissioner of Correction*, supra, 205 Conn. App. 486. Rather, the petitioner "stated only the following ground for appeal: 'Whether the habeas court erred in finding that there was not good cause to allow the petitioner's petition for [a writ of] habeas

During oral argument on remand before this court, Attorney Manasevit noted that the arguments in both *Banks* and the present case are the same. She contended that "the state, acting through the habeas court . . . had an obligation to appoint counsel. [It] failed to appoint competent counsel, so [it] failed to fulfill a statutory obligation, and I allege that that is a deprivation of due process, and that's the *Golding* claim. Separately, I say the [habeas] court had an obligation to step in when it was viewing this patently ineffective counsel, and it was plain error for the court not to do so. So, they're separate arguments."

In *Banks*, we concluded that the petitioner had failed to raise a colorable claim of plain error or a constitutional violation because the record was inadequate to review the petitioner's unpreserved claim pursuant to *Golding* and the plain error doctrine. *Banks* v. *Commissioner*, supra, 225 Conn. App. 254. Accordingly, we held that "it would not have been an abuse of the habeas court's discretion to deny the petition for certification to appeal if the unpreserved issues had been included therein." Id. Our conclusion in *Banks* is dispositive of this appeal, and it would serve no useful purpose for us to repeat our discussion and analysis here. Consequently, for the reasons stated in that decision, we likewise conclude that the petitioner in the present case has failed to raise a colorable claim of plain error or a violation of a constitutional right. See id. Therefore, the habeas court would not have abused its discretion in denying the petition for certification if the unpreserved issues had been included therein.

The appeal is dismissed.

In this opinion the other judges concurred.

corpus to proceed on the grounds that he filed [it] outside the applicable time limits.' " Id.

PAUL DAVIS *v.* COMMISSIONER OF CORRECTION (AC 46237)

Moll, Cradle and Westbrook, Js.

Syllabus

The petitioner, who had been convicted, following a jury trial, of various crimes in connection with a drive-by shooting, sought a writ of habeas corpus, claiming a violation of his right to due process and the ineffective assistance of his trial and appellate counsel. During the petitioner's criminal trial, the jury heard testimony from, inter alia, B, a convicted felon who was incarcerated and facing additional charges at that time and who claimed to have witnessed certain events surrounding the shooting. In his petition for a writ of habeas corpus, the petitioner claimed, inter alia, that the state had violated his constitutional rights to due process and a fair trial by failing to disclose that it had offered consideration to B for his cooperation in the petitioner's criminal case and to correct B's false or misleading testimony that he had received no consideration for his cooperation and that the petitioner's trial counsel, M, had provided ineffective assistance in failing to challenge B's testimony adequately and to investigate and to present evidence of B's cooperation with the state for favorable consideration. On the first day of the petitioner's habeas trial, the habeas court noted that the petitioner's habeas counsel had been unable to subpoena B and directed the parties to agree on an additional trial date to accommodate another attempt to subpoena him. At the continued trial date, almost two months later, the petitioner's habeas counsel indicated that he had served multiple subpoenas at B's abode and that B was aware of the proceedings but had not appeared in court, and the court issued a capias and set an additional trial date for a month later. B was again absent on the final trial date, and the court denied the petitioner's motion for a continuance to procure B's attendance at the proceedings. The habeas court heard testimony from the petitioner, M, and several attorneys who previously had either represented or prosecuted criminal charges against B. The petitioner did not present B as a witness. The court rendered judgment denying the petition for a writ of habeas corpus and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his unpreserved claim that the habeas court's denial of his motion for a continuance violated his constitutional right to present evidence and his right to due process under the United States and Connecticut constitutions: the petitioner was able to offer numerous exhibits and the testimony of several witnesses over the course of his three day habeas trial, and he failed to cite any cases that supported his assertion that a habeas court violates a petitioner's right to present evidence by imposing reasonable limits on the number of

delays in habeas proceedings; moreover, the habeas court granted him a continuance for the purpose of serving a subpoena on B and had issued a capias for B; accordingly, the petitioner's claim did not satisfy the third prong of *State* v. *Golding* (213 Conn. 233) as no constitutional violation existed.

2. The habeas court did not abuse its discretion in denying the petitioner's motion for a continuance: the court's denial was not arbitrary, as it considered the presence of one of the victims' families at the trial, the continuance it had previously granted and the capias it had issued for B; moreover, the petitioner did not specify the length of the continuance he requested or make a showing of his ability to achieve the purpose of the continuance were the court to grant it.

Argued February 1—officially released May 7, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Meryl Gersz, assistant state's attorney, with whom, on the brief, were *Sharmese L. Hodge*, state's attorney, and *Angela R. Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Paul Davis, 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 a due process violation and ineffective assistance of his trial and appellate counsel. On appeal, the petitioner claims that the habeas court violated his constitutional right to due process and abused its discretion when it denied his motion for a continuance

to afford him additional time to secure the testimony of a witness. We affirm the judgment of the habeas court.

The following facts, as set forth by this court in the petitioner's direct appeal from his criminal conviction, and procedural history are relevant to the petitioner's claims on appeal. "[The petitioner] was a member of a gang in Hartford. On May 28, 2006, in retaliation for a shooting that occurred earlier that day in which another member of [the petitioner's] gang was shot, [the petitioner], Ackeem Riley and Dominique Mack discussed conducting a drive-by shooting in the Nelton Court area of Hartford. The trio had no specific victim intended.

"[The petitioner] drove himself, Riley and Mack toward the Nelton Court area in a car he had borrowed. Riley was armed with a nine millimeter Glock handgun. Mack was armed with a nine millimeter Taurus. As [the petitioner] drove, he, Riley and Mack saw a group of children at the corner of Elmer and Clark Streets. Riley and Mack fired at lease seventeen shots from their handguns at the group, striking two boys. One of the victims . . . a fifteen year old boy, was hit by five bullets, resulting in his death. The other victim . . . a fourteen year old boy, was hit by three bullets, resulting in serious injury.

"After the shooting, [the petitioner], Riley and Mack fled the scene and left the car on Guilford Street. From there, they summoned a cab to take them to 140 Oakland Terrace. Riley, Mack and another man later returned to the vehicle and set it on fire.

"On June 7, 2006, [the petitioner] agreed to speak with members of the Hartford Police Department, and he provided them with information about the shooting. He told the officers about the planning of the shooting, the types of firearms used and where they could be found. He also told them how the vehicle used in the shooting later was set on fire. [The petitioner], however,

did not disclose his involvement in the shooting until almost three years later, in May, 2009, when he again spoke to the police and provided a written statement." *State* v. *Davis*, 163 Conn. App. 458, 460–61, 136 A.3d 257 (2016), cert. granted, remanded for reconsideration, 325 Conn. 918, 163 A.3d 618 (2017), aff'd, 178 Conn. App. 324, 175 A.3d 71 (2017), cert. denied, 327 Conn. 1001, 176 A.3d 1194 (2018).

Following the disclosure of his involvement in the May 28, 2006 shooting, the petitioner was charged with accessory to capital felony in violation of General Statutes § 53a-8 (a) and General Statutes (Rev. to 2005) § 53a-54b (8),[1] accessory to murder in violation of General Statutes §§ 53a-8 (a) and 53a-54a (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and attempt to commit murder in violation of General Statutes §§ 53a-49 (a) (2) and 53a-54a (a). After a jury trial—during which the prosecution admitted into evidence, inter alia, the petitioner's confession and the testimony of Lamel Brooks and Nikkia Parks, who implicated the petitioner in the shooting, the petitioner was convicted of all the charges except accessory to capital felony. The court, *Dewey*, *J.*, sentenced him to 100 years of incarceration.

This court affirmed the petitioner's judgment of conviction on direct appeal. *State* v. *Davis*, supra, 163 Conn. App. 460. Our Supreme Court granted certification and remanded the case to this court for consideration of a plain error claim.[2] *State* v. *Davis*, 325 Conn. 918, 918,

[1] This statute was amended, effective April 25, 2012, by the substitution of "murder with special circumstances" for "capital felony." See Public Acts 2012, No. 12-5, § 1.

[2] Specifically, this case was remanded with direction to consider the petitioner's claim that the court committed plain error by improperly instructing the jury that it was not necessary for the state to prove that the petitioner intended to kill the victim to find him guilty of accessory to murder. See *State* v. *Davis*, supra, 163 Conn. App. 477–79.

163 A.3d 618 (2017). On remand to this court, that claim was denied. *State* v. *Davis*, 178 Conn. App. 324, 326, 175 A.3d 71 (2017), cert. denied, 327 Conn. 1001, 176 A.3d 1194 (2018).

The petitioner filed a petition for a writ of habeas corpus in 2018. On September 15, 2021, the petitioner filed an amended three count petition alleging (1) violations of his due process rights, (2) ineffective assistance of his trial counsel, Dennis McMahon, and (3) ineffective assistance of his direct appellate counsel, Mary Beattie.[3] At his habeas trial, which took place on September 15, November 9 and December 8, 2022, the petitioner withdrew all but his claims alleging that (1) the

[3] In count one, the petitioner alleged that the state violated his due process rights during his criminal trial by failing (1) to disclose that it had offered consideration to Brooks for his cooperation during the petitioner's criminal trial, (2) to correct Brooks' false testimony at the petitioner's criminal trial that he received no consideration, (3) to disclose that it had offered consideration to Parks for her testimony during the petitioner's criminal trial, (4) to timely disclose Parks' complete criminal history, and (5) to timely disclose Parks' prior history as a police informant.

In count two, the petitioner alleged that McMahon was ineffective for failure (1) to "adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Brooks," (2) to "adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Parks," (3) to "adequately cross-examine, impeach, and otherwise challenge the testimony of [another witness] Edward Jachimowicz," (4) to "adequately investigate and present evidence of . . . Brooks' cooperation with the state for favorable consideration in exchange for his cooperation," (5) to "adequately investigate and present evidence of . . . Parks' cooperation with the state for favorable consideration in exchange for her cooperation," (6) to "adequately move to exclude evidence of the petitioner's purported gang involvement from evidence," (7) to "present mitigation evidence in support of a lesser sentence at the petitioner's sentencing, including the [petitioner's] institutional records from the Department of Correction and mitigating information from members of the [petitioner's] family," and (8) to "adequately investigate and present an alibi defense that the [petitioner] was with Shareece Watkins at or about the time of the offense."

In count three, the petitioner alleged that Beattie was ineffective for failure "to adequately investigate, raise and litigate the claim that the [petitioner's] right to due process and a fair trial were violated by the state's failure to preserve evidence, to wit a [nine millimeter] Glock and three associated shell casings, that had been associated with the shooting in this matter."

state had violated his constitutional right to due process and a fair trial in failing (a) to "disclose that it had offered consideration to . . . Brooks for his cooperation in the petitioner's case" and (b) to "correct . . . Brooks' false or substantially misleading testimony that he received no consideration for his cooperation with the state during the petitioner's criminal trial, which the state knew, or should have known to be false or misleading," and (2) McMahon was ineffective in failing (a) to "adequately cross-examine, impeach, and otherwise challenge the testimony of . . . Brooks" and (b) to "adequately investigate and present evidence of . . . Brooks' cooperation with the state for favorable consideration in exchange for his cooperation."

At the petitioner's habeas trial, he presented his own testimony and the testimony of McMahon; Attorney John Fahey, who prosecuted the petitioner; Attorney Keith Dubay, who represented Brooks between 2011 and 2013; Attorney Richard Rubino, who prosecuted Brooks in 2012; and Attorney Michael Weber, who prosecuted Brooks in 2013, directly after the petitioner's criminal trial. Although the petitioner successfully offered into evidence, inter alia, two letters written by Brooks; court documents related to Brooks' criminal cases that resulted in convictions in 2007, 2012, and 2013; transcripts related to Brooks' 2012 and 2013 convictions; and transcripts of his testimony at the petitioner's criminal trial, the petitioner did not present Brooks as a witness.

At a pretrial conference prior to the petitioner's habeas trial, the petitioner's habeas attorney, James Mortimer, indicated that he thought there would be "some issues with respect to at least one witness." On September 15, 2022, the first day of the petitioner's habeas trial, the court, *Bhatt, J.*, noted for the record that Mortimer had been unable to subpoena Brooks and Parks, whose testimony was essential to the petitioner's

claims. The court suggested that the parties agree on an additional trial date in order to accommodate another attempt to subpoena those witnesses.

The trial continued on November 9, 2022, and Mortimer was still unable to secure the presence of Brooks and Parks. Mortimer stated that he had served a number of subpoenas at Brooks' abode and had engaged Brooks' parole officer, who indicated that Brooks was aware of the proceedings.[4] Mortimer requested that the court issue a capias and offered into evidence three subpoenas that had been served at Brooks' abode and testimony from Ana Cantanhede, a private investigator who had located Brooks and served the subpoenas. The court found that "Brooks knows of today's proceeding. He knows it's in the afternoon. He's been properly served, and he's received the subpoena." The court then issued a capias and set the next trial date for December 8, 2022.

On December 8, 2022, Brooks was again absent despite the capias. Mortimer indicated that he had spoken to Brooks' parole officer, who informed him that Brooks "was aware that a capias had been issued" and that Brooks would try to avoid appearing in court. Mortimer requested a continuance "to afford additional time to gain custody of [Brooks] and bring him in to testify . . . ." The court, *Bhatt*, *J.*, denied the continuance, stating, "I understand that he's a necessary witness to your claims, but we've issued a subpoena. I've issued a capias. I don't know how much longer I can allow this to proceed in the . . . hope that, maybe, someday he'll agree to show up. I don't know that that's something that the court can agree to. So, I'll deny the motion for continuance."

[4] Mortimer indicated to the court that he was unable to demonstrate that Parks knew of the proceeding. We note, however, that the petitioner, at his habeas trial, withdrew his claims as to Parks and, therefore, does not raise on appeal any claims relating to Parks.

Following trial, the habeas court, *Bhatt*, *J.*, issued a memorandum of decision, dated December 15, 2022, in which it denied the petition, holding that "[the petitioner] has not proven his claims . . . ."

In its memorandum, the habeas court noted that "the following evidence was presented to the court. . . . On March 14, 2007, Brooks pleaded guilty to one count of conspiracy to commit robbery in violation of General Statutes § 53a-134. He received a sentence of fifty months to serve. On March 9, 2008, while incarcerated, he wrote a letter to the Hartford Police Department, offering information about unsolved crimes, including the one that [the petitioner] was eventually convicted of. Not receiving a response, he then wrote a letter to the [office of the state's attorney for Hartford] on April 2, 2008, reiterating that he had information about unsolved homicides including the one that [the petitioner] was eventually convicted of. In that letter he indicated that he was serving a sentence and stated, 'I'm bringing this to the [state's] attention because I need your help and I will gladly help the [office of the state's attorney] if they please help me.' Brooks then gave a statement to police on April 16, 2008. In that statement, he stated that he saw [the petitioner] driving a red Ford Explorer with . . . Riley in the passenger seat. He then heard gunshots within seconds of the car driving past and, although he did not see who did the shooting, he knew the shots came from that car.

"In April, 2012, Brooks had two matters pending: one involved an alleged robbery and the other involved narcotics. On April 9, 2012, Brooks and his attorney . . . Dubay, appeared before Judge Alexander, and Brooks entered a plea of guilty to one count of possession of narcotics in violation of General Statutes § 21a-279 (a). At the same time, the state declined to prosecute the robbery charge. [Prosecutor] Rubino explained on the record that the state 'couldn't determine [Brooks']

role in that particular robbery.' . . . [Dubay] added that . . . '[t]here was really nothing to tie him to the robbery in any fashion.' Brooks was then sentenced to three years' incarceration, execution suspended, followed by three years' probation. Subsequently, he was arrested on May 30, 2012, for further narcotics offenses and was also charged with violating his probation. [Dubay] once again represented him on that matter.

"On March 5, 2013, Brooks testified at [the petitioner's criminal] trial. The first questions asked by [Prosecutor] Fahey, on direct [examination], were whether Brooks had felony convictions and whether he had pending cases. He answered those questions truthfully. [Fahey] then asked whether he had written letters to the police department and the [office of the state's attorney] offering information, which he again answered truthfully. While his recollection had to be refreshed with his statement to police, he ultimately testified consistently with his statement and identified [the petitioner] as the driver of the vehicle from which shots were fired. His testimony on direct examination was very brief. [McMahon] then cross-examined Brooks at length about his drug use and how that affected his memory and his ability to recall. . . . [McMahon] also cross-examined Brooks about the circumstances of his statement to police and his motivations for contacting them from jail two years after the incident. Brooks maintained that he did so because it was the right thing to do. He was also asked if he hoped for or expected anything in exchange for the information he provided to police, and he answered no.

"On March 27, 2013, Brooks pleaded guilty to one count of possession of narcotics in violation of . . . § 21a-279 (a) and admitted that he violated his probation. The agreement was for a sentence of three years' incarceration, execution suspended, followed by three

years' probation. In support of the agreement, [Prosecutor] Weber stated that [Dubay] had 'provided documentation [that led] the state to believe that [Brooks] should be given an additional opportunity to complete probation.' When given the opportunity, [Dubay] stated that he thought it was 'a fair disposition [because Brooks had] been . . . enrolled in drug treatment [and had] been coming up with negative urines and [was] on the right path . . . .' "

The habeas court recounted that Dubay, in fact, had not been "aware [at the time] that Brooks was a witness to a homicide" or "that Brooks had cooperated. Thus, he would not have been able to fashion an agreement for Brooks that took into account cooperation." Similarly, the habeas court noted that Fahey, who called Brooks as a witness in the petitioner's criminal trial, had not had "any conversations with the prosecutor prosecuting Brooks prior to Brooks' testimony" and "was clear that he did not give Brooks any consideration, was not approached by anyone to give Brooks consideration and did not instruct anyone to give Brooks consideration." The habeas court further noted that McMahon, during his representation of the petitioner, had "raised the issue" and had been "told [that] there was no . . . benefit promised" for Brooks' cooperation. The habeas court, therefore, found that the petitioner had "presented absolutely no evidence of any cooperation agreement with or promised benefit to Brooks" in exchange for his testimony at the petitioner's criminal trial. "Without such evidence," the habeas court reasoned, "there is no due process violation and . . . McMahon cannot have performed deficiently. . . . The petition is denied." Thereafter, the court granted the petition for certification to appeal, and this appeal followed.

On appeal, the petitioner claims that the habeas court's denial of his motion for a continuance to secure

Brooks' testimony was both a violation of his due process rights and an abuse of the court's discretion.[5] We disagree.

"The determination of whether to grant a request for a continuance is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. . . .

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . . In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." (Internal quotation marks omitted.) *State* v. *Godbolt*, 161 Conn. App. 367, 374–75, 127 A.3d 1139 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016).

Although "[a] reviewing court ordinarily analyzes a denial of a continuance in terms of whether the court has abused its discretion . . . [t]his is so where the denial is not directly linked to a specific constitutional right. . . . If . . . the denial of a continuance is

[5] The petitioner also argues that the court violated his right to due process and abused its discretion when it issued a capias that did not require Brooks to be taken into custody overnight. Beyond this bald assertion, the petitioner has failed to brief his due process claim as it relates to the capias and we therefore decline to review it. Furthermore, because the petitioner did not ask the court to issue a capias that provided for Brooks' overnight incarceration, or take exception to the court's order, his claim that the court abused its discretion is unpreserved.

directly linked to the deprivation of a specific constitutional right, some courts analyze the denial in terms of whether there has been a denial of [such right]." (Internal quotation marks omitted.) *State* v. *Brown*, 195 Conn. App. 244, 258, 224 A.3d 905, cert. denied, 335 Conn. 902, 225 A.3d 685 (2020). "Even if the denial of a motion for a continuance on the ground of lack of due process can be directly linked to a claim of a denial of a specific constitutional right, if the reasons given for the continuance do not support any interference with the specific constitutional right, the court's analysis will revolve around whether the trial court abused its discretion. . . . In other words, the constitutional right alleged to have been violated must be shown, not merely alleged." (Citation omitted.) *In re Shaquanna M.*, 61 Conn. App. 592, 602–603, 767 A.2d 155 (2001). "A denial of constitutional due process, when shown by the particular facts, does not involve discretion because due process is an absolute right guaranteed by the constitution and allows the court no choice. 'Due process' may be a phrase impossible of precise definition, but when an act is shown by reliable facts to affect a specific constitutional right . . . the analysis should turn on whether a due process violation exists rather than whether there has been an abuse of discretion. A discretionary act and an act requiring due process are mutually exclusive." Id., 604.

"In connection with [the] inquiry into harmless error, [w]e distinguish between [these] two types of cases: those in which a constitutional right has been implicated by a denial of a continuance, and those of a nonconstitutional nature. . . . Although prejudice is presumed in instances in which a defendant has suffered a deprivation of a constitutional right, in order to establish reversible error in nonconstitutional claims, the defendant must prove both an abuse of discretion and harm. . . . In this evaluation as to whether the

party denied a continuance has been harmed, we have found prejudice when the denial of a continuance precluded a defendant from obtaining the testimony of a witness known to possess exculpatory information. . . . We have declined, however, to find prejudice in instances in which a defendant can do no more than offer mere conjecture or rank speculation as to the harm flowing from a denial of a continuance." (Citations omitted; internal quotation marks omitted.) *State* v. *Coney*, 266 Conn. 787, 802, 835 A.2d 977 (2003).

As to the petitioner's claim on appeal that the habeas court's denial of his motion for a continuance violated his due process rights, he argues that the court denied him the "right to present evidence in support of his habeas petition in violation of . . . article first, §§ 8, 10, and 12, of the [Connecticut] constitution and the fifth and fourteenth amendments to the [United States] constitution."[6] Because the petitioner did not assert this constitutional claim before the trial court, it is unpreserved. Thus, the petitioner seeks review of this unpreserved claim pursuant to *State* v. *Golding*, 213 Conn.

[6] The fifth amendment to the United States constitution provides in relevant part that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law . . . ."

The fourteenth amendment to the United States constitution provides in relevant part that no state shall "deprive any person of life, liberty, or property, without due process of law . . . ."

Article first, § 8, of the Connecticut constitution provides in relevant part that, "[i]n all criminal prosecutions, the accused shall have a right to be heard . . . to be confronted by the witnesses against him; [and] to have compulsory process to obtain witnesses in his behalf . . . . No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

Article first, § 10, of the Connecticut constitution provides that "[a]ll courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

Article first, § 12, of the Connecticut constitution provides that "[t]he privileges of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature."

233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Pursuant to the *Golding* doctrine, we may review an unpreserved claim only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Emphasis in original; internal quotation marks omitted.) *In re Na-Ki J.*, 222 Conn. App. 1, 7, 303 A.3d 1206, cert. denied, 348 Conn. 929, 304 A.3d 860 (2023). Assuming, without deciding, that this claim is reviewable under the first two prongs of *Golding*, we nevertheless conclude that the petitioner's claim fails under the third prong of *Golding*.

The petitioner asserts that the habeas court's denial of his motion for a continuance violates his constitutional right to present evidence and his rights under article first, §§ 8, 10, or 12, of the Connecticut constitution and the due process clauses of the fifth and fourteenth amendments to the United States constitution. We conclude that no constitutional violation exists. The petitioner does not cite any case that supports his assertion that a habeas court violates a petitioner's due process right to present evidence by imposing reasonable limits on the number of delays in the habeas proceedings. To the contrary, "[t]he trial court has the responsibility to avoid unnecessary interruptions, to maintain the orderly procedure of the court docket, and to prevent any interference with the fair administration of

justice. . . . Once a trial has begun . . . a defendant's right to due process . . . [does not entitle] him to a continuance upon demand." (Internal quotation marks omitted.) *State* v. *Godbolt*, supra, 161 Conn. App. 376. Three of the cases the petitioner cites to support his assertion concern a court's denial of *any* opportunity to be heard. See *Bloom* v. *Zoning Board of Appeals*, 233 Conn. 198, 205, 658 A.2d 559 (1995); *Sassone* v. *Lepore*, 226 Conn. 773, 777, 629 A.2d 357 (1993); *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 55, 459 A.2d 503 (1983). The other two cases the petitioner cites involved administrative hearings that provided little or no opportunity for the accused to present evidence. See *Wolff* v. *McDonnell*, 418 U.S. 539, 566, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (discussing prison disciplinary proceedings that did not provide inmates with opportunity to present evidence);[7] *Jenkins* v. *McKeithen*, 395 U.S. 411, 428–29, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969) (finding that Louisiana law establishing labor commission procedures violated due process by "drastically limit[ing]" right of persons investigated to present evidence). Here, in contrast, the petitioner was able to offer numerous exhibits and the testimony of several witnesses over three days of trial. Further, the court granted an earlier motion for a continuance, after trial had commenced, to afford the petitioner additional time—nearly two months—to secure Brooks' appearance, and it later issued a capias for Brooks at the petitioner's request. We, therefore, conclude that the court provided the petitioner with ample opportunity to present evidence at his habeas trial. For the foregoing

[7] We further note that, even if the habeas court in the present case had severely restricted the petitioner's ability to present evidence, *Wolff* v. *McDonnell*, supra, 418 U.S. 539, is not particularly supportive of the petitioner's claim. In *Wolff*, the United States Supreme Court expressed support for limits on the right to present evidence in the context of that particular case, which involved the right to call witnesses from the prison population and to present documentary evidence during inmate disciplinary proceedings. Id., 566.

reasons, the petitioner's claim fails under *Golding*'s third prong.

The petitioner also claims that the habeas court's denial of his motion for a continuance was an abuse of its discretion. He argues that the denial was improper because Mortimer did everything in his power to secure Brooks' testimony, the delay associated with the continuance is not likely to have been lengthy, and the inconvenience to the court would have been minimal. Further, the petitioner contends that the improper denial harmed him because the habeas court ultimately found, after declining to issue the orders necessary to secure Brooks' testimony, that the petitioner failed to prove the existence of an agreement for Brooks' cooperation with his criminal trial. We are not persuaded.

"Among the factors that may enter into the court's exercise of discretion in considering a request for a continuance are the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the [petitioner's] personal responsibility for the timing of the request; [and, if relevant] the likelihood that the denial would substantially impair the defendant's ability to defend himself. . . . We are especially hesitant to find an abuse of discretion where the court has denied a motion for continuance made on the day of the trial. . . .

"Lastly, we emphasize that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance." (Internal quotation marks omitted.) *State* v. *Brown*, supra, 195 Conn. App. 259.

In the present case, the habeas court, in denying the motion for a continuance, properly considered the continuance it previously granted and the capias it issued. The court was also aware that the victim's family was present in the courtroom, because counsel for the respondent, the Commissioner of Correction, argued, in response to the petitioner's motion for a continuance, that she had "[the victim's] father and his sister here and they deserve closure." Moreover, the petitioner's proffered reasons for requesting the continuance gave the court no assurances that Brooks would appear if the court granted the continuance.[8] In light of the habeas court's previous actions, and notwithstanding its acknowledgement of the importance of Brooks to the petitioner's case, the court expressed concern about "[allowing] this to proceed" on the basis of "the *hope* that, *maybe*, someday, [Brooks will] agree to show up." (Emphasis added.) In the past, our courts have held that a denial of a motion for a continuance was not an abuse of discretion when, as in the present case, the length of the continuance was unspecified and the movant did not make a showing of his ability to achieve the purpose of the continuance. See, e.g., *State* v. *Hamilton*, 228 Conn. 234, 247–48, 636 A.2d 760 (1994); *State* v. *Godbolt*, supra, 161 Conn. App. 376–77. Making every reasonable presumption in favor of the proper exercise of the habeas court's discretion, we conclude that the petitioner failed to sustain his burden of showing that the habeas court's denial of his motion for a continuance was arbitrary. Therefore, we hold that the court did not abuse its discretion.[9]

[8] In requesting the continuance, Mortimer argued that Brooks is "an important witness in this case . . . and, perhaps, with additional time, knowing his location, he will return home and be able to be picked up by the marshals. [That] would be our hope."

[9] Even if we were to find an abuse of the court's discretion, the petitioner's claim is still unavailing because he failed to demonstrate harm stemming from the alleged abuse of discretion. McMahon, Fahey, and Dubay consistently and unequivocally testified that they had no knowledge of any agreement to provide consideration to Brooks for his cooperation in the petitioner's criminal case. Furthermore, Brooks' previous testimony reveals his

The judgment is affirmed.

In this opinion the other judges concurred.

JOAN BUZZARD *v.* LAURA FASS ET AL.
(AC 46257)

Elgo, Clark and Lavine, Js.

Syllabus

Pursuant to statute (§ 45a-731), "[a] final decree of adoption . . . shall have the following effect in this state . . . (4) The adopted person shall, except as hereinafter provided, be treated as if such adopted person were the biological child of the adoptive parent for purposes of the applicability of all documents and instruments, whether executed before or after the adoption decree is issued, which do not expressly exclude an adopted person in their operation or effect."

Pursuant further to statute (§ 45a-731 (11), "[t]he provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959, and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend, unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence, or (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be made pursuant to court order entered prior to October 1, 1991."

The plaintiff appealed to the Superior Court from an order of the Probate Court overruling her objection to the approval of a periodic accounting of a testamentary trust, which had provided for distributions to the defendants, F and W, the adopted great grandnieces of the testator, T. In 1946, T executed a will and two codicils. T's will established a testamentary trust for the benefit of the descendants of his siblings. T's sister and the living issue of T's other siblings were designated as the original beneficiaries. T died in 1947, and, in 1949, the Probate Court issued a decree that transferred the "rest, residue and remainder" of

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repeated insistence that he had not received or been offered consideration for his testimony during the petitioner's criminal trial. The petitioner provided no argument as to how Brooks' testimony at the habeas trial would have differed from his previous testimony or how that testimony could have overcome other evidence in the record. See *State* v. *Rivera*, 268 Conn. 351, 380–81, 844 A.2d 191 (2004) (upholding court's denial of defendant's motion for continuance to rehabilitate absent alibi witness because "the defendant failed to establish that any further testimony provided by [the absent witness] upon redirect examination would have been anything other than cumulative of her previous testimony" or would provide "any further explanations . . . other than those that had already been heard by the jury").

T's estate to the trustee, so that the trustee could make distributions in accordance with the trust. W was adopted as a child in 1948 by a descendant of one of the original beneficiaries and began receiving distributions under the trust upon the death of her parent in 1997. F was adopted in 2008 as an adult by one of the descendants of the original beneficiaries and began receiving distributions under the trust in 2014 upon the death of her parent. In 2019, the plaintiff filed an objection in the Probate Court to the approval of a periodic accounting of the trust, arguing that the trust did not allow for distributions to F because she had been adopted as an adult. The Probate Court approved the periodic accounting, concluding that the presumption in favor of adopted persons in § 45a-731 (4) applied, and the plaintiff appealed to the Superior Court, where the defendants filed motions for summary judgment, arguing that they were included within the terms "issue" and "descendants" used in the trust pursuant to § 45a-731 (4). The plaintiff filed a motion for summary judgment, arguing that the exceptions to § 45a-731 (4) in § 45a-731 (11) applied and, therefore, the only persons permitted to receive distributions from the trust were the originally named beneficiaries and their lineal blood descendants. The Superior Court granted the defendants' motions for summary judgment and denied the plaintiff's motion for summary judgment, rejecting the plaintiff's contention that the exceptions to § 45a-731 (4) delineated in § 45a-731 (11) applied. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the Superior Court erred in rendering summary judgment for the defendants, which was based on her claim that the exception to the presumption in favor of adopted persons set forth in § 45a-731 (11) (B) applied: the 1949 decree, which transferred the rest, residue and remainder of the estate to the trustee, did not constitute a "distribution" for purposes of § 45a-731 (11) (B) so as to require the application of the outmoded "stranger to the adoption" rule, which presumed that an adopted child was not within the intended bounty of a settlor who was not the adopting parent, because the 1949 decree did not finalize the apportionment of the remainder of the estate under the will, as distributions to those who were entitled to share in the estate under the testamentary trust were still to occur into the future, with the beneficiaries under the trust continually changing upon the birth and death of T's descendants, and the trust remained under the jurisdiction of the Probate Court; moreover, other than the plaintiff's threadbare assertion that the 1949 decree fixed the identity of the distributees under the trust, the plaintiff did not explain how that decree vested any interest in any beneficiary of the trust, rather, the record showed that the 1949 decree simply transferred to the trustee the residue of the estate so that the trustee could, in turn, make distributions to the proper beneficiaries; furthermore, although some distributions under the trust were made prior to October 1, 1991, other distributions were made and

approved after that date, and, therefore, § 45a-731 (11) (B) applies only to trust distributions made or approved to be made pursuant to a court order entered prior to October 1, 1991, and does not apply to those distributions, such as the distribution challenged in this appeal, made after that date.

2. The plaintiff's claim that the exception to the presumption in favor of adopted persons set forth in § 45a-731 (11) (A) applied because there was clear and convincing evidence that T did not intend to include adopted persons as beneficiaries under the trust was unavailing: there was no rule of law at the time T's will was executed in 1946 excluding adopted persons from the definition of "issue" or "descendants," rather, under the common law, there existed a mere presumption against including an adopted person within those terms when a testator's intent was unclear, and, although the presumption in effect when T executed his will led some courts to interpret terms like the term "issue" to exclude adopted persons, that presumption no longer applies because, in 1991, the legislature altered that presumption, and, as a result, this court presumes that the terms "issue" and "descendants" include legally adopted persons when interpreting instruments that control distributions made in accordance with a will or an estate of a person that died prior to October 1, 1959; moreover, the plaintiff's argument that T's use of the terms "issue" and "descendants" constituted clear and convincing evidence of an intent to exclude adopted persons because the old common-law presumption excluded them conflated T's actual intent with a rule of construction, and, although the terms "issue" and "descendants" may have been presumed to exclude adopted persons at the time the will was executed, the use of these terms in a will or trust, in the absence of evidence that a testator actually considered the contingency of adoption, does not provide the requisite clear and convincing evidence of T's intention that adopted persons be treated differently from biological children; furthermore, although T executed a first codicil in which he added the word "the" into the trust document, so that the trust as amended provides that the interest of any of the original beneficiaries shall be held upon the same terms for the benefit of "*the* other beneficiaries then living and/or their issue or successors," the addition of that clarifying word did not imply anything with respect to T's intent as to adopted persons and did not constitute clear and convincing evidence of an intention to exclude them.

Argued January 9—officially released May 7, 2024

Procedural History

Appeal from the decree of the Probate Court for the district of Hartford approving the periodic accounting of a testamentary trust, brought to the Superior Court in the judicial district of Hartford, where the court,

Sicilian, *J.*, granted the defendants' motions for summary judgment, denied the plaintiff's motion for summary judgment, and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

John F. Carberry, with whom, on the brief, were *Kelley Galica Peck* and *M. Juliet Bonazzoli*, for the appellant (plaintiff).

Steven L. Katz, with whom was *Alan J. Rome*, for the appellee (named defendant).

Patrick M. Fahey, for the appellee (defendant Pamela Baker Weiss).

Opinion

CLARK, J. The dispositive issue in this appeal is whether the defendants, Laura Fass and Pamela Baker Weiss, the adopted great grandnieces of Joseph Merrow, the testator, are included within the terms "issue" and "descendants" used in a testamentary trust executed by the testator in 1946. The plaintiff, Joan Buzzard, claims that the only persons permitted to receive distributions under the subject trust are the originally named beneficiaries and their lineal blood descendants, not the adopted defendants. The plaintiff claims that the Superior Court improperly granted the defendants' motions for summary judgment and denied her motion for summary judgment because it erroneously concluded that General Statutes § 45a-731 (4),[1] which provides that the terms "issue" and "descendants" when

[1] General Statutes § 45a-731 provides in relevant part: "A final decree of adoption, whether issued by a court of this state or a court of any other jurisdiction, shall have the following effect in this state . . . (4) The adopted person shall, except as hereinafter provided, be treated as if such adopted person were the biological child of the adoptive parent for purposes of the applicability of all documents and instruments, whether executed before or after the adoption decree is issued, which do not expressly exclude an adopted person in their operation or effect. The words 'child', 'children', 'issue', 'descendant', 'descendants', 'heir', 'heirs', 'lawful heirs', 'grandchild' and 'grandchildren', when used in any will or trust instrument shall include legally adopted persons unless such document clearly indicates a contrary intention. . . ."

used in a will or trust shall include legally adopted persons, applied to the trust at issue in this case. She claims that the definitions set forth in § 45a-731 (4) do not apply to the subject trust because the exceptions to their application that are set forth in § 45a-731 (11) (A) and (B)[2] apply in this case. For the reasons that follow, we disagree with the plaintiff and affirm the judgment of the Superior Court.

We begin with the relevant undisputed facts and procedural history of the case. The testator died on or about March 27, 1947. He never had children and he had no living siblings at the time of his death. The testator executed a will on March 19, 1946, and later executed two codicils, one on July 1, 1946 (first codicil), and another on September 6, 1946 (second codicil). The will established three testamentary trusts for the benefit of the descendants of his siblings: the Article Fifth Trust, the Article Sixth Trust, and the Article Eighth Trust. The Article Eighth Trust (trust) is the subject of the present dispute.

The trust provides for a contingent, outright distribution of a portion of the interests in the trust proceeds to the testator's nephew, John Merrow Washburn, but it otherwise designated the testator's sister, Mary W. Merrow, who had no children, and the living issue of the testator's other two siblings, George W. Merrow and Martha Belden Washburn, as original beneficiaries.[3]

[2] General Statutes § 45a-731 provides in relevant part: "(11) The provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959, and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend, unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence, or (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be made pursuant to court order entered prior to October 1, 1991 . . . ."

[3] The testator's sister, Mary W. Merrow, who was living at the time that the testator executed his original will, predeceased the testator. The testator expressly noted in the first codicil that he had taken that unfortunate contin-

Relevant for present purposes, the testator's brother, George W. Merrow, had nine children, four of whom, John Merrow, Oliver Wolcott Merrow, Pauline M. Baker, and Harriet M. Landon, also had children. John Merrow had three biological children, all of whom had biological children, and Oliver Wolcott Merrow had three children, all of whom had biological children. Pauline M. Baker had three biological children. One of Pauline M. Baker's children, William Baker, adopted Weiss, who was born in April, 1946, and was placed for adoption with William Baker and his wife in or around February, 1947. Weiss' adoption was approved by the Hartford Probate Court on March 19, 1948. Harriet M. Landon had one biological daughter, Elizabeth M. Landon, who had no biological children. Elizabeth M. Landon adopted Fass in 2008, when Elizabeth M. Landon was eighty-five years old and Fass was fifty-three years old.

The trust provides in relevant part: "If any of the original beneficiaries or their successors in interest as herein determined shall die either before or after my death leaving issue, the interest of the one so dying shall thereafter be held upon the same terms for the benefit of such issue, per stirpes. If any of the original beneficiaries or their successors in interest as herein determined shall die either before or after my death leaving no issue, the interest of the one so dying shall thereafter be held upon the same terms for the benefit of [the] other beneficiaries then living and/or their issue or successors . . . in the same proportions in which they would inherit from the one so dying without issue if he or she were unmarried under the laws covering the distribution of intestate estates then in force in the State of Connecticut; it being my intention that the beneficial interests from the institution of this trust until its termination shall devolve through the line of

gency into account when he drafted his will and noted that her death resulted in an adjustment to the beneficiaries' respective interests.

descent or inheritance without including husbands or wives of any of the beneficiaries so that at the termination hereof the distributees shall all be descendants of one or more of the original named beneficiaries . . . .'' (Emphasis in original.)

Upon the death of William Baker in 1997, Weiss succeeded to his interest. She began receiving distributions under the trust whenever the trustee made distributions. Specifically, as her father's only child, Weiss received the entirety of what previously had been her father's share of each distribution from the trust.[4]

After the death of Elizabeth M. Landon in 2014, the distributions that were payable to her under the trust were paid to Fass. An accounting listing Fass as a beneficiary of the trust was approved by the Probate Court in 2015. Fass received distributions from the trust from 2014 to 2019.

On or about December 5, 2019, the plaintiff filed an objection in the Probate Court to the approval of a periodic accounting of the trust. On January 6, 2020, a hearing was held by the Probate Court on the approval of the periodic accounting and the objection filed by the plaintiff. At the hearing, the plaintiff's counsel argued that the trust document did not allow for distributions of the trust proceeds to Fass because she was adopted by Elizabeth M. Landon in 2008, when Fass was an adult. Notwithstanding § 45a-731, which generally provides that an adopted person shall have the same rights of inheritance as a biological child, the plaintiff's counsel argued that the trust document did not allow

[4] When Weiss' aunt, Ellen E. Baker, died in 2005 without issue, Weiss also received the entirety of what previously had been her aunt's share of the distributions from the trust. The testator made specific provisions for a beneficiary dying without issue. In such a circumstance, distributions would be paid under the laws covering the distribution of intestate estates then in effect in Connecticut. Weiss was the only person who inherited from Ellen E. Baker under Connecticut's intestacy laws.

for a descendant not related to the testator by blood to receive distributions from the trust. Counsel for Fass and for the other beneficiaries under the trust, including Weiss, opposed the plaintiff's objection during the hearing. The hearing on the periodic accounting was adjourned and the court ordered the parties to submit briefs on the plaintiff's objection.

On June 9, 2020, the Probate Court rejected the plaintiff's argument that the narrow exceptions to § 45a-731 (4) that are set forth in § 45a-731 (11) were applicable. Accordingly, the Probate Court approved the periodic accounting presented to it, thereby allowing Fass and Weiss to continue receiving distributions under the trust.

On July 9, 2020, pursuant to General Statutes § 45a-186,[5] the plaintiff appealed to the Superior Court. In her complaint, the plaintiff alleged that the Probate Court erroneously concluded that there was insufficient evidence of the testator's intent to exclude adopted persons. She also argued that a 1949 Probate Court decree (1949 decree) "definitively established that the beneficiaries entitled to distribution under the will were those individuals expressly named in the will and their descendants of the blood and not by adoption, whether then living or thereafter born, prior to the final termination of the continuing trust under the will."

On February 28 and March 18, 2022, Fass and Weiss, respectively, filed motions for summary judgment. They claimed that § 45a-731 (4), which provides that the terms "issue" and "descendants," when used in a will or trust, are to include legally adopted persons, applied to the testator's will that created the subject trust. They claimed that the exceptions to § 45a-731 (4) set forth

[5] General Statutes § 45a-186 (b) provides in relevant part: "Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . ."

in § 45a-731 (11) did not apply. Specifically, they argued that the plaintiff failed to establish by clear and convincing evidence that the testator had intended to exclude adopted persons from taking under the trust or that the trust had been distributed prior to October 1, 1991.

On April 6, 2022, the plaintiff filed a motion for summary judgment. She argued that subdivisions (1) through (9) of § 45a-731 were inapplicable because the exceptions to their application, set forth in § 45a-731 (11), applied. In particular, she claimed that the exception set forth in § 45a-731 (11) (B) was satisfied because the testator died before October 1, 1959, and the 1949 decree was a "court order entered prior to October 1, 1991," that distributed the estate. The plaintiff further claimed that the exception set forth in § 45a-731 (11) (A) also was satisfied because the testator's intent to exclude adopted persons was clear and unequivocal. As a result, the plaintiff argued that § 45a-731 (4) was inapplicable to the distributions at issue and that the court was required to give the words in the testator's will their ordinary meaning at the time the will was written and when the testator died. The plaintiff argued that the law at the time the will was written and when the testator died required the court to construe the will to exclude adopted persons as potential beneficiaries because the testator used the terms "issue" and "descendants" without any expression of an intent to include adopted persons. The plaintiff claimed that those terms, as they were ordinarily understood in 1946 and 1947, meant only " 'lineal blood relationships' . . . ." (Citation omitted.)

On January 24, 2023, the court, *Sicilian*, *J.*, issued a memorandum of decision granting the motions for summary judgment filed by Fass and Weiss, and denying the motion for summary judgment filed by the plaintiff. The court concluded that the exceptions set forth in § 45a-731 (11) did not apply to the undisputed facts of

this case and, therefore, Fass and Weiss were entitled to distributions under the trust. The court rejected the plaintiff's contention that § 45a-731 (11) (B) applied by its plain terms because the testator's estate was distributed to trusts pursuant to the 1949 decree. The court stated that, "[p]lainly, there has been no final distribution of the assets of the estate to the beneficiaries of the trusts, and the testamentary trust has remained under the jurisdiction of the Probate Court and, as evidenced by the decree challenged in this probate appeal, the Probate Court has been presented with periodic accountings seeking approval of distributions to be made."

The court further explained that, contrary to the plaintiff's contention, § 45a-731 (11) (B) does not unambiguously require a court to apply the outmoded " 'stranger to the adoption' " presumption to exclude adopted children from the class of beneficiaries of the trust for purposes of distributions neither made nor approved prior to October 1, 1991. The court reasoned that "[t]he legislature has made clear that its intent is to have adopted children treated equally with biological children, absent a clearly expressed contrary intent and except where doing so would disrupt distributions previously made pursuant to a court order. Section 45a-731 (11), if interpreted to exempt every testamentary trust that was subject to a probate decree prior to October 1, 1991, from the application of the modern presumption favoring adopted persons would significantly undermine the legislature's clearly expressed intention." The court thus concluded that § 45a-731 (11) (B) "applies, in the context of testamentary trusts established prior to October 1, 1991, only to trust distributions made or approved to be made pursuant to court order entered prior to that date."

With respect to the exception set forth in § 45a-731 (11) (A), the court concluded that the plaintiff had failed

to prove by clear and convincing evidence that the testator intended to exclude adopted persons from the class of beneficiaries created under the trust. Specifically, the court was not persuaded by the plaintiff's argument that a testator's failure to expressly include adopted persons in the trust constituted clear and convincing evidence of an intention to exclude them. The court concluded that such a "proposition [was] untenable" and "would contravene the legislature's intention as reflected in § 45a-731 (4) and . . . (11)." In so concluding, the court noted that "[the plaintiff] herself appear[ed] to acknowledge the problem with her argument when she [said]: 'It is possible the legislature, in adopting [§ 45a-731 (11)] expected that there be some additional evidence beyond the isolated use of the words recited in [§ 45a-731 (4)].' " The court explained that "it is more than possible," as "[t]he plain import of § 45a-731 (4) and . . . (11), and of its predecessor statutes dating back to 1959, was to change the presumption of exclusion of adopted persons to a presumption of inclusion of adopted persons."

The court went on to reject each of the plaintiff's additional arguments. Specifically, the court was not persuaded by the plaintiff's argument that the addition of the word "the" in the first codicil implied anything about adopted persons. Nor was it persuaded by the plaintiff's contention that the provision of the will excluding spouses of the descendants of the testator's siblings shed any light on the testator's intention regarding adopted persons. Accordingly, the court concluded that the "[the plaintiff] fail[ed] to provide clear and convincing evidence that the testator intended to exclude adopted persons as beneficiaries of the trust at issue." This appeal followed. Additional facts and procedural history will be set forth as necessary.

As a preliminary matter, we set forth the appropriate framework for appellate review of a summary judgment

determination. Practice Book § 17-49 provides: "The judgment sought shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Doe* v. *New Haven*, 214 Conn. App. 553, 563, 281 A.3d 480 (2022). "[T]he moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle [her] to a judgment as a matter of law." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 11, 938 A.2d 576 (2008). "[W]e must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Cefaratti* v. *Aranow*, 321 Conn. 637, 645, 138 A.3d 837 (2016). Our review of the trial court's rulings on the parties' motions for summary judgment is plenary. See, e.g., *Community Renewal Team, Inc.* v. *United States Liability Ins. Co.*, 128 Conn. App. 174, 177, 17 A.3d 88, cert. denied, 301 Conn. 918, 21 A.3d 463 (2011). Because the resolution of this appeal requires us to interpret § 45a-731 (11), which sets forth the exceptions to § 45a-731 (4), we are presented with an issue of statutory interpretation over which our review also is plenary. See, e.g., *Doe* v. *West Hartford*, 328 Conn. 172, 181, 177 A.3d 1128 (2018) ("[w]hen we are called upon to construe a statute that is implicated by a summary judgment motion, our review is plenary").

Before we turn to the merits of the plaintiff's claims, we begin with a brief history and overview of the law governing the inheritance rights of adopted persons in Connecticut. Prior to 1959, "[w]here the grantor or testator [was] the adopting parent, it [was] reasonable to presume that the adopted child was within the intended bounty of such grantor or testator." (Internal quotation marks omitted.) *Middletown Trust Co.* v. *Gaffey*, 96 Conn. 61, 71, 112 A. 689 (1921). That presumption, however, did not apply to a grantor or testator who was not the adopting parent. See *Mooney* v. *Tolles*, 111 Conn. 1, 9, 149 A. 515 (1930). Connecticut courts "presumed that an adopted child [was] not within the intended bounty of a settlor who, as a nonadopting parent, [was] a stranger to the adoption." *Schapira* v. *Connecticut Bank & Trust Co.*, 204 Conn. 450, 455, 528 A.2d 367 (1987). "[T]he common law favor[ed] ancestral blood and [would] presume that the settlor did not intend that a stranger to his blood take." *Connecticut Bank & Trust Co.* v. *Bovey*, 162 Conn. 201, 207, 292 A.2d 899 (1972). This has become known as the "stranger to the adoption" doctrine. *Mooney* v. *Tolles*, supra, 9.

In 1959, the legislature enacted No. 106 of the 1959 Public Acts (P.A. 106),[6] a predecessor of § 45a-731, which effectively abrogated the "stranger to the adoption" rule by replacing the common-law presumption against including adopted persons as beneficiaries of a will or trust with a presumption that adopted persons were intended to be included as beneficiaries. By the plain terms of P.A. 106, which was codified at General

[6] "Number 106 of the 1959 Public Acts provided in pertinent part: 'The words "child", "children", "issue", "descendant", "descendants", "heir", "heirs", "lawful heirs", "grandchild", "grandchildren", when used in the singular or plural in any will or trust instrument, shall, unless such document clearly indicates a contrary intention, include legally adopted persons. . . . The provisions of this act shall apply to wills and trust instruments executed subsequent to the effective date hereof.' " *Connecticut National Bank & Trust Co.* v. *Chadwick*, 217 Conn. 260, 264 n.2, 585 A.2d 1189 (1991).

Statutes (Cum. Supp. 1961) § 45-65a, however, the legislature limited that statute's application to wills and trusts executed "subsequent" to October 1, 1959. See, e.g., *Parker* v. *Mullen*, 158 Conn. 1, 5 n.1, 255 A.2d 851 (1969); *Connecticut Bank & Trust Co.* v. *Hills*, 157 Conn. 375, 378 n.1, 254 A.2d 453 (1969). Our courts therefore declined to apply § 45-65a retroactively to instruments executed prior to October 1, 1959. See, e.g., *Connecticut Bank & Trust Co.* v. *Bovey*, supra, 162 Conn. 209 ("we once again must refuse to hold . . . [§] 45-65a applicable retrospectively"). In 1973, the legislature enacted No. 73-156, § 21, of the 1973 Public Acts (P.A. 73-156), which repealed § 45-65a but specifically retained the statutory presumption in favor of adopted persons; see P.A. 73-156, § 14; which was subsequently codified at General Statutes (Rev. to 1975) § 45-64a (4).

For more than thirty years, the statutory presumption in favor of adopted persons continued to apply only to wills and trust instruments executed after October 1, 1959. In 1991, however, the legislature transferred the provisions of § 45-64a to § 45a-731 and made substantive changes to the law. Specifically, No. 91-83 of the 1991 Public Acts (P.A. 91-83) provides in relevant part that "[t]he provisions of subdivisions (1) to (9), inclusive, of [§ 45a-731]" shall apply "to the estate or wills of persons dying *prior* to October 1, 1959 . . . ." (Emphasis added.) Although the legislature expanded the presumption in favor of adopted persons to estates or wills of persons dying prior to October 1, 1959, it created two exceptions to this new rule. See P.A. 91-83. Specifically, P.A. 91-83 provides that subdivisions (1) through (9) of § 45a-731 would apply to the estate or wills of persons dying prior to October 1, 1959, "unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence or (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be

made pursuant to court order entered prior to October 1, 1991 . . . .''

As previously explained in this opinion, P.A. 91-83 transferred the statutory provisions governing the rights of adopted persons to § 45a-731. The relevant provisions of § 45a-731 for purposes of this appeal are located at § 45a-731 (4), (10), and (11). To that end, § 45a-731 provides in relevant part: ''A final decree of adoption, whether issued by a court of this state or a court of any other jurisdiction, shall have the following effect in this state . . . (4) The adopted person shall, except as hereinafter provided, be treated as if such adopted person were the biological child of the adoptive parent for purposes of the applicability of all documents and instruments, whether executed before or after the adoption decree is issued, which do not expressly exclude an adopted person in their operation or effect. The words 'child', 'children', 'issue', 'descendant', 'descendants', 'heir', 'heirs', 'lawful heirs', 'grandchild' and 'grandchildren', when used in any will or trust instrument shall include legally adopted persons unless such document clearly indicates a contrary intention. . . .''

Section 45a-731 provides in relevant part: ''(10) Except as provided in subdivision (11) of this section, the provisions of law in force prior to October 1, 1959, affected by the provisions of this section shall apply to the estates or wills of persons dying prior to said date and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend . . . .''

Section 45a-731 (11) instructs that ''[t]he provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959, and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend,

unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence, or (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be made pursuant to court order entered prior to October 1, 1991 . . . .'' General Statutes § 45a-731 (11).

With this background and overview of the relevant statutory provisions in mind, we turn to the plaintiff's claims on appeal.

I

The plaintiff first claims that the court erred in rendering summary judgment for the defendants because it improperly concluded that § 45a-731 (4) applies to the trust. Specifically, she directs this court to the 1949 decree, which she claims ''ascertained the distributees under the will and directed that the 'rest, residue and remainder of said estate be distributed, transferred and paid over to and among the distributees above named according to law and the provisions of the will of said decedent.' '' (Emphasis omitted.) She contends that, ''[u]pon issuance of the 1949 decree, the class of potential distributees under this will was fixed by order of the Probate Court,'' and that ''adopted persons could not be added to the class of potential beneficiaries after the 1949 decree was issued.'' In the plaintiff's view, once the Probate Court issued its 1949 decree identifying the distributees under the will, and once distribution was made to the trust pursuant to that decree, ''the rights of the biological descendants were fixed and vested . . . .'' (Citation omitted.) Accordingly, the plaintiff argues that the 1949 decree clearly falls within the exception set forth in § 47a-731 (11) (B) because that decree constitutes a court order entered ''prior to October 1, 1991'' pursuant to which ''distribution of the estate or under the will . . . has been or will be made . . . .''

The defendants disagree. Weiss takes issue with the plaintiff's contention that all the interests in the trust were "vested" by operation of the 1949 decree. Weiss points out that the 1949 decree did not vest any interest in the plaintiff or in any of the original beneficiaries of the trust, rather, that the distribution in the 1949 decree was only a distribution to the trustee of the trust. Weiss notes that the trust remains subject to the jurisdiction of the Probate Court and the beneficiaries of the trust continue to receive distributions. She argues that the trial court properly construed the exception in § 45a-731 (11) (B) in the context of a testamentary trust to apply " 'only to trust distributions made or approved to be made pursuant to a court order entered prior to [October 1, 1991].' "

Fass similarly argues that it is clear that the trust was not distributed for purposes of the exception set forth in § 45a-731 (11) (B) by virtue of the 1949 decree because future trust distributions remained subject to the ongoing jurisdiction and accounting approvals of the Probate Court. Fass argues that the plaintiff's contention that the 1949 decree constitutes a distribution for purposes of § 45a-731 (11) (B) runs counter to the legislature's clear intent to make § 45a-731 (4) retroactive to all estates or wills of persons dying prior to October 1, 1959. She further contends that the plaintiff's interpretation would result in an extremely narrow application of the statute's retroactive presumption in favor of adopted persons. The better and more logical interpretation of § 45a-731 (11) (B), Fass argues, is that it applies only to a final distribution to a beneficiary that was made prior to October 1, 1991, not to distributions to a testamentary trust that, by the terms of the trust, will result in future distributions to beneficiaries occurring after October 1, 1991. For the reasons that follow, we agree with the defendants and conclude that the presumption in favor of adopted persons set forth

in § 45a-731 (4) applies to the trust and distributions at issue in this appeal.

"When construing a statute, [o]ur 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. . . . The meaning of a statute shall, in the first instance, be ascertained from 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. General Statutes § 1-2z." (Citation omitted; internal quotation marks omitted.) *Seramonte Associates, LLC* v. *Hamden*, 345 Conn. 76, 83–84, 282 A.3d 1253 (2022).

Section 45a-731 provides in relevant part that "(11) [t]he provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959 . . . unless . . . (B) distribution of the estate or under the will or under the inter vivos instrument has been or will be made pursuant to court order entered prior to October 1, 1991 . . . ." The term "distribution" is not defined in § 45a-731 or elsewhere in chapter 803 of the General Statutes. As such, we must construe the term according to its commonly approved usage, mindful of any peculiar or technical meaning it may have assumed in the law. See General Statutes § 1-1 (a). Indeed, in the absence of statutory definitions, we often "find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme." *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015); see

also *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 697, 258 A.3d 1268 (2021) ("in the absence of statutory definitions, we look to the contemporaneous dictionary definitions of words to ascertain their commonly approved usage").

Contemporary to the 1991 amendment of § 45a-731, the word "distribution," in the probate context, was defined as "[t]he apportionment and division, under authority of a court, of the remainder of the estate of an intestate, after payment of the debts and charges, *among those who are legally entitled to share in the same*." (Emphasis added.) Black's Law Dictionary (6th Ed. 1990) p. 475. More generally, the term "distribution" meant "the act or process of distributing" or "something distributed . . . ." Webster's Ninth New Collegiate Dictionary (1990) p. 368.

We conclude that the plain language of § 45a-731 (11), in the context of the entire statute, evinces a clear legislative intent that adopted persons are to be presumptively treated the same as biological children for purposes of inheritance under estates or wills of persons dying prior to October 1, 1959. Indeed, subdivision (11) makes clear that the substantive provisions of the statute that require equal treatment of adopted persons (i.e., subdivisions (1) through (9) of § 45a-731) shall apply to the estates or wills of those dying prior to October 1, 1959, unless one of two narrow exceptions apply. As to the exception in § 45a-731 (11) (B), we conclude that the language makes clear the legislature's intent that subdivisions (1) through (9) of § 45a-731 shall apply to the estates or wills of those dying prior to October 1, 1959, but not to the extent that such an application of those subdivisions would disturb or otherwise invalidate a final distribution *to a beneficiary* that occurred *prior* to October 1, 1991, the effective date of the provision. See Black's Law Dictionary, supra, p. 475 (defining "[d]istribution" in probate context as

"[t]he apportionment and division, under authority of a court, of the remainder of the estate of an intestate, after payment of the debts and charges, *among those who are legally entitled to share in the same*" (emphasis added)).

In applying § 45a-731 to the facts of this case, we must reject the plaintiff's argument that the 1949 decree, which transferred the "rest, residue and remainder" of the estate to the trustee (i.e., so that the trustee could later make distributions in accordance with the testamentary trust), constitutes a distribution for purposes of § 45a-731 (11) (B) so as to require application of the outmoded "stranger to the adoption" rule to all trust distributions occurring after October 1, 1991. Although the 1949 decree in this case transferred to the trustee the "rest, residue and remainder" of the estate, that decree did not finalize the apportionment and division of the remainder of the estate under the will, as distributions to those who would be entitled to share in the remainder of the estate under the testamentary trust were still to occur into the future. As the trial court aptly noted, "the testamentary trust has remained under the jurisdiction of the Probate Court and, as evidenced by the decree challenged in this probate appeal, the Probate Court has been presented with periodic accountings seeking approval of distributions to be made."

Furthermore, the plaintiff's contention that the 1949 decree "affirm[ed] the identity of the distributees . . . and distribution was made pursuant to that [decree] [and] that the rights of the biological descendants were fixed and vested" at that time must also be rejected. Other than these threadbare assertions, the plaintiff has not sufficiently explained or demonstrated how the decree vested any interest in any beneficiary of the trust, let alone named or otherwise vested any interest in her. Rather, the record shows that the 1949 decree

simply transferred to the trustee the rest, residue and remainder of the estate so that the trustee, in turn, could make distributions from the estate to the proper beneficiaries. Although the plaintiff attempts to support her arguments by pointing to a few cases; see, e.g., *Middletown Trust Co.* v. *Gaffey*, supra, 96 Conn. 61; those authorities are inapposite to the facts of the present case and the question presented in this appeal.

The trust at issue, like many testamentary trusts, provides that distributions are to be made on a periodic basis into the future, with the beneficiaries under the trust continually changing upon the birth and/or death of the testator's descendants. Although various distributions "of the estate or under the will" were made prior to October 1, 1991; General Statutes § 45a-731 (11) (B); other distributions were made and approved after that date, including the distribution that the plaintiff challenges in this appeal. Given the nature of a testamentary trust so described, we agree with the Superior Court that, in a case like this, § 45a-731 (11) (B) applies only to *trust* distributions made or approved to be made pursuant to a court order entered prior to October 1, 1991. In other words, pursuant to the exception, subdivisions (1) through (9) of § 45a-731 do not apply to trust distributions made or approved to be made to a beneficiary pursuant to a court order entered prior to October 1, 1991. However, subdivisions (1) through (9) of § 45a-731 are generally applicable to trust distributions of a person who died prior to October 1, 1959, that occur after October 1, 1991.

Although the plaintiff would have us interpret the statute to mean that subdivisions (1) through (9) of § 45a-731 have no application to a testamentary trust of a person dying prior to October 1, 1959, if *any* transfer is made from an estate to a testamentary trust prior to October 1, 1991, so as to exempt from the modern

presumption favoring adopted persons any and all testamentary trust distributions made after October 1, 1991, such an interpretation effectively would render the retrospective provision in § 45a-731 (11) a nullity. Under the plaintiff's interpretation, there effectively would be no retrospective application of subdivisions (1) through (9) to an estate or under a will of a person dying prior October 1, 1959, except in instances in which administration of the estate or under the will remained in limbo, until at least October 1, 1991—a period of not less than thirty-two years after such person's death. It is axiomatic, however, that the legislature does "not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results"; (internal quotation marks omitted) *Dias* v. *Grady*, 292 Conn. 350, 361, 972 A.2d 715 (2009); and "that reviewing courts should not construe statutes in disregard of their context and in frustration of the obvious legislative intent or in a manner that is hostile to an evident legislative purpose . . . or in a way that is contrary to common sense." (Internal quotation marks omitted.) *State* v. *Banks*, 321 Conn. 821, 842, 146 A.3d 1 (2016). Accordingly, we conclude that the Superior Court properly determined that the exception set forth in § 45a-731 (11) (B) was inapplicable in this case.[7]

[7] In her appellate brief, the plaintiff makes a passing reference to a claim that she has been deprived of property without due process of law. Although the plaintiff asserted in her appeal to the Superior Court that the Probate Court's interpretation of § 45a-731 rendered that statute unconstitutional, she did not pursue a constitutional claim in her motion for summary judgment, her objection to the defendants' motions for summary judgment, or in her appellate brief before this court. Because this claim was neither decided by the Superior Court nor adequately briefed before this court, we deem that constitutional claim abandoned. See, e.g., *JPMorgan Chase Bank, National Assn.* v. *Virgulak*, 192 Conn. App. 688, 720 n.9, 218 A.3d 596 (2019) ("[t]o the extent that the plaintiff's few passing references in its appellate brief about the court's decision . . . can be read to challenge that decision, we conclude that the plaintiff abandoned such argument as a result of an inadequate brief"), aff'd, 341 Conn. 750, 267 A.3d 753 (2022).

II

The plaintiff next claims that, even if the exception in § 45a-731 (11) (B) does not apply, the exception in § 45a-731 (11) (A) applies because there is clear and convincing evidence that the testator did not intend to include adopted persons as beneficiaries under the trust. In support of that claim, she argues that the testator's use of the terms "issue" and "descendants" in the trust, without any reference to adopted persons, is clear and convincing evidence that he intended to exclude such persons as beneficiaries. She also argues that the testator's addition of the word "the" in the first codicil to the trust demonstrates a clear intent by the testator to exclude adopted persons as beneficiaries under the trust. We are not persuaded.

Section 45a-731 provides in relevant part that "(11) [t]he provisions of subdivisions (1) to (9), inclusive, of this section shall apply to the estate or wills of persons dying prior to October 1, 1959, and to inter vivos instruments executed prior to said date and which on said date were not subject to the grantor's power to revoke or amend, unless (A) a contrary intention of the testator or grantor is demonstrated by clear and convincing evidence . . . ."

Here, the parties dispute the retroactive application of the definitions set forth in § 45a-731 (4). That subdivision provides in relevant part that the words " 'issue' " and " 'descendants,' " "when used in any will or trust instrument shall include legally adopted persons unless such document clearly indicates a contrary intention." General Statutes § 45a-731 (4).

In order for the exception set forth in § 45a-731 (11) (A) to apply, therefore, the plaintiff must show that there is clear and convincing evidence that the testator did not intend for adopted persons to be included as beneficiaries under the testator's trust. Our courts have

explained that "[c]lear and convincing proof is a demanding standard denot[ing] a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution." (Internal quotation marks omitted.) *Blackwell* v. *Mahmood*, 120 Conn. App. 690, 700, 992 A.2d 1219 (2010). A plaintiff may sustain her burden "if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." (Internal quotation marks omitted.) *Notopoulos* v. *Statewide Grievance Committee*, 277 Conn. 218, 226, 890 A.2d 509, cert. denied, 549 U.S. 823, 127 S. Ct. 157, 166 L. Ed. 2d 39 (2006).

The plaintiff argues that the testator's use of the words "issue" and "descendants," alone, is clear and convincing evidence that the testator did not intend for adopted persons to be included as beneficiaries under the trust because an adopted person was not among the class of persons constituting "issue" or "descendants" when the testator executed his will in 1946. The plaintiff contends that "the testator was a knowledgeable businessman, with a keen and sophisticated understanding of the law, and a savvy and careful reviewer of legal documents," and that "the testator's intent to include only lineal blood descendants is clear beyond peradventure." (Emphasis omitted.)

Contrary to the plaintiff's contention, there was no rule of law at the time the will was executed in 1946 excluding adopted persons from the definitions of "issue" or "descendants." Under the common law, there existed merely a *presumption* against including an adopted person within the definitions of "issue" or "descendants" when a testator's intent with respect to that question was unclear. See, e.g., *Trowbridge* v.

Trowbridge, 127 Conn. 469, 473–74, 17 A.2d 517 (1941); *Ansonia National Bank* v. *Kunkel*, 105 Conn. 744, 751, 136 A. 588 (1927). Indeed, "[w]here no intent to include the adopted child [could] be ascertained, the common law favor[ed] ancestral blood and [would] *presume* that the settlor did not intend that a stranger to his blood take." (Emphasis added.) *Connecticut Bank & Trust Co.* v. *Bovey*, supra, 162 Conn. 207. Our Supreme Court made clear, though, that this presumption was "merely an aid to construction"; id.; "which cannot prevail over an intent fairly deducible from the terms of the will read in the light of the surrounding circumstances." *Trowbridge* v. *Trowbridge*, supra, 474.

Although the presumption in effect around the time the testator executed his will led to some courts interpreting terms, like the term "issue," to exclude adopted persons; see, e.g., *Bankers Trust Co.* v. *Pearson*, 140 Conn. 332, 356, 99 A.2d 224 (1953); that presumption is no longer the lens through which we review the testamentary language. The statutory amendment that the legislature adopted in 1991 altered that presumption. See P.A. 91-83. As a result of that amendment, we now presume that the terms "issue" and "descendants" *include* legally adopted persons when we are interpreting instruments that control distributions made in accordance with a will or an estate of a person that died prior to October 1, 1959. In light of that statutory change and the legislature's clear intent to reverse and replace the old presumption that treated adopted and biological children differently, we are not persuaded that the legislature intended for its new presumption to be rebutted by virtue of an instrument's mere reference to terms such as "issue" or "descendants" that, under the prior common-law presumption, excluded adopted persons.

Moreover, the plaintiff's argument that the testator's use of the terms "issue" and "descendants" in the trust

constitutes clear and convincing evidence of an intent to exclude adopted persons because the old common-law presumption excluded them conflates the actual intent of a testator with a rule of construction. The decision in *Purifoy* v. *Mercantile-Safe Deposit & Trust Co.*, 398 F. Supp. 1075, 1079 (D. Md. 1974), aff'd, 567 F.2d 268 (4th Cir. 1977), speaks directly to this point. In *Purifoy*, the court addressed a nearly identical issue, namely, whether the term "descendants," as well as the terms "child" and "children," included an adopted child in various testamentary instruments that were at issue. (Internal quotation marks omitted.) Id., 1077. The defendants, like the plaintiff in this case, argued that the testator clearly intended to exclude an adopted child from the terms "child" or "children" because the law in place when the testator executed the testamentary instruments excluded such persons and the testator was presumed to know the law when he executed the will at that time. Id., 1079.

The court rejected that claim, noting that the defendants' argument "fail[ed] to properly distinguish between the *actual* intent of the testator in employing the words in question and the meaning that a rule of construction assigns to them. . . . [F]or these words to reflect a clear actual intention, this [c]ourt would have to make the unwarranted assumption that the testator actually considered the contingency of adoption in choosing the words. The defendants, though, find actual intention in a combination of the terms 'child,' 'children,' etc. and the rule of construction prior to 1947, which excluded adopted children of one other than the testator. In other words, the defendants would have an earlier rule of construction, without anything else, become part of the testator's actual intent so as to defeat the retroactive application of a subsequent and conflicting rule of construction. By definition, a rule of construction is not synonymous with or a part of the

actual intent of the testator. Its function is to assign a meaning to the words when the testator's actual intention cannot be determined, and only after the failure to find an intention can a rule of construction be considered. . . . Therefore, since the testators used only the words 'child,' 'children,' and 'descendants' and since the will and surrounding circumstances fail to reveal that the contingency of adoption was ever considered, no actual intention of the testator concerning adopted children is present. The meaning to be ascribed to the words in question is to be found in one of the two applicable rules of construction." (Citations omitted; emphasis added; footnote omitted.) Id.

The court in *Purifoy* was addressing competing rules of construction created by statute—the defendants in that case advocated for the earlier rule of construction, whereas the plaintiff argued that the later rule of construction must be applied. Id. Here, by contrast, the plaintiff pits a prior common-law presumption against a more recent, statutory presumption. The rationale of *Purifoy*, however, applies equally. The plaintiff attempts to equate the common-law presumption about the meaning of the terms "issue" and "descendants" with the actual intention of the testator. In the words of the *Purifoy* court, this "[she] clearly cannot do." Id., 1079 n.3.

Section 45a-731 (11) changed the lens through which the terms at issue here must be examined. Although the terms "issue" and "descendants" may have been presumed at the time the will was executed in 1946 to include only lineal descendants when no contrary intent could be discerned from the instrument, the use of these terms in a will or trust, in the absence of evidence that the testator actually considered the contingency of adoption, does not provide the requisite quantum of proof (i.e., clear and convincing evidence) that the

testator actually intended to treat adopted persons differently from biological children. In other words, the use of the terms "issue" or "descendants" in a will or trust, without more, does not suffice to satisfy the new statutory burden of showing, by clear and convincing evidence, the testator's actual intention that adopted persons be treated differently from biological children.

In a final effort to show by clear and convincing evidence that the testator in this case intended to exclude adopted persons from receiving distributions pursuant to the trust, the plaintiff points to the testator's first codicil, in which the testator added the word "the" into the trust document. The language so amended provides in relevant part: "If any of the original beneficiaries or their successors in interest as herein determined shall die either before or after my death leaving no issue, the interest of the one so dying shall thereafter be held upon the same terms for the benefit of *the* other beneficiaries then living and/or their issue or successors . . . in the same proportions in which they would inherit from the one so dying without issue if he or she were unmarried, under the laws covering the distribution of intestate estates then in force in the State of Connecticut . . . ." (Emphasis added.)

The plaintiff argues that the addition of the word "the," which did not appear in the original will but was considered of such importance by the testator that it was added in the first codicil, "clearly define[s] the connecting words 'other beneficiaries then living and/or their issue or successors," evincing an intent by the testator to limit the class of distributees under the will to the originally named ten individuals that he named and their lineal blood descendants. We are not persuaded. As the trial court correctly noted, the addition in the first codicil of the clarifying word "the" implies nothing about adopted persons and certainly does not constitute clear and convincing evidence of an intention

to exclude them. Although the plaintiff attempts to show the testator's intent to exclude adopted persons by pointing to other areas of the will, those attempts fall short for the same reasons. Nothing to which the plaintiff points us speaks to the testator's intention regarding adopted persons.[8]

On the basis of the foregoing, we conclude that neither of the exceptions in § 45a-731 (11) are satisfied in this case and, therefore, the interpretation of the testamentary trust at issue is governed by § 45a-731 (4), which provides that the terms "issue" and "descendants" as used in the trust include legally adopted persons. Accordingly, we conclude that the Superior Court properly granted the defendants' motions for summary

[8] The plaintiff makes numerous references throughout her briefing to this court suggesting that Fass' adult adoption was a sham or otherwise improper. The plaintiff made no such claim in her complaint and presented no evidence to the Probate Court or to the Superior Court in support such a claim. In addition, she fails adequately to brief any such claim on appeal. We therefore deem her claim, to the extent she is making one to that effect, abandoned.

We further note that, to the extent the plaintiff's arguments can be read as calling into question the validity of adult adoptions in general, Connecticut law expressly permits them. See General Statutes § 45a-734. Furthermore, to the extent that the plaintiff suggests that Fass' adoption as an adult supports her claim concerning the testator's intention to exclude adopted persons, that argument also lacks merit. Fass' adoption in 2008, as an adult, is not evidence of the testator's intent to exclude adopted persons when he executed his will and codicils more than fifty years earlier. This is especially true in light of the fact that Connecticut has recognized adult adoptions since as early as 1918, many years prior to the testator's death. See General Statutes (1918 Rev.) § 4882 ("Any person of full age may, by written agreement with another person of full age younger than himself, unless such other person is his or her wife, husband, brother, sister, uncle or aunt of the whole or half blood, adopt such other person as his child, *provided*, such written agreement be approved by the court of probate for the district in which the adopting parent resides or, if such adopting parent is not an inhabitant of this state, for the district in which adopted person resides. . . . Such child by virtue of such adoption shall inherit estate from its adopting parent or parents, or the relatives of such adopting parent or parents, the same as though such adopted child were the natural child of such adopting parent or parents, and shall not inherit estate from his or her natural parents or relatives . . . ." (Emphasis in original.))

judgment and denied the plaintiff's motion for summary judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMES HILTON *v.* COMMISSIONER OF CORRECTION
(AC 46270)

Alvord, Moll and Clark, Js.

Syllabus

The petitioner sought relief in a second petition for a writ of habeas corpus, claiming, inter alia, that R, his counsel during his first habeas action, and G, his criminal trial counsel, had rendered ineffective assistance by failing to present expert testimony from a forensic pathologist to support the petitioner's claim of actual innocence. The petitioner had been convicted of several crimes, including murder, as a result of a drug related shooting. K, an associate medical examiner, had performed an autopsy that showed that the victim died from a single gunshot to the head at close range. At the petitioner's criminal trial, K testified that the barrel of the gun had been touching the victim's skin when the gun was discharged and that the wound was a typical contact gunshot wound of entrance. This court upheld the petitioner's conviction on direct appeal. At his first habeas trial, R presented the testimony of C, the state's chief medical examiner, which was consistent with that of K, and the testimony of D, a forensic scientist. At that habeas trial, the petitioner claimed, inter alia, that G had improperly failed to present the testimony of an expert witness, such as D, to attack K's testimony. D, however, testified at the first habeas trial that the victim's wound could resemble a contact wound but that he could not conclude with certainty that the victim had sustained a contact wound. The habeas court denied the habeas petition, concluding that the petitioner had failed to establish that G rendered ineffective assistance. This court upheld the habeas court's decision, concluding that D had not contradicted K's opinion at the criminal trial that the victim's wound was a contact gunshot wound and that D's testimony would not have been helpful at the criminal trial to establish that the petitioner did not shoot the victim. At the second habeas trial, the petitioner presented the testimony of W, an expert in forensic pathology, who disagreed with K's conclusion that the victim suffered from a contact wound. The habeas court declined to credit W's testimony, reasoning that W had not reviewed certain testimony and

that his opinion did not overcome the overwhelming evidence the state presented against the petitioner at the criminal trial. The court denied the habeas petition, concluding that the petitioner failed to establish that G and R had rendered ineffective assistance. The court thereafter granted in part and denied in part the petitioner's petition for certification to appeal. *Held*:

1. The habeas court correctly determined that the petitioner had failed to establish that he was prejudiced as a result of G's and R's decisions not to present the testimony of a forensic pathology expert: W's testimony, at best, challenged the nature of the victim's injury and was inconsistent with that of witnesses at the petitioner's criminal trial that the petitioner had been standing next to the victim when the shooting occurred, and G had presented testimony similar to that of W at the criminal trial; moreover, W's testimony did not undermine confidence in the outcome of the criminal trial, as C's testimony was consistent with that of K and other state's witnesses, and the state had presented what this court in the petitioner's two prior appeals characterized as overwhelming evidence against the petitioner at his criminal trial; accordingly, a reasonable probability did not exist that the outcome of the petitioner's criminal trial would have been different had G presented expert testimony from a forensic pathologist such as W, and, because the petitioner failed to establish that he was prejudiced by G's performance, the petitioner's ineffectiveness claim necessarily failed as to R.
2. The petitioner could not prevail on his claim that the habeas court abused its discretion in denying him certification to appeal as to his claim that the court had applied the wrong legal standard in finding W not credible; the petitioner failed to demonstrate that his claim was debatable among jurists of reason, that a court could resolve the issue in a different manner or that the question was adequate to deserve encouragement to proceed further.
3. This court dismissed the petitioner's appeal as to his claim that the habeas court had applied an erroneous legal standard in concluding that W's testimony was not credible when it denied the petitioner certification to appeal as to that issue: contrary to the petitioner's contention that the habeas court should have relied on *Lapointe* v. *Commissioner of Correction* (316 Conn. 225) and assessed W's credibility in light of whether a jury could have credited W's testimony, the petitioner's claim was factually distinguishable from *Lapointe*, in which the state's case was relatively weak, whereas the state in the present case had presented overwhelming evidence against the petitioner, and legally distinguishable from *Lapointe*, which limited appellate evaluation of an expert witness' credibility to claims under *Brady* v. *Maryland* (373 U.S. 83), in which a habeas court's function, as part of its determination of the legal question of materiality, is to make a predictive evaluation, rather than an absolute finding, as to whether the evidence withheld by the state reasonably could be credited by the ultimate fact finder and, if

so, whether that evidence reasonably could lead to a different result at a trial; moreover, the court in *Lapointe* neither precluded a habeas court from determining the credibility of an expert witness and that witness' conclusions, as the petitioner claimed, nor did the court in *Lapointe* establish that a petitioner is entitled to a new trial by presenting an expert of sufficient import and credibility, as such a vague standard could necessitate a new criminal trial in nearly all postconviction habeas proceedings involving expert witnesses; accordingly, this court determined that *Lapointe* was inapplicable to the petitioner's case and would not disturb the habeas court's factual finding that W was not credible.

Argued January 31—officially released May 7, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Klatt*, *J.*; judgment denying the petition; thereafter, the court granted in part and denied in part the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed*; *appeal dismissed in part.*

Alexander T. Taubes, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *John P. Doyle, Jr.*, state's attorney, and *Craig P. Nowak*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, James Hilton, appeals from the judgment of the habeas court denying his second petition for a writ of habeas corpus.[1] On appeal,

[1] The habeas court granted in part and denied in part the petitioner's petition for certification to appeal from the judgment of the habeas court. "We are mindful of our jurisprudence that, following the granting of a petition for certification to appeal, 'at least in the absence of demonstrable prejudice, the legislature did not intend the terms of the habeas court's grant of certification to be a limitation on the specific issues subject to appellate review.' *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 138, 712 A.2d 947 (1998). Thus, 'once the habeas court, in its gatekeeping function, certified that appellate review was warranted, any issue could be presented on appeal, so long as the opposing party is not prejudiced.' *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 753 n.7, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011). In *James L.*, however, the court expressly

the petitioner claims that the habeas court (1) improperly rejected his claim that his right to the effective assistance of counsel was violated when his first habeas counsel, Attorney David B. Rozwaski, failed to present the expert testimony of a forensic pathologist in support of his claim that the petitioner's criminal trial counsel, Attorney Al Ghiroli, had provided ineffective assistance of counsel and (2) abused its discretion in denying his petition for certification to appeal as to his claim that the habeas court applied the wrong legal standard in assessing witness credibility. We affirm the judgment of the habeas court as it relates to the petitioner's first claim. We dismiss the appeal as to the petitioner's second claim.

The following facts and procedural history, as set forth by this court in the petitioner's direct appeal from his conviction or as undisputed in the record, are relevant to our resolution of the petitioner's appeal. "The victim, William Rodriguez, was shot on July 14, 2000, at approximately 9 p.m. in the area of Truman Street and King Place in New Haven. Sergeant Anthony Duff arrived at the scene of the shooting and discovered the victim's body on the sidewalk, surrounded by a crowd of people. An autopsy performed on the victim's body revealed that he died from a single gunshot at close range to the left side of his head. Bullet fragments removed during the victim's autopsy were tested and

noted: 'This case does not present a question of mixed certification, in which a habeas court expressly grants permission to appeal with regard to some, but not all, of the issues on which certification was requested.' *James L.* v. *Commissioner of Correction*, supra, 138 n.7. It remains unsettled whether a habeas petitioner is limited in the claims he or she may pursue on appeal when a habeas court grants certification to appeal as to certain specific claims and denies certification to appeal as to others." *Diaz* v. *Commissioner of Correction*, 214 Conn. App. 199, 202 n.1, 280 A.3d 526, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). In this case, as in *Diaz*, "[b]ecause neither party has challenged the propriety of the habeas court's unusual mixed certification order, we leave that issue for another day and simply address each of the petitioner's claims in turn." Id.

found to be consistent with having been fired from either a .38 special or a .357 magnum firearm. No gun was ever recovered.

"The shooting was precipitated by a drug turf war. Anna Rodriguez, the victim's longtime friend, testified that two days before the murder, she and her boyfriend had gone to visit the victim, who had just moved to an apartment on Truman Street. Rodriguez testified that upon arriving outside the victim's apartment, her boyfriend sounded his car horn, and the victim and his girlfriend, Cora Moore, came outside to visit them. At that point, the [petitioner] suddenly approached on the passenger's side of the car and peered inside. When the [petitioner] recognized Rodriguez' boyfriend, he walked away.

"The jury also heard testimony from Sherice Mills, who stated that on the afternoon of the shooting, 'Shawn,' an associate of the victim, verbally confronted the [petitioner] and one of his associates regarding Shawn's drug dealing activities on Truman Street, which was part of the [petitioner's] drug territory. During that conversation, Shawn threatened the [petitioner] and his associate. The confrontation soon ended, and Shawn and the victim drove off in the victim's car.

"Two women testified as eyewitnesses to the actual shooting. Mills testified that the victim left his porch to make a drug sale to someone in a car. She testified that moments later, while the victim was at the car, she heard the [petitioner] state that he was 'about to kill [the victim],' and observed the [petitioner] walk across the street and shoot the victim in the head. According to Mills, the [petitioner] fell to the ground with the victim, and the [petitioner] 'kept holding [the victim's] head, saying he didn't mean to do it and [telling] somebody to call the police.' Mills later identified the [petitioner] as the shooter from an array of photographs.

"A second eyewitness, Simone Williams, who was on the porch at the time of the shooting, testified about essentially the same events as did Mills. Williams' testimony added that the [petitioner] had approached the victim from behind and stated: 'You ain't from around here, son,' and, 'You need to move from around here, son,' and that she then saw the [petitioner] take a gun from behind his back and shoot the victim. When the shooting stopped, Williams testified, the victim fell to the ground, and the [petitioner] yelled for someone to call an ambulance. A short time later, the [petitioner] fled the scene. Williams went to the police station sometime later and related to the police what she had observed concerning the shooting. At that time, she positively identified the [petitioner] in a photographic array and did so again at trial.

"The state also presented testimony from Moore, the victim's girlfriend, that while she was in Toisann Henderson's second floor apartment on Truman Street playing with Henderson's baby and listening to music, she heard a gunshot. Minutes after the shooting, Henderson ran from the porch into the apartment and told Moore that the [petitioner] had shot her boyfriend. Moore ran outside where she found the victim lying motionless on the ground. She fell to the ground and started crying and hugging him. Shortly thereafter, Duff arrived. On the basis of the information that the witnesses provided, Duff dispatched the [petitioner's] description over the police radio.

"At trial, the [petitioner] testified that after meeting with his family, he voluntarily went to the police station, accompanied by his brother-in-law, Sergeant Nate Blackman, and provided a statement about the shooting. While he was in police custody, the [petitioner] stated that he had been sitting on his porch when he heard a commotion and went to see what was happening. The [petitioner] further told the police that a third

man had drawn a gun, that the [petitioner] had grappled for the gun, and 'it went bashing across [the victim's] head.' Later in the interview, the [petitioner] was asked if he could give more detail about the shooting. It was at that point that the [petitioner] ended the interview. At trial, [the petitioner] described how several seconds after he fought with the third man, a fourth man shot the victim and ran away. Immediately after the gunshot, the [petitioner] testified, he applied pressure to the victim's wound to stop the bleeding. [The petitioner] further testified that he left the victim to make sure someone had called an ambulance. When [the petitioner] returned and saw that the victim was receiving aid, he went to and sat on the porch. The [petitioner] testified that he sat on the porch until people in the crowd began to tell the police that he did the shooting. [The petitioner] then stated that he became scared, and went directly to see his children and then to Blackman's house.

"During their investigation, the police learned that after the shooting, the [petitioner] went to see his fiancée, Maybertha Ashley. . . . [H]er sister, Andrea Ashley, testified that the [petitioner] had given his bloody clothes to his fiancée, who in turn gave them to Andrea Ashley to wash. When the police arrested the [petitioner] at the police station, they took the clothing he had worn on the evening of the shooting. The blood samples and clothes collected from both the victim and the [petitioner] were sent to the state forensic laboratory. A state's expert testified that a drop of blood found on the [petitioner's] boxer shorts matched the victim's blood type and DNA. Despite the fact that the victim had been shot at fairly close range, there was no detectable blood on the [petitioner's] other clothes. The [petitioner] denied ever having his clothes washed after the shooting, and explained that his clothes were not

covered in blood because he wore his shirt over his head and his pants around his knees.

"On September 12, 2000, the [petitioner] was charged with murder, and criminal possession of and carrying a pistol or revolver without a permit." (Footnotes omitted.) *State* v. *Hilton*, 79 Conn. App. 155, 157–60, 829 A.3d 890 (2003).

At the petitioner's criminal trial, the state presented the testimony of Arkady Katsnelson, an associate medical examiner in the Office of the Chief Medical Examiner, who had performed the victim's autopsy. Katsnelson testified that, because "there was no evidence of soot or gun powder," the victim's gunshot wound in this particular case resembled either a "long distance" or a contact wound.[2] When asked whether the victim's gunshot wound was typical, Katsnelson testified: "This gunshot wound, it is not typical from a gunshot wound which was created from a long distance because a gunshot wound from a distance will be a round shape, and the round shape wound and the size of the wound will be slightly bigger than the size of the bullet. In this particular case, it's not a typical gunshot wound of entry which is created from a long distance." Thus, Katsnelson testified: "[M]y conclusion is, this gunshot wound is consistent with a contact gunshot wound of entrance. It means in this particular case the barrel of the gun was touching the skin when the gun was discharged. It is the reason for my conclusion, number one, there is no evidence of soot or gunpowder around, and number two, which is extremely important also, the size of the wound. The wound is 3.2 centimeters in vertical dimension and it is 1.2 centimeters in horizontal dimension and it is the reason I believe this gunshot wound is a typical contact gunshot wound."

[2] Katsnelson testified that "[a] contact wound means, if the barrel of the gun is touching the skin, touching the body" and that a long distance wound results from a gun generally being "more than three feet" away.

Following a jury trial, during which the petitioner was represented by Ghiroli, the petitioner was convicted of murder in violation of General Statutes § 53a-54a,[3] carrying a pistol or revolver without a permit in violation of General Statutes (Rev. to 1999) § 29-35 (a),[4] and criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 1999) § 53a-217c.[5] See *State* v. *Hilton*, supra, 79 Conn. App. 156. "On September 28, 2001, the court sentenced the [petitioner] to a term of sixty years imprisonment on the charge of murder, a consecutive term of five years imprisonment on the charge of carrying a pistol without a permit and a concurrent term of five years imprisonment on the charge of criminal possession of a pistol or revolver for a total effective sentence of sixty-five years imprisonment." Id., 160. The petitioner's conviction was affirmed on direct appeal. Id., 170.

Thereafter, the petitioner commenced his first habeas action, during which he was represented by Rozwaski. "In his third amended petition, dated December 19,

[3] General Statutes § 53a-54a (a) provides: "A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

[4] General Statutes (Rev. to 1999) § 29-35 (a) provides in relevant part: "No person shall carry any pistol or revolver upon one's person, except when such person is within the dwelling house or place of business of such person, without a permit to carry the same issued as provided in section 29-28. . . ."

[5] General Statutes (Rev. to 1999) § 53a-217c provides in relevant part: "(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and (1) has been convicted of a felony . . . ."

2011, [the petitioner] alleged, inter alia, that [Ghiroli] had provided him with ineffective assistance. Specifically . . . [the petitioner] alleged that [Ghiroli] was ineffective in failing to cross-examine witnesses properly, failing to present witnesses, failing to prepare the petitioner to testify and failing to present sentence mitigation evidence."[6] *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 64–65, 127 A.3d 1101 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1095 (2016).

During the petitioner's first habeas trial, "the petitioner argued that [Ghiroli] was ineffective in his cross-examination of Katsnelson regarding the nature of the victim's fatal wound." Id., 69. "[T]he petitioner presented the expert testimony of Harold Wayne Carver II, the state's chief medical examiner, and Peter DeForest, who held a doctorate degree in forensic science, regarding Katsnelson's autopsy report and conclusions." Id., 69–70.

When asked whether certain indicia "conclusively prove[d] that the wound was made by a contact shot," Carver testified, "I believe that there's sufficient evidence here between the photographs and the written record to make that diagnosis, yes." Carver noted that, had he looked at the autopsy report without the corresponding photographs, then a "contact wound would be on the short list of explanations but would not be the only one." Carver testified that the abnormal shape of

[6] "The third amended petition also alleged that the petitioner had received ineffective assistance of his appellate attorney, that he was actually innocent of the crimes charged, and that the state had failed to provide him with exculpatory information in violation of his due process rights under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States constitution and the Connecticut constitution." *Hilton* v. *Commissioner of Correction*, 161 Conn. App. 58, 65 n.2, 127 A.3d 1101 (2015), cert. denied, 320 Conn. 921, 132 A.3d 1095 (2016). The petitioner withdrew his claims as to his appellate attorney during his first habeas trial, and, in his appeal following his first habeas trial, the petitioner did not challenge the court's denial of his actual innocence and *Brady* claims. Id.

the wound, however, is "the major basis for my diagnosis that it was a contact wound . . . ."

DeForest testified that, on the basis of the autopsy report and photographs, the wound "[s]uperficially . . . could resemble a contact wound." When asked for his conclusion as to the type of wound the victim suffered, DeForest responded "[t]hat it's—it's ambiguous. I can't eliminate the idea of it being a contact shot where the supporting evidence was not elicited or that it could be a—a destabilized bullet that caused the damage and that the scene investigation didn't find areas or impact sights where a bullet may have interacted with something else." Thus, due to the wound's ambiguities, DeForest testified that he could not conclude with certainty whether the victim suffered from a contact wound.

After the conclusion of the petitioner's first habeas trial, the habeas court issued a memorandum of decision denying the petitioner's claims. On appeal,[7] this court "agree[d] with the respondent [the Commissioner of Correction] and the habeas court that the petitioner failed to sustain his burden of establishing either deficient performance or prejudice with respect to the cross-examination of Katsnelson. As to the former, we have stated that [a]n attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . In regard to the latter, given the other evidence and the inconclusive and indeterminate nature of DeForest's testimony, the petitioner

[7] On appeal to this court, the petitioner claimed "that the court improperly concluded that [the petitioner] had received effective assistance of counsel during his criminal trial and at sentencing. Specifically, [the petitioner] argue[d] that [Ghiroli had] provided ineffective assistance by failing to (1) secure sufficient information and properly cross-examine two of the state's witnesses, (2) present witnesses in support of his defense, (3) prepare the petitioner to testify and (4) present sentence mitigation evidence." *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 65.

failed to sustain his burden of establishing prejudice." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 70–71. This court also rejected the petitioner's claim that counsel improperly failed to present the testimony of DeForest at his criminal trial to attack the testimony of Katsnelson. See id., 72. This court agreed with the habeas court's analysis that "DeForest's testimony would not have been helpful in establishing that the petitioner did not shoot the victim. Katsnelson had testified at the criminal trial that the fatal wound was a contact gunshot wound. DeForest did not contradict this opinion, 'but could only say that the evidence was ambiguous, and therefore he could not offer an opinion as to the type of wound, and therefore could not say that it was not a contact wound.' " Id., 73–74. Thus, the petitioner did not sustain his burden of proving that the testimony of DeForest would have been helpful to his defense. Id., 74. This court affirmed the judgment of the habeas court,[8] and our Supreme Court denied the petitioner's petition for certification to appeal.

In 2016, the petitioner, then self-represented, filed this second habeas action. In his operative, second amended petition for a writ of habeas corpus filed September 23, 2020, the petitioner raised what the habeas court described as "a myriad of allegations" in thirteen counts. Relevant to this appeal are the petitioner's allegations that Ghiroli and Rozwaski rendered ineffective

[8] The respondent also appealed from the judgment of the first habeas court. See *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 60. On appeal, the respondent claimed "that the court improperly determined that the petitioner received ineffective assistance of counsel with respect to his claim regarding sentence review. As a result of this determination, the habeas court reinstated the petitioner's right to apply for sentence review." Id. The respondent prevailed on appeal, and this court reversed the judgment. Id., 85.

assistance of counsel by not presenting expert testimony from a forensic pathologist to challenge the testimony of Katsnelson and establish that he was actually innocent. See footnote 12 of this opinion.

Prior to the start of the habeas trial, on November 30, 2021, the petitioner's counsel filed an appearance on the petitioner's behalf. The matter was tried to the habeas court, *Klatt*, *J.*, on December 20, 2021, and May 31, 2022. The court admitted into evidence as full exhibits copies of the transcripts of the petitioner's underlying criminal trial and first habeas trial, a copy of a report from the petitioner's forensic pathology expert, Cyril H. Wecht, a copy of Katsnelson's autopsy report, and photographs taken during the autopsy. Additionally, the court heard testimony from the following witnesses: (1) the petitioner; (2) Wecht; (3) Maybertha Ashley; (4) Attorney Michael Brown, the petitioner's legal expert; and (5) Rozwaski. Thereafter, the parties filed posttrial briefs.

Relevant to the petitioner's appeal, Wecht testified that, on the basis of his review of Katsnelson's autopsy report and photographs, certain testimony from the petitioner's criminal trial, including the testimony of Katsnelson, a police report, the petitioner's posttrial brief, and a report from a private investigator service, it was his "opinion this gunshot wound, fatal gunshot wound of the victim's head, was fired from a distance beyond twenty-four inches in the absence of gunpowder residue, stippling powder. I find nothing to contradict that and everything to support it. So I believe this was what we would call a gunshot wound of distance or long-range gunshot wound. I cannot tell you what the distance would have been beyond the twenty-four inches. I can't tell you if that was three feet or four feet. That, I cannot do, but I can say that I believe it was a distance gunshot wound and certainly not a tight contact wound." Wecht testified that, on this basis, he

disagreed with Katsnelson's conclusion that the victim suffered from a contact wound.

On February 1, 2023, the court issued a memorandum of decision denying the petitioner's petition for a writ of habeas corpus. The court stated that its "discussion of the claims will track the petitioner's posttrial brief and will be limited to only those claims briefed by the petitioner." Specifically, the court addressed, inter alia, the petitioner's contentions that "counsel failed to properly investigate [Katsnelson's] report and testimony" and that "counsel failed to hire and utilize a forensic pathologist or medical examiner to challenge [Katsnelson's] conclusions." The court found that "[the petitioner] has failed to prove both the deficient performance and prejudice prongs" of his ineffective assistance of counsel claims.

The petitioner filed a petition for certification to appeal wherein he stated nine grounds on which he proposed to appeal. Relevant to this appeal[9] are the following grounds: "(1) [w]hether the trial court erred by ruling that the petitioner's expert was 'not . . . credible,' instead of applying the correct standard under *Lapointe* v. *Commissioner of Correction*, [316 Conn. 225, 112 A.3d 1 (2015)], that is, whether the petitioner's expert was of sufficient import and credibility that the petitioner is entitled to a new trial at which a jury will evaluate that testimony . . . (3) [w]hether a jury reasonably could credit the petitioner's expert's testimony . . . (4) [w]hether there was strong reason that the jury might well have found the testimony of the petitioner's expert persuasive, considering the expert's unquestioned qualifications and experience . . . (5) [w]hether the testimony of the petitioner's expert is sufficient, if credited, to call into question the outcome

[9] The petitioner did not brief in this appeal three of the grounds raised in his petition for certification to appeal.

of the petitioner's criminal trial . . . (6) [w]hether the testimony of the petitioner's expert and the other evidence presented raises a reasonable probability that the result of the proceedings would have been different . . . [and] (7) [w]hether the evidence raises a probability sufficient to undermine the confidence in the outcome of the trial . . . ."

Thereafter, on February 14, 2023, the habeas court issued an order on the petition for certification to appeal, stating in relevant part that "the petition for certification to appeal is denied as to the grounds indicated in [inter alia, ground one] . . . because [that ground is] not debatable among jurists of reason, able to be resolved in a different manner, or deserving of encouragement to proceed further. . . . The court grants the petition for certification to appeal as to grounds (3) through (7), which all individually and collectively seek to challenge this court's prejudice determination." (Citations omitted.) This appeal followed.

I

We begin with the petitioner's claim that the habeas court improperly rejected his claim that his right to the effective assistance of counsel was violated when Rozwaski failed to present the expert testimony of a forensic pathologist during his first habeas trial in support of the claim that Ghiroli had provided ineffective assistance of counsel during his criminal trial.[10] With

[10] "It is axiomatic that courts may decide against a petitioner on either prong [of the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the *alleged* deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Emphasis added; internal quotation marks omitted.) *Delgado* v. *Commissioner of Correction*, 224 Conn. App. 283, 291–92, 311 A.3d 740, cert. denied, 349 Conn. 902, A.3d (2024). Moreover, "[i]t is well established that [a] court

respect to the prejudice prong, the petitioner contends that the court improperly determined that he failed to show that he was prejudiced by Ghiroli's and Rozwaski's decisions not to present a forensic pathology expert to provide testimony similar to that of Wecht.[11] The petitioner maintains that "[a]n objective review of the state's case against the petitioner reveals that [the petitioner's] scientific expert evidence would raise more than a reasonable probability that the result of the proceeding would have been different if it had it been presented at the criminal trial."[12] The respondent

deciding an ineffective assistance of counsel claim need not address the question of counsel's performance, if it is easier to dispose of the claim on the ground of insufficient prejudice." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 783–84, 272 A.3d 189 (2022). Thus, because we conclude that the habeas court properly determined that the petitioner had failed to establish prejudice, we need not address the performance prong.

[11] As noted previously in this opinion, the habeas court granted certification to appeal as to the petitioner's grounds challenging the court's determination that the petitioner had failed to demonstrate prejudice.

[12] The petitioner claims that "[t]he trial court erred because a jury reasonably could credit the petitioner's scientific expert evidence, which proves the petitioner's innocence by clear and convincing evidence and raises more than a reasonable probability that the result of the proceedings would have been different but for prior counsel's failure to present the evidence." The respondent argues, inter alia, that, had Wecht testified at the petitioner's criminal trial, such testimony would not have proved the petitioner's innocence because the jury instead would have weighed Wecht's testimony with the totality of the evidence that had been presented. In support of this contention, the respondent relies on *Summerville* v. *Warden*, 229 Conn. 397, 641 A.2d 1356 (1994), for the proposition that the testimony of a petitioner's new expert is "nothing more than a[n] [additional] expert opinion derived from an interpretation of the underlying autopsy data that [other experts] ha[ve] already interpreted." Id., 437. Our Supreme Court in *Summerville* also stated that a petitioner's new expert testimony "is not the kind of evidence that renders prior expert opinions . . . scientifically impossible or improbable. Indeed, if it were, [t]he ultimate result would be a never-ending battle of [pathologists] appointed [or retained] as experts for the sole purpose of discrediting a prior [pathologist's] diagnosis." (Internal quotation marks omitted.) Id. Wecht's testimony at the petitioner's habeas trial would not have satisfied the clear and convincing standard because his testimony did not unquestionably establish the petitioner's innocence and was, at most, contradictory to, and offered to discredit a portion of, the state's evidence

disagrees and argues that the petitioner has failed to prove prejudice because he has not shown a reasonable probability that the outcome of the petitioner's criminal trial would have changed had the jury heard testimony similar to that of Wecht. We agree with the respondent.

The following procedural history is relevant to our resolution of this claim. In its memorandum of decision, the habeas court stated in relevant part: "[The petitioner] has argued that the expert testimony of [Wecht], combined with his testimony . . . would establish the prejudice prong of [*Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. [The petitioner] argues that . . . [Wecht's] testimony that the gunshot was fired from a distance of at least greater than two feet supports his testimony that another person, at least eight feet away fired the fatal shot. . . .

"[The petitioner] however chooses to ignore the remaining evidence in the state's case. There were multiple witnesses to the argument and ongoing feud between him and the victim. Identification was not an issue, as all parties knew each other. There were two eyewitnesses who remained on the scene and gave statements to the police identifying [the petitioner] as the shooter and placing him standing right next to the victim when he was shot. There were no witnesses to [the petitioner's] third and fourth individuals. . . .

"In short, [the petitioner] has failed to demonstrate that there is a reasonabl[e] probability that the outcome of the criminal trial would have been different had . . .

at the underlying criminal trial. See *Ross* v. *Commissioner of Correction*, 217 Conn. App. 286, 305–306, 288 A.3d 1055, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023); *Myers* v. *Commissioner of Correction*, 215 Conn. App. 592, 616–17, 284 A.3d 309 (2022), cert. denied, 346 Conn. 1021, 293 A.3d 897 (2023), and cert. denied sub nom. *Myers* v. *State*, 346 Conn. 1021, 293 A.3d 897 (2023). Accordingly, the petitioner did not meet the high burden of proof necessary to sustain a claim of actual innocence.

[Wecht] . . . testified. The state had abundant evidence, motive, and forensic testimony to support its case against [the petitioner]. [Wecht's] testimony fails to show not only the necessary performance prong, but also the prejudice prong. The state's evidence against [the petitioner] was overwhelming and his claims against trial counsel must fail.

"In addition, any of [the petitioner's] claims as against habeas counsel must fail by the same reasoning. [The petitioner's] posttrial brief ignores the testimony of [Carver] and submits that the testimon[y] of . . . [Wecht] . . . [is] sufficient to undermine the confidence in the outcome of the habeas trial. [First habeas] counsel did in fact offer expert medical testimony from a more than qualified witness. His testimony was consistent with [that of Katsnelson] and other state's witnesses. [Wecht's] testimony at best challenged [the] nature of the injury and was inconsistent with eyewitness testimony, but did nothing to overcome the state's evidence and undermine this court's confidence in the outcome of the jury trial."

Our standard of review and the relevant legal principles on ineffective assistance of counsel claims are well settled. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . .[13] To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra,

[13] "[T]he state and federal constitutional standards for review of ineffective assistance of counsel claims are identical and the rights afforded are essentially coextensive in nature and, thus, do not require separate analysis." (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830 n.8, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation omitted; footnote in original; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 829–30, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

"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. . . . As our Supreme Court [has explained], [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." (Citations omitted; internal quotation marks omitted.) *Madera* v. *Commissioner of Correction*, 221 Conn. App. 546, 555–56, 302 A.3d 910, cert. denied, 348 Conn. 928, 305 A.3d 265 (2023).

"Our Supreme Court, in *Lozada* v. *Warden*, [223 Conn. 834, 843, 613 A.2d 818 (1992)], established that habeas corpus is an appropriate remedy for the ineffective assistance of appointed habeas counsel, authorizing . . . a second petition for a writ of habeas corpus . . . challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus . . . [that] had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal. . . . [T]he court in *Lozada* also emphasized that a petitioner asserting a habeas on a habeas faces the herculean task . . . of proving in accordance with [*Strickland*] both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. . . .

"Simply put, a petitioner cannot succeed . . . on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised." (Citations omitted; internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 585–86, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023).

We now turn to the merits of the petitioner's claim, recognizing that the claimed ineffective assistance regarding his first habeas counsel, Rozwaski, must fail if the claim of ineffective assistance of his trial counsel, Ghiroli, is without merit. See *Lebron* v. *Commissioner of Correction*, 204 Conn. App. 44, 50, 250 A.3d 44, cert. denied, 336 Conn. 948, 250 A.3d 695 (2021). For the reasons that follow, we conclude that the habeas court properly determined that the petitioner has failed to satisfy the prejudice prong of *Strickland*. Specifically, the petitioner has failed to show that, had Ghiroli presented testimony similar to that of Wecht during the petitioner's criminal trial, there exists a reasonable probability that the outcome of that proceeding would have been different.

In the present case, the habeas court determined that Wecht's testimony did not undermine the state's "abundant evidence, motive, and forensic testimony to support its case against [the petitioner]." The court characterized the state's evidence against the petitioner as "overwhelming," and emphasized evidence of the "multiple witnesses to the argument and ongoing feud between [the petitioner] and the victim," and the "two eyewitnesses who remained on the scene and gave statements to the police identifying [the petitioner] as the shooter and placing him standing right next to the victim when he was shot." We agree with the court that the state presented overwhelming evidence against the petitioner. This court has, on two prior occasions, recognized the strength of the state's case against the petitioner. First, in the petitioner's direct appeal following his criminal trial, this court stated that "the evidence against the [petitioner] was overwhelming." *State* v. *Hilton*, supra, 79 Conn. App. 168. Subsequently, in the petitioner's appeal following his first habeas trial, this court observed that "the petitioner failed to carry his

burden of demonstrating that there is a reasonable probability that the outcome of the trial would have been different had he been more prepared, given the strong and overwhelming evidence presented by the state." *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 76.

Additionally, the habeas court determined that Wecht's testimony did not undermine confidence in the outcome of the petitioner's criminal trial because the petitioner's first habeas counsel, Rozwaski, presented the testimony of Carver, which was "consistent with [that of Katsnelson] and other state's witnesses." At the petitioner's first habeas trial, Carver addressed Katsnelson's conclusion that the victim suffered a contact wound and testified that, had he looked at the autopsy report without the corresponding photographs, then a "contact wound would be on the short list of explanations but would not be the only one." When asked, however, whether Katsnelson's conclusion that the victim suffered from a contact shot was proper, Carver responded, "I believe that there's sufficient evidence here between the photographs and the written record to make that diagnosis, yes." Carver also discussed the abnormality of the shape of the wound by testifying that "the major basis for my diagnosis that it was a contact wound [is] the fact [that] part of th[e] edge of the hole doesn't have an abrasion. . . . That would indicate that the forces that created that part of the hole came from inside, not from the outside. And the only way to do that would be the gasses from a contact wound." The habeas court determined that, on the basis of Carver's earlier testimony, the petitioner had failed to sustain his burden of proving prejudice because the testimony of Wecht was insufficient "to undermine . . . confidence in the outcome of the habeas trial. [Rozwaski] did in fact offer expert medical testimony from

a more than qualified witness. His testimony was consistent with [that of Katsnelson] and other state's witnesses. [Wecht's] testimony at best challenged [the] nature of the injury and was inconsistent with eyewitness testimony, but did nothing to overcome the state's evidence and undermine this court's confidence in the outcome of the jury trial."[14] Accordingly, on the basis of the record before us, including the overwhelming evidence the state presented against the petitioner, we conclude that the petitioner has failed to demonstrate a reasonable probability that the outcome of the criminal trial would have been different had Ghiroli presented expert testimony from a forensic pathologist, such as Wecht.

In sum, we conclude that the habeas court correctly determined that the petitioner had failed to sustain his burden of establishing prejudice under *Strickland* as to Ghiroli's decision not to present expert testimony and, therefore, the petitioner's claim of ineffective assistance of counsel against Rozwaski necessarily fails. We, therefore, conclude that the court properly denied the petitioner's petition for a writ of habeas corpus on this claim.

II

The petitioner next claims that the habeas court abused its discretion in denying him certification to appeal with respect to his claim that the court applied the wrong legal standard in finding Wecht not credible.

[14] Rozwaski also presented the testimony of DeForest on the petitioner's behalf. DeForest testified that, pursuant to his review of Katsnelson's autopsy report and photographs, the wound "[s]uperficially . . . could resemble a contact wound." When asked to render an opinion as to what type of gunshot wound the victim suffered, DeForest testified: "The—that I can't reach a conclusion. That it's—it's ambiguous," and could have resulted from either a long distance or a contact gunshot. As a result, DeForest testified that he could not conclude, to a reasonable degree of scientific certainty, that the victim had not sustained a contact gunshot wound.

He contends that the court should have used the standard set forth by our Supreme Court in *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 225. We conclude that *Lapointe* is inapplicable to the present case and that the court's finding that Wecht was not credible is not clearly erroneous.

"The following legal principles are relevant to our resolution of the petitioner's claim. General Statutes § 52-470 (g) provides: No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of

the petitioner's underlying [claim] to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive [claim] for the purpose of ascertaining whether [that claim satisfies] one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Glen S.* v. *Commissioner of Correction*, 223 Conn. App. 152, 158–59, 307 A.3d 951, cert. denied, 348 Conn. 951, 308 A.3d 1038 (2024).

For the reasons set forth in part III of this opinion, we conclude that the petitioner has failed to demonstrate that his claim is debatable among jurists of reason, that a court could resolve the issue in a different manner, or that the question is adequate to deserve encouragement to proceed further. Thus, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal on this ground.

III

The petitioner's substantive claim on appeal, relying on *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 225, is that the habeas court applied the wrong legal standard in assessing witness credibility. Specifically, the "[p]etitioner's argument is that the trial court erred when it made an assessment of who it thought was 'more credible' . . . without determining, as a matter of law, if a reasonable jury could credit the petitioner's scientific expert evidence—which it could." (Citation omitted; emphasis omitted.) The respondent disagrees and asserts, inter alia, that *Lapointe* is inapplicable in the present case because of its "explicit limitation on its exception to [the] general rule of deference to a fact finder's credibility assessment." We agree with the respondent.

The following additional procedural history is relevant to our resolution of this claim. In its memorandum of decision, the habeas court stated: "The primary focus of [the petitioner's] claims is the autopsy and the conclusions reached by [Katsnelson], in particular the distance that the deadly shot was fired from. This issue has now been litigated in the criminal trial and both habeas trials. The jury and two separate habeas courts have heard from a total of four experts: [Katsnelson]; [DeForest]; [Carver]; and [Wecht]. [The petitioner] now posits that [Wecht's] conclusions and testimony prove his innocence. This court does not agree."

Specifically, the court determined that "[t]hree of the four experts found that there were indicia of a contact wound. Only [Wecht] completely ruled out the possibility of a contact wound. The court does not find [Wecht's] assessment to be credible, especially because he did not review [Carver's] testimony from the first habeas trial. [Carver] observed a stellate tear and evidence of a blowback laceration. Additionally, [Wecht] did not provide any explanation for the causes of the oval wound. Nor did [Wecht's] evaluation address the potential effects of the victim['s] being kept alive for a day or more so that organs could be harvested from his cleaned and disinfected body, the blood from the wound washing away gunshot residue, or the beginnings of the healing process making residue in the wound difficult to detect. The more credible evidence establishes that the shot that killed the victim was a contact shot.

"Because the court does not find [Wecht's] conclusion that the shot could not have been fired from less than twenty-four inches to be credible, [the petitioner's] claims premised thereon must fail."

As noted previously, the habeas court denied the petitioner certification to appeal as to his claim that

the legal standard used by the court to assess witness credibility was erroneous. In denying certification to appeal on this ground, the court stated that it found "Wecht's conclusion that the shot could not have been fired from less than twenty-four inches to be not credible. The court did not find [Wecht] credible based on the totality of all evidence from the criminal, prior habeas, and current habeas trials. [Wecht] did not review all relevant evidence, and his opinion was contradicted by the factual findings regarding the shape of the wound, stellate tearing, and evidence of a blowback laceration. It is this lack of foundation supporting [Wecht's] conclusion about the shot distance that caused the court to find him not credible as an expert witness.

"Contrary to the petitioner's argument in the petition for certification to appeal, *Lapointe* v. *Commissioner of Correction*, [supra, 316 Conn. 225], does not preclude a habeas court from determining that an expert witness and their conclusion are not credible. Nor does *Lapointe* establish a standard that a petitioner is entitled to a new trial by presenting an expert who is of sufficient import and credibility. Such a vague standard could necessitate a new criminal trial in nearly all post-conviction habeas proceedings involving expert witnesses. A habeas court's credibility assessments and how they impact the prejudice prong of the ineffective assistance of counsel standard would be rendered meaningless if a habeas court had to grant a new trial upon the presentation of expert testimony that was of sufficient import and credibility." (Emphasis omitted; internal quotation marks omitted.) Accordingly, the court denied the first ground of the petition for certification to appeal on the ground that it is "not debatable among jurists of reason, able to be resolved in a different manner, or deserving of encouragement to proceed further."

In addition to our well settled standard of review on ineffective assistance of counsel claims set forth in part I of this opinion, the following additional legal principles are relevant to our resolution of this claim. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given their testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review." (Internal quotation marks omitted.) *Fields* v. *Commissioner of Correction*, 179 Conn. App. 567, 575, 180 A.3d 638 (2018). "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses." (Internal quotation marks omitted.) *Necaise* v. *Commissioner of Correction*, 112 Conn. App. 817, 825, 964 A.2d 562, cert. denied, 292 Conn. 911, 973 A.2d 660 (2009).

On appeal, the petitioner argues that we should deviate from these principles in light of our Supreme Court's decision in *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 225. We disagree.

In *Lapointe*, our Supreme Court "granted the respondent's petition for certification to appeal, limited to the following issue: 'Did the Appellate Court properly determine that the [petitioner's] first habeas counsel was ineffective for failing to pursue a claim that the state had suppressed evidence in violation of *Brady* v. *Maryland*, [373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)],' " and "answer[ed] the certified question in the affirmative because the testimony of the petitioner's experts was more than sufficient to call into question the reliability of the petitioner's conviction. Indeed, even if that expert testimony only tended to support the petitioner's claim that he could not have murdered the victim, *in view of the tenuous nature of the state's case against the petitioner—based as it was on his*

suspect admissions—the state's *Brady* violation would warrant a new trial because, as the United States Supreme Court has recognized, exculpatory evidence of even 'minor importance' may well be 'sufficient to create a reasonable doubt' when, as in the present case, 'the [guilty] verdict is already of questionable validity . . . .' *United States* v. *Agurs*, 427 U.S. 97, 113, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Accordingly, [our Supreme Court] affirm[ed] the judgment of the Appellate Court reversing in part the judgment of the third habeas court and ordering a new trial." (Emphasis added.) *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 234.

The present case is both factually and legally distinguishable from *Lapointe*. As set forth in part I of this opinion, this court twice has identified the state's evidence against the petitioner as "overwhelming"; *Hilton* v. *Commissioner of Correction*, supra, 161 Conn. App. 76; *State* v. *Hilton*, supra, 79 Conn. App. 168; whereas our Supreme Court in *Lapointe* stated that its conclusion took "due account of the fact that the state's case against the petitioner was relatively weak, founded as it was on highly questionable admissions." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 261. Thus, because we agree that the state presented overwhelming evidence against the petitioner, the petitioner's appeal is factually distinguishable from *Lapointe*.

Next, the petitioner's legal argument is different from that raised in *Lapointe*. In the present case, the petitioner challenges the habeas court's finding that Wecht was not credible. The court determined, in light of finding Wecht not credible, that the petitioner had failed to establish that the outcome of his criminal trial would have been different had a jury heard Wecht's testimony. Accordingly, the court concluded that the decisions of

Ghiroli and Rozwaski not to present the expert testimony of a forensic pathologist did not constitute ineffective assistance of counsel. In contrast, the petitioner in *Lapointe* argued that prior counsel "rendered ineffective assistance in failing to demonstrate that the state withheld certain exculpatory evidence prior to trial in violation of *Brady* . . . ." Id., 229. This distinction is significant. In *Lapointe*, our Supreme Court determined that, "for purposes of the present case, which involves the suppression of exculpatory evidence by the state, our task is not to determine whether the jury more likely than not *would* have credited [the] testimony [of the petitioner's witnesses], such that the petitioner *would* have prevailed at a new trial. . . . The question, rather, is whether the jury reasonably *could* have credited the testimony of the petitioner's witnesses." (Citation omitted; emphasis in original.) Id., 293–94. In other words, the court stated that, "[i]n such circumstances, when the habeas court's assessment of the expert testimony has nothing to do with the personal credibility of the expert witness but instead is based entirely on the court's evaluation of the foundational soundness of the witness' professional opinion, this court is as well situated as the habeas court to assess that testimony for *Brady* purposes." Id., 269.

Our Supreme Court explained its reasoning for limiting an appellate court's evaluation of the credibility of an expert witness specifically to *Brady* claims as follows: "Our conclusion in this regard is limited to the kind of fact-finding that is implicated in the *Brady* context. In cases involving claims under *Brady*, the function of the habeas court is to determine whether the evidence withheld by the state is sufficiently credible that a jury reasonably could credit it and, if so, whether the evidence also is sufficiently pertinent to an issue in the case that it reasonably could lead to a

different result. This predictive evaluation of the evidence is different from the ordinary case, in which the fact finder is responsible for the ultimate assessment of credibility. Thus, as the Pennsylvania Supreme Court recently explained, '[a]ssessing credibility for purposes of [*Brady*] prejudice is not necessarily the same thing as assessing credibility at a trial.' *Commonwealth* v. *Johnson*, 600 Pa. 329, 359, 966 A.2d 523 (2009)." *Lapointe* v. *Commissioner of Correction*, supra, 316 Conn. 272 n.42. The court further stated that, "[b]ecause, in addressing a claim under *Brady*, a habeas court's credibility determination is not an 'absolute' finding, as the factual findings of the ultimate finder of fact are, but merely is a threshold evidentiary assessment required for the purpose of determining whether the ultimate finder of fact reasonably could credit the evidence, the principle that reviewing courts typically defer to credibility findings in the *Brady* context has its sole basis in the fact that the habeas court is ordinarily in a better position to judge credibility, and is not based on the general prohibition against appellate fact-finding. Consequently, when this court is in as good a position as the habeas court to assess credibility for the purpose of reviewing a claim under *Brady*, reviewing the habeas court's credibility assessment de novo does not place this court in the improper role of finding ultimate facts but merely allows this court to carry out its proper role of determining the legal question of materiality under *Brady*." Id.

A petitioner's claim of ineffective assistance of counsel outside of the *Brady* context is, therefore, treated differently from a petitioner's claim implicating *Brady*. With respect to the former, this court has articulated a "well settled standard of review governing challenges to a habeas court's judgment on ineffective assistance of counsel claims. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court

unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) *Delgado* v. *Commissioner of Correction*, 224 Conn. App. 283, 290–91, 311 A.3d 740, cert. denied, 349 Conn. 902, A.3d (2024).

In the present case, both the petitioner's principal appellate brief and reply brief set forth scant argument as to why this court should apply *Lapointe* to his claim on appeal. Significantly, the petitioner does not (1) address our Supreme Court's limitation of *Lapointe* to *Brady* claims, (2) attempt to reconcile the factual dissimilarities between his claims on appeal and *Lapointe*, or (3) provide argument as to why this court should read *Lapointe* beyond the Supreme Court's language to apply its reasoning to his ineffective assistance of counsel claim. Accordingly, we will not deviate from our well settled rule that "[i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) *Fields* v. *Commissioner of Correction*, supra, 179 Conn. App. 569. Therefore, on the basis of the record before us, we conclude that the present case is not governed by *Lapointe*. Accordingly, we will not disturb the habeas court's finding that Wecht was not credible. See *Perez* v. *Commissioner of Correction*, 194 Conn. App. 239, 243, 220 A.3d 901 ("[t]he issue of credibility is not debatable among jurists of reason and, thus, cannot be used to overturn the decision of a habeas court" (internal quotation marks omitted)), cert. denied, 334 Conn. 910, 221 A.3d 43 (2019).

The judgment is affirmed with respect to the petitioner's claim of ineffective assistance of counsel; the appeal is dismissed as to the petitioner's remaining claim.

In this opinion the other judges concurred.

MICHAEL G. *v.* COMMISSIONER OF CORRECTION* (AC 43327)

Suarez, Westbrook and Prescott, Js.

Syllabus

The petitioner, who previously had been convicted of various crimes, appealed to this court following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to the applicable statute (§ 52-470 (d) and (e)). On appeal, the petitioner claimed that his prior habeas counsel's failure to advise him of the statutory deadline for filing a new petition prior to the withdrawal of his previously pending petition constituted ineffective assistance of counsel, which constituted good cause for the delay in filing. *Held* that, in accordance with our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction* (348 Conn. 333) and this court's recent decision in *Hankerson* v. *Commissioner of Correction* (223 Conn. App. 562), this court reversed the judgment of the habeas court and remanded the case for a new hearing and good cause determination under § 52-470 (d) and (e).

Argued April 15—officially released May 7, 2024

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Alvord*, *Cradle* and *Eveleigh*, *Js.*, which dismissed the appeal; subsequently, on the granting of

* In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the petitioner's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

certification, the petitioner appealed to the Supreme Court, which vacated the judgment of this court and remanded the case to this court. *Reversed*; *further proceedings*.

Jennifer B. Smith, assigned counsel, for the appellant (petitioner).

Jonathan M. Sousa, deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, former state's attorney, and *Leah Hawley*, former senior assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, Michael G., appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e).[1] The

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . . For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. . . .

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section."

respondent, the Commissioner of Correction, filed a request for an order to show cause why the petitioner's habeas petition should not be dismissed as untimely pursuant to § 52-470 (d) and (e). On appeal, the petitioner claims, inter alia, that the court erred in concluding that he failed to establish good cause for his late-filed petition. In particular, the petitioner argues that his prior habeas counsel's failure to advise him of the statutory deadline for filing a new petition prior to the withdrawal of his previously pending petition constituted ineffective assistance of counsel, which constituted good cause for the delay in filing. In accordance with our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), and our recent decision in *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 308 A.3d 1113 (2024),[2] we conclude that the judgment of the habeas court must be reversed, and we remand the case for a new hearing and good cause determination under § 52-470 (d) and (e).

The judgment of the habeas court is reversed and the case is remanded for further proceedings in accordance with this opinion.

MARCUS HODGE *v.* COMMISSIONER OF CORRECTION
(AC 46580)

Alvord, Moll and Seeley, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with a fatal hit-and-run accident, sought a writ of habeas corpus, claiming, inter alia, that certain changes to a risk reduction earned credit

[2] In 2021, prior to the issuance of the decisions in *Rose* and *Hankerson*, the appeal from the habeas court's dismissal of the petitioner's writ of habeas corpus was argued before this court. See *Michael G.* v. *Commissioner of Correction*, 214 Conn. App. 358, 360, 280 A.3d 501 (2022), vacated, 348 Conn. 946, 308 A.3d 35 (2024). The appeal was dismissed. Id., 378. The petitioner filed a petition for certification to appeal with our Supreme Court, which,

program had been improperly applied to him by the respondent, the Commissioner of Correction. The habeas court, sua sponte and without providing the petitioner with prior notice or an opportunity to be heard, dismissed the petitioner's first amended petition pursuant to the rule of practice (§ 23-29), concluding that it lacked subject matter jurisdiction over that petition and that the petition failed to state a claim on which habeas corpus relief could be granted. In the petitioner's prior appeal to this court, this court held that the habeas court was required to provide to the petitioner prior notice of its intention to dismiss, on its own motion, the petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal, which it did not do. Accordingly, this court remanded the case to the habeas court for further proceedings. On remand, the habeas court issued the requisite notice to the parties, and the petitioner, rather than addressing the jurisdiction of the court over the first amended petition, filed a second amended petition and a memorandum addressing why the claims asserted in his second amended petition were not subject to dismissal. The petitioner's claims in his second amended petition included, inter alia, two statutory interpretation claims challenging the respondent's interpretation of certain amendments to the statute (§ 54-125a) governing eligibility for parole and risk reduction earned credit. The court rejected the second amended petition in light of the pendency of the court's own motion to dismiss and subsequently dismissed the petitioner's first amended petition, reasoning that, in light of the petitioner's failure to respond to the court's order to address the legal sufficiency of the first amended petition, he had abandoned those claims. On the granting of certification, the petitioner appealed to this court, challenging only the habeas court's rejection of his second amended petition. After the briefs in the present appeal were filed, but before oral argument was held before this court, the petitioner completed his underlying sentence. *Held* that the appeal was dismissed as moot, this court having concluded that, even if it were to assume that the habeas court erred in rejecting the second amended petition, there was no practical relief that could be afforded to the petitioner with respect to the claims asserted therein: with respect to the petitioner's statutory interpretation claims, the petitioner did not have a present interest in the calculation of his risk reduction earned credits with regard to his parole eligibility date or in a parole suitability hearing; moreover, with respect to the petitioner's claims challenging the circumstances surrounding his decision to plead guilty, the petitioner did not seek the vacatur of his guilty pleas, and therefore no practical relief remained in connection with those claims; furthermore, with respect to the petitioner's claim challenging the performance of his criminal trial counsel during his sentencing

the judgment of this court, and remanded the case to this court "for further consideration in light of *Rose* . . . ." *Michael G.* v. *Commissioner of Correction*, 348 Conn. 946, 308 A.3d 35 (2024).

hearing, although the petitioner's counsel stated during oral argument before this court that, notwithstanding the completion of his sentence, the petitioner still purportedly sought a new sentencing hearing, in light of the fact that he had fully served his sentence, there was no practical relief that could be afforded to him.

Argued April 8—officially released May 7, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*, judge trial referee, rendered judgment dismissing the petition; thereafter, the petitioner, on the granting of certification, appealed to this court, *Elgo*, *Moll* and *Clark*, *Js.*, which reversed the judgment of the habeas court and remanded the case for further proceedings; subsequently, the court, *Newson*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Appeal dismissed.*

Vishal K. Garg, assigned counsel, for the appellant (petitioner).

Lisamaria T. Proscino, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (respondent).

Opinion

PER CURIAM. This case returns to us following the remand ordered in *Hodge* v. *Commissioner of Correction*, 216 Conn. App. 616, 624, 285 A.3d 1194 (2022). The petitioner, Marcus Hodge, appeals, following the grant of his petition for certification to appeal, from the judgment of the habeas court dismissing, on its own motion, his amended petition for a writ of habeas corpus dated November 15, 2017 (first amended petition). On appeal, the petitioner claims that the court erred in rejecting the filing of his six count amended

petition dated February 21, 2023 (second amended petition). Because there is no practical relief that we can afford the petitioner, who has fully served his underlying sentence, we dismiss the appeal as moot.

A comprehensive recitation of the relevant factual and procedural background, which is not necessary to repeat in this opinion, is set forth in *Hodge* v. *Commissioner of Correction*, supra, 216 Conn. App. 616. It suffices to state that, following the entry of guilty pleas in October, 2011, to charges arising out of a fatal hit-and-run accident, the petitioner was convicted of manslaughter in the second degree in violation of General Statutes § 53a-56 (a) (1), evading responsibility in the operation of a motor vehicle in violation of General Statutes (Rev. to 2009) § 14-224 (a), and failure to register as a sex offender in violation of General Statutes (Rev. to 2009) § 54-251. The court, *Alexander*, *J.*, sentenced the petitioner to a total effective sentence of fifteen years of incarceration without the imposition of probation or special parole.[1] While he was serving his sentence, he filed in the present action, inter alia, his first amended petition, which the habeas court, *Hon. Edward J. Mullarkey*, judge trial referee, dismissed on its own motion pursuant to Practice Book § 23-29. See *Hodge* v. *Commissioner of Correction*, supra, 619.

In the petitioner's appeal from the court's dismissal of his first amended petition, this court held that "the habeas court committed error in dismissing the [first] amended habeas petition pursuant to [Practice Book] § 23-29 without providing to the petitioner prior notice of its intention to dismiss, on its own motion, the [first]

[1] This court has taken judicial notice of the petitioner's December 16, 2011 sentencing proceeding and notes that the court, *Alexander*, *J.*, also concomitantly sentenced the petitioner in a separate violation of probation file to seven years and three months of incarceration and two years of incarceration in each of three other violation of probation files, all to run concurrently.

amended habeas petition and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal." Id., 617–18. We went on to "conclude that the proper remedy is to reverse the judgment of dismissal and remand the case to the habeas court for further proceedings according to law. Should the habeas court again elect to exercise its discretion to dismiss the [first] amended petition, or any subsequent amended petition properly filed by the petitioner, on its own motion pursuant to . . . § 23-29, the court must comply with the mandate of *Brown* [v. *Commissioner of Correction*, 345 Conn. 1, 282 A.3d 959 (2022)] and *Boria* [v. *Commissioner of Correction*, 345 Conn. 39, 282 A.3d 433 (2022)] by providing to the petitioner prior notice and an opportunity to submit a brief or a written response addressing the proposed basis for dismissal." *Hodge* v. *Commissioner of Correction*, supra, 216 Conn. App. 624.

On remand, the habeas court, *Newson*, *J.*, issued the requisite notice to the petitioner and the respondent, the Commissioner of Correction.[2] After an extension of time, on February 21, 2023, instead of filing the contemplated submission defending the jurisdiction of the

[2] The notice provided: "NOTICE OF POSSIBLE DISMISSAL PURSUANT TO PRACTICE BOOK § 23-29

"Pursuant to the remand order of the Appellate Court, upon review of the complaint in the above-titled matter, the court hereby gives notice pursuant to Practice Book § 23-29 that the court will consider whether the petition, or certain counts thereof, should be dismissed for the following reasons:

"(1) the court lacks jurisdiction;

"(2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted;

"(5) any other legally sufficient ground for dismissal of the petition exists.

"MORE SPECIFICALLY: Since the petitioner's offense date preceded enactment of the [risk reduction earned credit] statute he now asserts the benefit of, should his claim(s) be dismissed.

"Pursuant to the case of *Brown* v. *Commissioner of Correction*, [supra, 345 Conn. 1], the parties shall have until January 20, 2023, to submit any legal memorandum they wish the court to consider in its decision."

court over the *first* amended petition, the petitioner simultaneously filed (1) the second amended petition and (2) a "memorandum re: jurisdiction" addressing why the claims asserted in his *second* amended petition were not subject to dismissal.

With respect to the second amended petition, the petitioner asserted the following claims: (1) a so-called statutory interpretation claim challenging (a) the respondent's interpretation of No. 13-3 of the 2013 Public Acts, § 59, which amended subsections (b) (2), (c), and (e) of General Statutes (Rev. to 2013) § 54-125a, and (b) the resulting calculation of the petitioner's risk reduction earned credits (RREC) vis-à-vis his parole eligibility date (count one); (2) a so-called statutory interpretation claim challenging (a) the respondent's interpretation of No. 13-247 of the 2013 Public Acts, § 376, which amended subsections (d) and (e) of General Statutes (Rev. to 2013) § 54-125a, and (b) the resulting refusal by the respondent to hold a parole suitability hearing (count two); (3) a *Santobello*[3] claim and an ineffective assistance of counsel claim challenging the circumstances surrounding the petitioner's decision to plead guilty (counts three and four, respectively); (4) an ineffective assistance of counsel claim challenging the petitioner's criminal trial counsel's performance at the petitioner's sentencing hearing (count five); and (5) a due process claim challenging the prosecutor's alleged rescission of an agreement to a sentence modification hearing (count six).

[3] "In *Santobello* v. *New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the United States Supreme Court stated that 'the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to [en]sure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' " *State* v. *Hurdle*, 217 Conn. App. 453, 470, 288 A.3d 675, cert. granted, 346 Conn. 923, 295 A.3d 420 (2023).

On February 21, 2023, the court rejected the second amended petition in light of the pendency of the court's own motion to dismiss.[4] On February 27, 2023, the petitioner filed a "request to accept and docket amended petition for a writ of habeas corpus," which the court denied that same day. On March 30, 2023, the court dismissed the petitioner's first amended petition, reasoning that, in light of the petitioner's failure to respond to the court's order to address the legal sufficiency of the first amended petition, he had abandoned those claims. Thereafter, the petitioner filed a petition for certification to appeal, which the court granted. This appeal followed.

On January 8, 2024, between the filing of the appeal and oral argument before this court, the petitioner completed his underlying sentence. On appeal, the petitioner exclusively challenges the court's rejection of the petitioner's second amended petition. For the reasons that follow, we dismiss the appeal as moot.

"Mootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . 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

[4] Specifically, the court stated: "This matter was remanded from the Appellate Court with specific directions on the issue to be addressed, namely, whether the [first amended] petition should be dismissed.

"Based on that remand order, this court issued notice to the parties (Order #119.00) to respond in writing whether the matter should be dismissed because the habeas court lacked jurisdiction over the claims made in the initial action. Further pleadings not directly addressing the issue of the motion to dismiss are not appropriate until such time as [the question of] whether the jurisdiction of the habeas court was properly invoked by the content of the original petition has been answered. [See] *Marshall* v. *Commissioner of Correction*, 206 Conn. App. 461, 470, 261 A.3d 49, [cert. denied, 338 Conn. 916, 259 A.3d 1180 (2021)]."

determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [T]he question of subject matter jurisdiction is a question of law . . . and, once raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Internal quotation marks omitted.) *Brookstone Homes, LLC* v. *Merco Holdings, LLC*, 208 Conn. App. 789, 798–99, 266 A.3d 921 (2021).

Mindful of the foregoing principles, we conclude that, even if we were to assume arguendo that the court erred in rejecting the second amended petition, there is no practical relief that can be afforded to the petitioner with respect to the claims asserted therein. With respect to the petitioner's so-called statutory interpretation claims set forth in counts one and two, the petitioner does not have a present interest in the calculation of his RREC credits vis-à-vis his parole eligibility date or in a parole suitability hearing. With respect to the petitioner's *Santobello* and ineffective assistance of counsel claims set forth in counts three and four, which challenge the circumstances surrounding his decision to plead guilty, the petitioner does not seek the vacatur of his guilty pleas, as confirmed by the petitioner's counsel during oral argument before this court. No practical relief remains, therefore, in connection with those claims. With respect to count five, in which the petitioner challenges the performance of his criminal trial counsel during his sentencing hearing, although the petitioner's counsel stated during oral argument that,

notwithstanding the completion of his sentence, the petitioner still purportedly seeks a new sentencing hearing, we conclude that, in light of the fact that he has fully served his sentence, there is no practical relief that can be afforded to him. Finally, with respect to count six, the petitioner's counsel abandoned such claim during oral argument before this court. See *Ayala* v. *Smith*, 236 Conn. 89, 94, 671 A.2d 345 (1996) ("[t]he determination of whether a claim has become moot is fact sensitive, and may include the representations made by the parties at oral argument"). In sum, because we cannot afford the petitioner any practical relief, we dismiss the appeal as moot.[5]

The appeal is dismissed.

[5] We note that, in his principal appellate brief, the petitioner appeared to acknowledge that, "as a result of the dismissal, it is likely that the petitioner's opportunity to litigate a habeas corpus case challenging the length of his period of incarceration—which is the issue he seeks to raise—will become moot, as he will have finished the sentence and parole by the time he is able to have a trial on the merits of his claims and may be in a position where practical relief is unavailable to him."

In his appellee brief filed in December, 2023, the respondent agreed, arguing that "the appeal should be dismissed as moot after January 8, 2024, when the petitioner is scheduled to be discharged from the respondent's custody without any special parole or probation." The respondent relied on *Patterson* v. *Commissioner of Correction*, 112 Conn. App. 826, 964 A.2d 1234 (2009), in which the petitioner in that case, who sought to challenge his classification as a "violent offender" by the Board of Pardons and Paroles, completed his sentence prior to oral argument before this court. See id., 828–29. This court concluded that the expiration of the petitioner's sentence rendered his appeal moot and that he did not satisfy his burden to show that "there is a reasonable possibility that prejudicial collateral consequences will occur as a result of the allegedly improper classification . . . ." Id., 834.

In his reply brief, the petitioner changed his position, contending that the completion of his sentence does not render the appeal moot. As an initial matter, the petitioner argues that *Patterson* is an outlier and instead relies on two cases standing for the overly broad proposition that a habeas corpus action survives a petitioner's release from custody. The petitioner's reliance on those cases is misplaced, however, because in those cases, the petitioners brought claims challenging the legality of their convictions. See *Herbert* v. *Manson*, 199 Conn. 143, 144 n.1, 506 A.2d 98 (1986) ("[i]n attacking the legality of his conviction [i.e., by alleging that his convictions of the crimes of sexual assault in the first degree and kidnapping in the second degree

DORAINE REED *v.* COMMISSIONER OF CORRECTION (AC 46226)

Alvord, Elgo and Keller, Js.

Syllabus

The petitioner appealed from the judgment of the habeas court denying her amended petition for a writ of habeas corpus, claiming that the application to her of an administrative directive amended by the respondent, the Commissioner of Correction, that changed the calculation of credit that inmates may earn under the risk reduction earned credit program established by statute (§ 18-98e) violated the ex post facto clause of the United States constitution. *Held* that the petitioner could

should be overturned because of ineffective assistance of counsel], the petitioner has stated a claim that survives his release from incarceration and parole"); *Smith* v. *Commissioner of Correction*, 65 Conn. App. 172, 176, 782 A.2d 201 (2001) ("[i]n attacking the legality of his conviction in a habeas corpus action [i.e., by alleging that his guilty plea to an assault in the second degree charge was not made knowingly, intelligently, or voluntarily], the petitioner's claim survives his release from incarceration"). Here, the petitioner's counsel expressly acknowledged during oral argument before this court that the petitioner is not attacking his convictions.

Further, the petitioner argues, in the alternative, that, even if deemed moot, the petitioner's claims satisfy the capable of repetition yet likely to evade review exception to the mootness doctrine. See *Loisel* v. *Rowe*, 233 Conn. 370, 382, 660 A.2d 323 (1995) (exception has three requirements: (1) challenged action must be of inherently limited duration; (2) there must be reasonable likelihood that question presented will arise again and it will affect either same complaining party or reasonably identifiable group for whom that party can be said to act as surrogate; and (3) question must have some public importance). This argument warrants little discussion. Instead of analyzing how the nature of the petitioner's habeas claims satisfies the three part test for this exception set forth in *Loisel*, the petitioner launches unjustified and unsupported criticisms at the intentions of the habeas court and the manner in which it handles RREC related cases. Simply put, the petitioner has provided us with no basis on which to conclude that the three requirements set forth in *Loisel* are satisfied.

Finally, to the extent the petitioner's counsel attempted to invoke the collateral consequences exception to the mootness doctrine during oral argument before this court, we do not consider them because "[i]t is well settled that a claim cannot be raised for the first time at oral argument." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 797 n.12, 256 A.3d 655 (2021).

not prevail on her claim that the application to her of the administrative directive violated the ex post facto clause of the United States constitution as, pursuant to *Rios* v. *Commissioner of Correction* (224 Conn. App. 350), the administrative directive in question did not constitute a law within the meaning of the ex post facto clause and, thus, she could not establish an ex post facto violation.

Argued January 3—officially released May 7, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and 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.*

Doraine Reed, self-represented, the appellant (petitioner).

Diaghilev Lubin-Farnell, assistant attorney general, with whom were *Patrick Ring* and *Zenobia Graham-Days*, assistant attorneys general, and, on the brief, *William Tong*, attorney general, for the appellee (respondent).

Opinion

PER CURIAM. The self-represented petitioner, Doraine Reed, appeals from the judgment of the habeas court denying her amended petition for a writ of habeas corpus. Her appeal concerns an administrative directive amended by the respondent, the Commissioner of Correction, in 2016, which changed the calculation of credit that inmates may earn under the risk reduction earned credit program established by General Statutes § 18-98e. See Conn. Dept. of Correction, Administrative Directive 4.2A (effective February 1, 2016).[1] On appeal, the petitioner contends that the application of that

[1] The respondent issued Administrative Directive 4.2A in 2013 and amended it in 2016. A copy of the amended directive was admitted into evidence at the habeas trial.

administrative directive to her violates the ex post facto clause of the United States constitution.[2]

Resolution of the petitioner's claim is controlled by *Rios* v. *Commissioner of Correction*, 224 Conn. App. 350, A.3d (2024). In *Rios*, this court concluded that, because Administrative Directive 4.2A, as amended, did not constitute a law within the meaning of the ex post facto clause, the petitioner could not establish an ex post facto violation. Id., 353, 375. Bound by that precedent; see *State* v. *White*, 215 Conn. App. 273, 304–305, 283 A.3d 542 (2022), cert. denied, 346 Conn. 918, 291 A.3d 108 (2023); the petitioner's ex post facto challenge must fail.

The judgment is affirmed.

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[2] In her habeas petition and her appellate brief, the petitioner also vaguely alludes to her due process rights without citation to, or discussion of, legal authority. It is well established that inmates do not possess a constitutional right to be conditionally released prior to the expiration of their sentences. See *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). Our Supreme Court likewise has held that an inmate has no cognizable liberty interest in credit potentially earned pursuant to § 18-98e. See *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 369–72, 163 A.3d 597 (2017). Accordingly, the petitioner's invocation of due process is unavailing.