IN RE P. T.-W.*
(AC 45944)

Suarez, Clark and Seeley, Js.

Syllabus

The respondent father filed a motion to open the judgment rendered by the trial court terminating his parental rights with respect to his minor daughter, P. In his motion, the father alleged that, although he had consented to the termination of his parental rights, he had recently discovered information that indicated that the mother of P and the mother's attorney had committed fraud by failing to provide certain vital information to the court and, that if he had known that information, he would not have voluntarily given up his parental rights. The mother filed a motion to dismiss the father's motion to open. Eight days prior to the scheduled hearing on the father's motion, the father's parent called the court clerk's office and stated that the father, who was incarcerated in the state of Washington, would not be able to make it to court. The record contained notes from a clerk indicating that a call was placed to the correctional facility in Washington and that the clerk was told that, although the prison had access to Microsoft Teams, the collaborative meeting software used by the Connecticut Judicial Branch for remote hearings, it was only used for internal purposes, and that

* 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.

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

the prison "[did] not do virtual for inmates." The scheduled hearing on the father's motion to open took place even though the father was not present. The court thereafter dismissed the father's motion. The father appealed to this court, claiming, inter alia, that the court erred in dismissing his motion to open by proceeding with the hearing in his absence and without giving him a chance to participate remotely. *Held* that the trial court violated the respondent father's due process rights in conducting the hearing on his motion to open without giving him a meaningful opportunity to be heard on his motion: it was undisputed that the father was not present and was not afforded an opportunity to participate remotely, either by telephone or a video conferencing platform, at the hearing on his motion to open the judgment terminating his parental rights, and there was nothing in the transcript of that hearing that indicated that steps had been taken to provide the father with a meaningful opportunity to participate and be heard at the hearing, as the transcript simply reflected that counsel for the mother told the court that the father was incarcerated in the state of Washington; moreover, even though the court's written order dismissing the father's motion stated that the clerk's office had previously attempted to have the father participate remotely from the correctional facility but that the facility indicated that they used a platform other than Microsoft Teams, that was not the only means by which the father could have participated, as he could have participated via telephone or the hearing could have been rescheduled to a future date at which the father's participation could be secured; accordingly, the case was remanded for a new hearing on the motion to open, at which the father was to be provided with a meaningful opportunity to be heard on the motion.

Argued November 9, 2023—officially released January 31, 2024**

Procedural History

Petition to terminate the respondent father's parental rights with respect to his minor child, brought to the Probate Court in the district of Stamford and transferred to the Superior Court in the judicial district of Stamford-Norwalk, Juvenile Matters, where the respondent father consented to the termination of his parental rights; thereafter, the case was tried to the court, *Maronich, J.*; judgment terminating the respondent father's parental rights; subsequently, the court, *E. Richards, J.*, dismissed the respondent father's motion to open

** January 31, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

the judgment, and the respondent father appealed to this court. *Reversed*; *further proceedings*.

Michael W., self-represented, the appellant (respondent father).

Opinion

SEELEY, J. The self-represented respondent father,[1] Michael W., appeals from the judgment of the trial court dismissing his motion to open a judgment previously rendered by the court terminating his parental rights with respect to his minor daughter, P. T.-W. (P). In his motion to open, the respondent alleged that the judgment terminating his parental rights had been procured by fraud. On appeal, the respondent claims, inter alia, that the court improperly dismissed his motion to open the judgment terminating his parental rights at a hearing at which he was not present due to his incarceration in the state of Washington and was not given an opportunity to participate remotely, such as by telephone. We agree and reverse the judgment.

The following facts and procedural history are relevant to this appeal. Melissa T. became pregnant after

[1] The minor child's mother, Melissa T., filed a petition in the Probate Court seeking to terminate the respondent father's parental rights with respect to their minor child. Thereafter, the matter was transferred to the Superior Court. The respondent father subsequently consented to the termination of his parental rights, and the court rendered judgment terminating his parental rights.

Melissa T. did not file a brief and is not otherwise involved in this appeal and, as a result, this court issued an order on September 6, 2023, stating that the appeal will "be considered on the basis of the [respondent's] brief and, if applicable, the appendix, the record, as defined by Practice Book [§] 60-4, and oral argument . . . ." Furthermore, the attorney for the minor child, who had anticipated adopting the position of Melissa T. in this matter but could not do so when no appellee brief was filed, filed a letter dated October 19, 2023, stating that it is the minor child's position that the court properly dismissed the respondent's motion to open and that, if the respondent were to prevail, it would "cause direct harm to the child's wishes and best interests."

she and the respondent commenced an intimate relationship in October, 2014. The respondent and Melissa T. moved to Connecticut in January, 2015, and P was born in July, 2015. Melissa T. and the respondent were never married but resided together until April, 2017. When they resided together, Melissa T. observed certain conduct by the respondent, including controlling behavior, that caused her to be concerned about the stability of his mental health and, ultimately, to end the relationship.

On April 10, 2017, Melissa T. filed an application for relief from abuse seeking a restraining order against the respondent, in which she alleged that she had "been subjected to a continuous threat of present physical pain or physical injury, stalking or a pattern of threatening . . . ."[2] That same day, the court issued an ex parte restraining order, which remained in effect until the matter was heard at a hearing on April 21, 2017, at which the court determined that the evidence was legally insufficient to demonstrate that Melissa T. had met her burden of proof to justify the issuance of a restraining order.

Thereafter, the parties became involved in a contentious battle for custody of P. Two days after Melissa T. filed her application for relief from abuse, the respondent petitioned the court for sole legal and physical custody of P. The parties thereafter stipulated to joint legal and shared physical custody. They subsequently filed numerous motions pertaining to custody and visitation of P that were resolved by a second stipulation dated July 31, 2017, which was approved by the court

[2] In her affidavit in support of her application, Melissa T. alleged, inter alia, that the respondent had exhibited erratic, manipulative, and hostile behavior toward her, which made her fear for her safety, that the respondent had been taking her prescription pain medications for recreational use, and that one night his behavior escalated when he restrained her to grab her phone.

and provided for "a 'rotating 2-2-3 parental responsibility plan' but made no change to the prior agreement of joint legal custody." After Melissa T. filed an emergency motion for custody in August, 2017, the court granted the motion, awarded sole legal and physical custody of P to Melissa T., and ordered that the respondent's parenting time with P be supervised. Following competing motions to modify custody, the parties entered into another stipulation, which was submitted for court approval on March 19, 2018. That stipulation granted decision-making authority to Melissa T. and changed the custody arrangement from shared parenting and visitation time to primary residence with Melissa T., with a more limited visitation schedule with the respondent. Melissa T. filed a second emergency motion for custody in September, 2018, claiming that " 'there [was] an immediate and present physical and psychological danger' " to P, and the parties entered into an agreement. The parties continued to file numerous motions relating to the custody of P, most of which were resolved following a trial that began in January, 2019, and concluded in May, 2019, that resulted in the court issuing a lengthy memorandum of decision in which it made numerous orders, including awarding sole legal and physical custody of P to Melissa T., suspending visitation with the respondent and ordering the respondent, inter alia, to participate in a program of intensive psychotherapy.

In 2018, Melissa T. sought and obtained a restraining order against the respondent that was extended to 2019.[3] The respondent violated that order when, on

[3] Specifically, in her affidavit in support of her 2018 application for relief from abuse, Melissa T. alleged that she was in "imminent fear for [her] physical safety and [her] daughter's well-being caused by behavior and communication of [the respondent]." She further alleged that the respondent's actions were "abusive, angry, full of hatred and escalating in both rage and frequency," and that he had been engaging in a pattern of stalking. On September 26, 2018, the court, *Heller*, *J.*, issued a full, no contact restraining order against the respondent as to Melissa T. and P. On October

November 24, 2019, he attempted to break into Melissa T.'s residence while she and P were in that residence.[4] As a result, the respondent was charged with criminal violation of a restraining order, burglary in the first degree, and attempt to commit risk of injury to a child. At a hearing before the court on October 28, 2020, the respondent entered a guilty plea to the charges of burglary in the first degree, criminal violation of a restraining order, and attempt to commit risk of injury to a child, with a proposed total effective sentence of ten years, execution suspended after a minimum period of one year and a maximum period of three years, with that effective term being determined by the court at sentencing, and five years of probation. As an additional condition of the plea, the prosecutor asked the court to issue three full no contact protective orders for the protection of Melissa T., her husband, and P. At that hearing, the prosecutor specifically stated that the period of those protective orders would be "forty years for [Melissa T.] and her husband and until the child's eighteenth birthday for [P]." The respondent's counsel indicated that the respondent, who was present at that hearing, "[was] in agreement with those conditions."

At the respondent's sentencing hearing on December 30, 2020, at which the respondent was present, the court sentenced the respondent, in accordance with the plea agreement, to a total effective sentence of ten years,

16, 2018, the court extended the order for one year with respect to Melissa T. but lifted it as to P.

[4] Specifically, at the respondent's plea hearing, the state asserted that, "[a]t approximately 2:04 and 2:13 in the morning, the [respondent] illegally entered a dwelling unit at [a particular address where Melissa T. resided] without consent after sunset at night and attempted to make entry into [Melissa T.'s] unit. Inside the unit was [Melissa T.'s] minor child. The defendant at the time had made a number of statements indicating his intent to take custody of the child to quote, unquote, rescue her from [Melissa T.]. It is the state's allegation that that is what he was trying to accomplish on the night in question."

execution suspended after one year, with five years of probation. The court also specifically recounted the conditions of its standing criminal protective orders and their duration, stating that the orders pertaining to Melissa T. and her husband would expire on December 30, 2060, and that the one pertaining to P would expire in July, 2033, on her eighteenth birthday. The court also made clear to the respondent that, with respect to those protective orders, he has to "stay away from the home of the protected person, wherever that person may reside," "have no form of contact with the protected person, including any written, electronic or telephonic contact, and . . . not contact the protected person's home or place of others with whom the contact will be likely to cause annoyance or alarm to the protected person or persons." The respondent also was ordered to stay 100 yards away from all three protected persons. Those same conditions apply to all three protective orders. At that hearing, Melissa T.'s attorney was asked if he had anything to say, to which he remarked that he wanted the respondent to know that the criminal protective orders that were being put in place at that hearing as part of the criminal disposition supersede the restraining order that previously had been in place.[5]

[5] In his appellate brief and at oral argument before this court, the respondent challenges the existence of the condition of the protective order precluding him from having any contact with P until she reaches eighteen years of age that was issued by the court at the time of sentencing. For example, at oral argument before this court he stated that it is "not true" that he cannot talk to his daughter until she is eighteen. In his appellate brief, he further asserts: "One of the most important false statements in the motion to dismiss came with an exhibit attached. The information presented to the court stated, 'a protective order was issued against [the respondent] preventing him from having any contact with the minor child until age eighteen years old.' This is an untrue fact." We disagree. We have carefully reviewed the transcripts of the respondent's plea and sentencing hearings in the criminal proceeding, at which the court clearly and explicitly stated the terms of the standing criminal protective order related to P. Under those terms, the protective order remains in place until P reaches eighteen years old, and the respondent is "to have no form of contact with the protected person, including any written, electronic or telephonic contact . . . ." The

On March 5, 2021, Melissa T. filed a petition in the Probate Court seeking to terminate the respondent's parental rights with respect to P on the grounds that (1) P had been abandoned by the respondent, (2) P had been denied the care, guidance or control necessary for her physical, educational, moral or emotional well-being by reason of acts or parental commission or omission, namely, the respondent had pleaded guilty to attempting to commit risk of injury to a child, for which a criminal protective order was issued that precluded the respondent from having any contact with P for the next fourteen years, (3) there was no ongoing parent-child relationship between P and the respondent, and (4) P had been found in a prior proceeding by the Probate Court to have been neglected and the respondent has failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time and considering the age and needs of P, the respondent could assume a responsible position in P's life. The matter was subsequently transferred to the juvenile division of the Superior Court.

On August 30, 2021, the respondent executed and signed an affidavit consenting to the termination of his parental rights. Thereafter, on October 21, 2021, the court rendered judgment terminating the respondent's parental rights pursuant to its findings, by clear and

respondent bases his assertion on a clerk's notation on a criminal docket sheet, dated the same day as the sentencing hearing, stating that the respondent is to have no contact with Melissa T. or P "other than through [M]y [F]amily [W]izard." The clerk's note, however, was not signed by the judge and contains a scrivener's error. See *RCN Capital, LLC* v. *Sunford Properties & Development, LLC*, 196 Conn. App. 823, 835 and n.6, 231 A.3d 201 (2020). The actual orders of protection signed by the judge include the condition that the respondent have no contact with the protected persons "in *any* manner, including by written, electronic or telephonic contact," and make no reference to contact through "[M]y [F]amily [W]izard," which clearly would contradict the no contact order imposed by the court. (Emphasis added.)

convincing evidence, that the respondent had voluntarily consented to the termination of his parental rights and that such termination was in P's best interest.

On June 10, 2022, the respondent filed a motion to open the judgment terminating his parental rights. In that motion, the respondent alleged, inter alia, that, in the preliminary meetings leading to the termination of his parental rights, Melissa T. and her attorney committed fraud by failing to provide vital information to the court. Specifically, he alleged that information pertaining to Melissa T.'s health was "hidden from the court," that he had just discovered the "horrible news" a few weeks prior, and that if he had known such information, he would not have voluntarily given up his parental rights and, instead, would have proceeded with a hearing on the termination petition.

A hearing on the respondent's motion to open was initially scheduled for July 5, 2022, but that date was continued to September 6, 2022, at the request of Melissa T.'s attorney, who had a conflict. On July 25, 2022, P was adopted by Melissa T.'s husband. Subsequently, on September 2, 2022, Melissa T. filed a motion to dismiss the respondent's motion to open the judgment terminating his parental rights. In her motion to dismiss, Melissa T. argued that the respondent's motion to open was not timely filed and, thus, was barred by the statute of limitations. She also asserted that a final judgment of stepparent adoption had been rendered with respect to her husband, who is now P's sole father. In her motion, Melissa T. also noted that, on December 30, 2020, the respondent had pleaded guilty to criminal violation of a protective order, burglary in the first degree, and attempt to commit risk of injury to a child, and was sentenced to ten years of incarceration, execution suspended after one year, followed by five years of probation. Melissa T. further noted that "[a] protective order was issued against [the respondent] preventing

him from having any contact with [P] until she [is] eighteen years old."

On September 6, 2022, the respondent sought a continuance of the September hearing date on his motion to open on the ground that his attorney " 'quit' " and he needed more time to prepare for the hearing as a self-represented party. A continuance was granted, and a hearing was set for October 6, 2022. On September 28, 2022, the respondent's father called the court clerk's office and stated that the respondent, who was incarcerated in the state of Washington at the time, would not be able to make it to court for the October 6, 2022 hearing. The record contains notes from a clerk dated September 29, 2022, indicating that a call was placed to the correctional facility in Washington and that the clerk was told that, "while the prison had access to [Microsoft Teams],[6] it was only used for internal purposes," and that the prison "[does] not do virtual for inmates." (Footnote added.)

The scheduled hearing on the respondent's motion to open took place on October 6, 2022, despite the fact that the respondent was not present at the hearing due to his incarceration in Washington. After counsel for the parties identified themselves at the hearing, the following colloquy took place between the court and Frank Bevilaqua, the attorney for Melissa T.:

"The Court: All right. . . . Is the [respondent] here today or?

"[Attorney Bevilacqua]: . . . I provided [this] [court] with information. [The respondent] is currently incarcerated in Washington state waiting for extradition for

[6] Microsoft Teams is "collaborative meeting [computer software] with video, audio, and screen sharing features." Connecticut Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (January 17, 2024), p. 5, available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited January 31, 2024).

violating . . . the standing protective orders that were in [place] on file with my client, Melissa T., and her current husband. So, I don't know if there's going to be a Zoom or not. I gave the—the clerk's office all of the information of where . . . [the respondent] is currently residing. I hate using the term residing but being held.

"The Court: All right. Anything else? Was it down for dismissal today or what was the? Okay. All right. So, do we know where the father is? Has there been any attempt to contact him in Washington state or has there been service in that regard, do we know?

* * *

"The Court: And so, the motion [to open] is by the [respondent], correct me if I am wrong, he is not here.

"[Attorney Bevilacqua]: Correct. . . .

"The Court: He's incarcerated in . . . the far west, Washington state.

"[Attorney Bevilacqua]: Correct.

"The Court: All right.

"[Attorney Bevilacqua]: Based on his violation of the protective order[s] and terms of his release where the protective order[s] w[ere] imposed against him in criminal court by Judge White.

"The Court: Yes.

"[Attorney Bevilacqua]: And as in [Melissa T.], [Melissa T.'s husband], and . . . [P] [were] the recipients of the standing protective order[s].

"The Court: The [respondent's] rights were previously terminated, is that correct?

"[Attorney Bevilacqua]: Correct, Your Honor. By this court.

"The Court: All right.

"[Attorney Bevilacqua]: In this jurisdiction. . . .

"The Court: There's a full permanent protective order in effect [enjoining] the [respondent] from having contact with the child. Is that correct?

"[Attorney Bevilacqua]: Correct, Your Honor. For the next nineteen years, seventeen to nineteen years. . . .

"The Court: All right. Anything else?

"[Attorney Bevilacqua]: No, Your Honor.

"The Court: I'm going to dismiss the matter. . . . Just so the record is clear, there is a full protective order [enjoining] the respondent . . . from having any contact with the child . . . . He can't have contact with that child by order of Judge White by order of the Stamford court. In light of those factors, to have any relitigation of the motion would . . . in my mind, violate the best interest rule of the child . . . .

"So, with that end in mind, while I understand it is a bit of a stretch to, I don't want to say bit of a stretch, but it—I don't like to have a motion to dismiss without all the parties present. In view of the fact that the father filed this motion. The child is in, has been adopted, is in the custody of another individual. Apparently, the reason for that, at least part of the reason for that termination of parental rights and the custodial change, was the [respondent's] violence against the child, who [the respondent] now wishes to have contact with, yield the fact that there is a full protective order. . . . The court is going to find that it is in the best interest . . . of the child to dismiss the . . . [respondent's motion to open] at this time."

The court thereafter issued a written order, consistent with its oral decision, dismissing the motion to open. The order stated: "[The respondent], [whose

parental rights previously were terminated], has filed a motion to [open] alleging fraud. [The respondent] is incarcerated in Washington state. There is a permanent protective order in effect, which was previously ordered by the Stamford criminal court against the [respondent]. [The respondent] is not present today. [The] clerk's office previously attempted to have the [respondent] participate remotely from jail, but [the] correctional facility indicated that they use a different platform, other than [Microsoft] Teams. Since [the respondent] is not present today, and because a permanent protective order is in effect against [the respondent], the court enters a dismissal as to [the respondent's] motion to [open]." The respondent subsequently filed a timely appeal challenging the dismissal of his motion to open and seeking a new hearing thereon.

Thereafter, pursuant to Practice Book § 66-5, the respondent filed a motion for articulation, seeking to have the court articulate, inter alia, the legal and factual basis for its dismissal of his motion to open. In an articulation dated January 24, 2023, the court set forth the factual and procedural history of the case and stated: "On the basis of the statute of limitations alone, the [respondent's] motion to [open] [the] judgment is time barred. But, in the event that the [respondent] meets the initial threshold to open [the] judgment, it is the trial court's opinion that, on the basis of the previously mentioned case history, including the [respondent's] plea to the aforementioned felony charges and the subsequent adoption of the child on July 25, 2022, it would be disruptive to and not in the best interest of the child to [open] the judgment."[7]

On appeal, the respondent claims that the court erred in dismissing his motion to open by proceeding with

[7] On April 5, 2023, the respondent filed a motion for review of the trial court's articulation. On April 26, 2023, this court granted the motion for review but denied the relief requested therein.

the hearing on the motion in his absence and without giving him a chance to participate remotely. Specifically, he claims that he had a right to be heard on his motion and to participate in the proceeding. He asserts that the court was aware that he would not be able to make it to court for the proceeding, as his father had called the clerk's office eight days prior to the proceeding and informed the clerk of his incarceration in Washington. He also notes that the hearing had been rescheduled previously and that it, again, should have been rescheduled to enable his participation. We agree with the respondent.

The following legal principles are relevant to the respondent's claim. "[F]or more than a century the central meaning of procedural due process has been clear: Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. . . . It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. . . . Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Instead, due process is a flexible principle that calls for such procedural protections as the particular situation demands. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 198 Conn. App. 320, 332, 232 A.3d 1229 (2020). "It 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. . . . *Hasbrouck* v. *Hasbrouck*, 195 Conn. 558, 559–60, 489 A.2d 1022 (1985). It is a fundamental premise of due process that a court cannot adjudicate a matter until the persons directly concerned have been notified of its pendency and have been given a reasonable opportunity to be heard in sufficient time to prepare their positions on the issues involved." (Internal quotation marks omitted.) *Egan* v. *Egan*, 83 Conn. App. 514, 518, 850 A.2d 251 (2004); see also *Davis* v. *Davis*, 200 Conn. App. 180, 190, 238 A.3d 46, cert. denied, 335 Conn. 977, 241 A.3d 130 (2020).

"It is a fundamental tenet of due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 10, of the Connecticut constitution that persons whose . . . rights will be affected by a court's decision are entitled to be heard at a meaningful time and in a meaningful manner. . . . Whe[n] a party is not afforded an opportunity to subject the factual determinations underlying the trial court's decision to the crucible of meaningful adversarial testing, an order cannot be sustained." (Internal quotation marks omitted.) *Ill* v. *Manzo-Ill*, 210 Conn. App. 364, 376–77, 270 A.3d 108, cert. denied, 343 Conn. 909, 273 A.3d 696 (2022). "In exercising its statutory authority to inquire into the best interests of the child, the court . . . must . . . exercise that authority in a manner consistent with the due process requirements of fair notice and reasonable opportunity to be heard." (Internal quotation marks omitted.) *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 515, 146 A.3d 26 (2016). "Whether a party was deprived of his [or her] due process rights is a question of law to which appellate courts grant plenary review." (Internal quotation marks omitted.) *Coleman* v. *Bembridge*, 207 Conn. App. 28, 45, 263 A.3d 403 (2021).

Moreover, "[i]t is undisputed that [t]he right of a parent to raise his or her children has been recognized as a basic constitutional right. *Stanley* v. *Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Accordingly, a parent has a right to due process under the fourteenth amendment to the United States constitution when a state seeks to terminate the relationship between parent and child. See *Lassiter* v. *Dept. of Social Services*, 452 U.S. 18, 27, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981)." (Internal quotation marks omitted.) *In re Egypt E.*, 322 Conn. 231, 244, 140 A.3d 210 (2016); see also *McDuffee* v. *McDuffee*, 39 Conn. App. 412, 415–16, 664 A.2d 1164 (1995) ("natural parent has a protected liberty interest in a relationship with [his or] her child and, therefore, has a constitutional right to be present and to be heard at hearings affecting that relationship"). In the present case, the court held a hearing, without any participation by the respondent, on his motion seeking to open and to reverse the judgment terminating his parental rights with respect to P, which clearly implicates his constitutional right to parent his child and the attendant due process protections afforded to parents.

In *In re Aisjaha N.*, 343 Conn. 709, 726, 275 A.3d 1181 (2022), our Supreme Court noted that "trial courts have an obligation to ensure that parties have the ability to meaningfully participate . . . ." In that case, the court declined the party's invitation to invoke its "supervisory authority to create a rule requiring that a trial court, before conducting a virtual trial in a child protection case, ensure that the parties either appear by two-way videoconferencing technology or waive the right to do so, after a brief canvass." Id., 726–27. Nevertheless, the court took the "opportunity to emphasize the importance of ensuring equal access to justice" in the contexts of virtual hearings. Id., 727. Relevant to the present case, the court stated that, "[i]n situations in

which parties or witnesses express an inability to participate in virtual proceedings, it is imperative that our courts either provide alternative means of accessing the technology needed to participate . . . or continue the proceeding until it can be conducted in person or until such time as the party or witness has secured the necessary technology to meaningfully participate in the proceeding. Courts must also be mindful of ensuring that parties have equal access to the same technological means to participate in the virtual trial, such as ensuring that both parties participate by either video and audio or audio only." Id., 729–30.

In the present case, it is undisputed that the respondent was not present and was not afforded an opportunity to participate remotely, either by telephone or a video conferencing platform, at the hearing on his motion to open the judgment terminating his parental rights. There is nothing in the transcript of that hearing indicating that steps were taken to provide the respondent with a meaningful opportunity to participate and be heard at the hearing. Instead, the transcript simply reflects that counsel told the court that the respondent was incarcerated in the state of Washington. Moreover, even though the court's written order states that the "clerk's office previously attempted to have the [respondent] participate remotely from jail, but [the] correctional facility indicated that they use a different platform, other than [Microsoft] Teams," that is not the only means by which he could have participated. For example, in *In re Juvenile Appeal (Docket No. 10155)*, 187 Conn. 431, 434, 446 A.2d 808 (1982), the trial court denied a request for a continuance in which the respondent father, who was incarcerated in California, sought a continuance until his expected release from prison so that he could be physically present at the termination of his parental rights trial. Our Supreme Court concluded that the father was not denied due process,

especially given the unusual measures taken by the court to secure the father's long-distance participation following its denial of his motion for a continuance. Id., 435–41. Specifically, on the initial day of hearings, the state's principal witness testified and was cross-examined by the father's counsel, and a complete transcript of that hearing was sent to the father, who was given time to discuss the witness' testimony with his counsel by telephone. Id., 436–37. At the second session, a speaker was attached to a telephone at the court in Connecticut and the father testified and was cross-examined from his California prison. Id., 437. As a result of these measures, the court determined that the father's telephonic testimony adequately protected his due process rights. Id., 435–41; see also *In re Aisjaha N.*, supra, 343 Conn. 723 n.6.

In contrast to the procedures followed in cases such as *In re Juvenile Appeal (Docket No. 10155)* and *In re Aisjaha N.*, the record in the present case does not demonstrate that the respondent was given a meaningful opportunity to be heard at the hearing on his motion to open.[8] See *Egan* v. *Egan*, supra, 83 Conn. App. 518–19 (court, which proceeded with hearing on motion to terminate child support in plaintiff's absence, denied plaintiff due process by failing to provide plaintiff with notice of hearing on motion to terminate child support and meaningful opportunity to be present and be heard on motion). If there was a problem with the video conferencing platform used by the correctional facility in Washington, the respondent could have participated via telephone; see *In re Juvenile Appeal (Docket No. 10155)*, supra, 187 Conn. 436–37 (father who was incarcerated in California participated at termination of parental rights hearing in Connecticut via telephone); *In re Takie O.*, 215 Conn. App. 580, 584, 282 A.3d 1279

[8] The respondent does not claim on appeal that he lacked adequate notice of the hearing.

(on first day of trial on termination of parental rights petition, respondent father joined proceeding by telephone), cert. denied, 345 Conn. 922, 284 A.3d 982 (2022); or the hearing could have been rescheduled to a future date at which the respondent's participation could be secured. See *In re Aisjaha N.*, supra, 343 Conn. 729–30. Accordingly, because the hearing was conducted in violation of the respondent's due process rights, the court's dismissal of his motion to open cannot stand. For that reason, the case must be remanded for a new hearing on the motion to open,[9] at which the respondent must be given a meaningful opportunity to be heard on the motion.[10]

[9] We note that the record is ambiguous as to whether the hearing on October 6, 2022, also concerned Melissa T.'s motion to dismiss. The summons ordering Melissa T. to appear on October 6, 2022, indicates that the scheduled hearing pertained to the respondent's motion to open, and the record does not contain any notice for a hearing on Melissa T.'s motion to dismiss. The court's written order containing its judgment of October 6, 2022, however, indicates that the order pertains to both the motion to dismiss and the motion to open, and judgment was rendered dismissing the respondent's motion to open. Moreover, the transcript of the hearing of October 6, 2022, does little to clarify this issue, as the court did not state clearly what motion or motions were before it, and it referenced both the motion to dismiss and the motion to open. Nevertheless, regardless of whether the hearing concerned the motion to dismiss in addition to the motion to open, we have determined that the October 6 hearing was improper in that it took place in violation of the respondent's due process rights; accordingly, the judgment rendered at that hearing dismissing the respondent's motion to open cannot stand. We remand for a new hearing on the motion to open only, as requested by the respondent in his appellate brief. On remand, however, Melissa T. is free to renew her motion to dismiss or to file a new one and seek a hearing thereon, should she choose to do so.

[10] In light of our determination that a new hearing on the motion to open is necessary, we need not address the respondent's claim that the court improperly based its decision dismissing his motion to open on hearsay and otherwise inadmissible testimony. Moreover, the respondent, in his appellate brief, makes a number of arguments that relate to the substance and merits of his motion to open. For example, he discusses the circumstances of his consent to the termination of his parental rights, first disputing that he ever consented and next arguing that he did so under duress. He also argues in his appellate brief that the court-appointed attorney who represented him during the termination of parental rights proceeding did not act in the best interests of the respondent or P, and that the court erred in determining

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

IN RE AVA M.*
(AC 46676)

Bright, C. J., and Alvord and Flynn, 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, A. The mother first became involved with the Department of Children and Families when F assaulted the mother's then nineteen month old son, M. F was ultimately convicted of assault in connection with the incident and incarcerated. Within three months of F's release from prison, the mother reengaged with him despite the department's repeated admonishment that the mother should refrain from doing so. After the mother gave birth to F's child, A, she denied to the department that she was in a relationship with F but agreed not to allow him to have contact with A. When A was approximately four months old, the

that his motion to open was time barred because it was filed beyond the four month period in which motions to open must be filed. See General Statutes § 52-212a; Practice Book § 17-4. In light of our determination that it was improper for the court to proceed with the hearing on his motion to open without providing the respondent with a meaningful opportunity to be heard at the hearing, we need not address these arguments, as the merits of the motion to open will be litigated at a new hearing on the motion. Our decision, therefore, in no way reflects an opinion by this court concerning the merits of the motion to open. We simply hold that the court's judgment issued after the hearing held on October 6, 2022, must be reversed because the respondent had a right to be heard on his 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.

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

parents were involved in an altercation and, when the mother escaped F's grasp and locked herself in another room to telephone the police, F kicked in the door and then left the premises. Approximately one year later, when M was six years old, he reported that F would hit the mother in his presence. One week later, the police responded to a 911 call from a neighbor who had reported that a little boy was screaming at the mother's home because F was beating him. The neighbor further reported to the police that she had overheard violent incidents between the mother and F every night. A was removed from the mother's care shortly thereafter, pursuant to a motion for order of temporary custody made by the petitioner, the Commissioner of Children and Families. A neglect petition was also filed on that same date, substantially based on the mother's inability to provide a stable environment for A that was free of exposure to intimate partner violence. More than one year later, a court-ordered evaluator, C, completed a psychological evaluation of the mother and recommended a zero tolerance policy toward the mother having any reengagement with toxic men in her life, noting in the report that any issue concerning the mother's reengagement with F should be taken very seriously and was potential proof that the mother had not internalized her treatment and did not fully understand the impact of intimate partner violence on A. The department conveyed a zero tolerance policy to the mother, but she was soon involved in another instance of intimate partner violence with another man with whom she had a romantic relationship. M's father disclosed this incident to the department and the mother pressured him to lie to the department and to recant his disclosure. The petitioner subsequently filed a petition to terminate the mother's parental rights as to A. Several months later, a friend of the mother called the police and reported that F was causing a disturbance at the mother's residence. F stated to the police that the mother was his property and that he had forbidden her from being around her friend. The mother told the responding officer that F only occasionally spent the night at her residence and that he did not live there. She refused to cooperate fully with the investigation, but F was nevertheless arrested at the scene. The mother did not report this incident to the department. Several months later, police officers went to the mother's residence in order to serve an arrest warrant on F. The mother and F locked themselves inside the mother's vehicle and refused to follow the officers' commands to exit the vehicle. At F's direction, the mother attempted to evade capture but backed into the rear passenger side of a police vehicle before pulling forward and parking. After the mother and F refused to exit the vehicle, officers struck F's car window in order to unlock his door and remove him from the vehicle. Both the mother and F were arrested on the scene. The mother did not disclose the incident to the department and, at the termination trial, she testified that she was merely giving F a ride. On the first day of the trial, the mother's counsel made an oral motion for posttermination

visitation if the petition for termination were to be granted. C testified at trial that she had observed the mother and F carpooling to one of the court-ordered evaluations despite her previous recommendation of a zero tolerance policy toward the mother reengaging with F. In her subsequent report, C opined that the mother lacked the capacity to understand and to meet A's needs, as evidenced by her reengagement with F. After the trial, the court issued a memorandum of decision in which it held that the department had made reasonable efforts to reunify the mother with A but that she was unable or unwilling to benefit from such reunification efforts and that termination of the mother's parental rights was in A's best interest. The court also denied the mother's motion for posttermination visitation. *Held*:

1. The respondent mother could not prevail on her claim that the trial court erred in concluding that she was unable or unwilling to benefit from the department's efforts provided to her pursuant to statute (§ 17a-112 (j) (1)) to reunify her with A; although this court recognized that the evidence in the record demonstrated that the mother was consistent in visitation, showed significant interest in A's life, and implemented skills she had learned in programs during her visits, the trial court's subordinate factual findings, which the mother did not contest, provided sufficient evidence to support that court's determination that she had failed to successfully address the primary factor that led to A's initial commitment to the petitioner's custody, namely, her inability to provide a stable environment for A free of exposure to intimate partner violence.
2. The respondent mother could not prevail on her claim that the trial court erred in finding that termination of her parental rights was in A's best interest; although the court found that A had a bond with the mother, it focused on A's need for stable, competent and reliable caretakers and found that the mother was not willing or able to fulfill that role, as her continued involvement with F made clear that she was unwilling or unable to do what it took to successfully rehabilitate within a reasonable time, that she lacked the capacity to prioritize, understand or meet the needs of A, and that she had not brought her conduct to even the minimal acceptable standards of parenting, even giving due credit to her compliance with treatment, and, because the trial court's subordinate findings that the mother was unable to provide the stable environment free from intimate partner violence that A needed were supported by clear and convincing evidence in the record, this court concluded that the trial court's findings as to A's best interest were not clearly erroneous.
3. This court concluded that the trial court did not err in denying the respondent mother's motion for posttermination visitation; although the trial court made several findings supporting posttermination visitation, including that the mother clearly desired posttermination visitation and sincerely believed that A would benefit from continued visitation, that the mother's visits with A were consistent in their timing and frequency, and that the mother had strong emotional bonds with A, that court also

found that the mother continued to demonstrate issues in judgment that the court found deeply concerning, including her continued engagement with F at the risk of losing A, that the visits between the mother and A were not overwhelmingly positive such that granting posttermination visitation was necessary or appropriate, and that the record demonstrated that A was tightly bonded to her foster parents in whose care she had been for three years.

Argued November 8, 2023—officially released February 1, 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 Windham, Juvenile Matters, where the respondent father consented to the termination of his parental rights; thereafter, the matter was tried to the court, *Lohr, J.*; judgment terminating the respondents' parental rights and denying the respondent mother's motion for posttermination visitation, from which the respondent mother appealed to this court. *Affirmed.*

David E. Schneider, Jr., assigned counsel, for the appellant (respondent mother).

Jennifer C. Leavitt, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

FLYNN, J. The respondent mother, Brittany P.,[1] appeals from the judgment of the trial court, rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights as to her

** February 1, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The respondent father consented to the termination of his parental rights with respect to Ava. Because he is not involved in this appeal, our references in this opinion to the respondent are to the respondent mother.

daughter, Ava.[2] On appeal, the respondent claims that the court erred in (1) concluding that the Department of Children and Families (department) made reasonable efforts to reunify her with Ava and that she was unable or unwilling to benefit from such reunification efforts, (2) finding that termination of her parental rights was in Ava's best interest, and (3) denying her motion for posttermination visitation. We affirm the judgment of the trial court.

The following facts, as found by the court, and procedural history are relevant to our resolution of the respondent's claims on appeal. Violence caused the respondent's involvement with the department as a result of an incident in May, 2016, wherein Ava's father, Michael M., assaulted the respondent's then nineteen month old child, M, an older half-sibling of Ava. The respondent took M to a hospital but initially denied that Michael M. was caring for M at the time of the incident and told hospital staff that M had fallen in a bathtub, which explanation the hospital staff determined was incongruent with M's injuries. Ultimately, Michael M. was convicted of assault in connection with the incident and incarcerated.

As a result of this incident, the department removed M from the respondent's care. M was returned to her care in October, 2016, under protective supervision, which supervision expired in 2017. Within three months of Michael M.'s release from prison, the respondent reengaged with him despite the department's repeated admonishment that the respondent should refrain from doing so. The respondent, who has equivocated over the years as to whether she believed that Michael M. had injured M, allowed him to provide unsupervised care for M following his release from prison.

[2] The attorney for the minor child filed a statement adopting the brief of the petitioner in this appeal pursuant to Practice Book §§ 67-13 and 79a-6 (c).

In July, 2018, Michael M. drove the respondent to a hospital to give birth to Ava but was not physically present in the hospital because, after dropping the respondent off, he overdosed on heroin in the hospital parking lot. The respondent denied to the department that she was in a relationship with Michael M. but agreed not to allow him to have contact with Ava. Ava is medically complex and was subsequently diagnosed with a laryngeal cleft, dysphagia, chronic lung disease, failure to thrive, and asthma and requires a medical device called a "G-tube," used for feeding.

Another violent incident occurred approximately four months after Ava's birth. The respondent threw a baby bottle at Michael M., who, in response, threw the bottle at the respondent's head, then pulled her to the ground by her hair. When the respondent escaped his grasp and locked herself in another room to telephone the police, Michael M. kicked in the door and then left the premises.

An additional incident of violence occurred in December, 2019. On December 20, 2019, when M was six years old, he reported that Michael M. would hit the respondent in his presence. One week later, the police responded to a 911 call from a neighbor who had reported that a little boy was screaming at the respondent's home because Michael M. was beating him. The neighbor further reported to the police that she had overheard violent incidents between the respondent and Michael M. every night.

Ava and M were removed from the respondent's care on January 3, 2020, pursuant to motions for orders of temporary custody made by the petitioner.[3] Neglect petitions were also filed on that same date. The orders

[3] As of the time of trial, M was in the custody of his biological father in another state.

of temporary custody and the neglect petitions substantially were based on the respondent's inability to provide a stable environment for the children that was free of exposure to intimate partner violence.

A court-ordered psychological evaluation of the respondent was conducted on March 29, 2021, by Dr. Suzanne Ciaramella, who noted in the evaluation that any issue concerning the respondent's having reengaged with Michael M. should be taken "very seriously" and served as potential proof that the respondent had not internalized her treatment and did not fully understand the impact of intimate partner violence on Ava. Dr. Ciaramella recommended a zero tolerance policy toward the respondent having any reengagement with toxic men in her life. The department conveyed a zero tolerance policy to the respondent. Despite this statement, on May 12, 2021, the respondent was in a romantic relationship with John P. when she was involved in another instance of intimate partner violence with him. M's father disclosed this incident to the department and the respondent pressured him to lie to the department and to recant his disclosure. On December 21, 2021, the petitioner filed a petition to terminate the respondent's parental rights as to Ava. The custody of M, who resided with his biological father at the time of trial, was not at issue in the court's decision concerning the termination of parental rights petition for Ava.

Additionally, the court found that yet another incident of family violence occurred following the petitioner's filing of the petition to terminate the respondent's parental rights as to Ava. Marissa L., the respondent's friend, called the police on July 13, 2022, and reported that Michael M. was causing a disturbance at the respondent's residence. Michael M., who was found in the respondent's apartment, stated to the police that the respondent was "his property" and that he had forbidden her from being around Marissa L., the dispute over

which had caused their altercation. The respondent told the responding officer that Michael M. only occasionally spent the night at her residence and that he did not live there. She refused to cooperate fully with the investigation, but, nonetheless, Michael M. was arrested at the scene. The respondent did not report this incident to the department.

The July 13, 2022 incident was followed by another violent incident on November 4, 2022, when the police went to the respondent's residence in order to serve an arrest warrant on Michael M. for two counts of violation of a protective order, among other charges. The respondent and Michael M. locked themselves inside the respondent's vehicle and refused to follow officers' commands to exit the vehicle. At Michael M.'s direction, the respondent proceeded to drive the vehicle in an effort to evade capture but backed into the rear passenger side of a police vehicle before pulling forward and parking. An officer unsuccessfully attempted to deescalate the situation, but Michael M. and the respondent persistently refused to exit the vehicle. Thereafter, officers struck Michael M.'s car window in order to unlock his door and remove him from the vehicle. Both the respondent and Michael M. were arrested on the scene. The respondent did not disclose the incident to the department, and, at trial, she testified that she was merely giving Michael M. a ride and that "no good deed goes unpunished."

On January 9, 2023, at the start of the first day of the two day trial regarding the termination petition, the respondent's counsel made an oral motion for posttermination visitation. The respondent's counsel did so in the event that the court granted the petition to terminate the respondent's parental rights. As pointed out by the court in its decision, Dr. Ciaramella testified at trial that she had observed the respondent and Michael M. carpooling to the second court-ordered evaluation that

was conducted in late 2022, despite her previous recommendation of a zero tolerance policy toward the respondent reengaging with him. As also noted by the court in its decision, in her report following this second court-ordered evaluation, Dr. Ciaramella opined that the respondent lacks the capacity to understand and meet Ava's needs as evidenced by her reengagement in a relationship with Michael M., which situation was, in part, the basis for why Ava previously had been removed from the respondent's custody. The court issued a memorandum of decision on May 12, 2023, in which it determined that the department had made reasonable efforts to reunify the respondent with Ava but that the respondent was unable or unwilling to benefit from such reunification efforts and that termination of the respondent's parental rights was in Ava's best interest.[4] The court denied the respondent's motion for posttermination visitation. This appeal followed. Additional facts will be set forth as necessary.

I

The respondent first claims that the court improperly determined that the department made reasonable efforts to reunify her with Ava and that she was unable or unwilling to benefit from such reunification efforts under General Statutes § 17a-112 (j) (1). Pursuant to § 17a-112 (j) (1), the petitioner must prove either that the department has made reasonable efforts to reunify or, alternatively, that the respondent parent is unwilling or unable to benefit from reunification efforts. See *In re Gabriella A.*, 319 Conn. 775, 777 n.4, 127 A.3d 948 (2015). Accordingly, because either showing is sufficient to satisfy this statutory element, we address only

[4] The court also determined that that the respondent had failed to rehabilitate under General Statutes § 17a-112 (j) (3) (B) (i). The respondent does not contest this determination on appeal.

the respondent's claim that the court improperly determined that she was unable or unwilling to benefit from reunification efforts made by the department. See id.

"[W]e 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." (Citation omitted; internal quotation marks omitted.) Id., 790.

In determining that the respondent was unable or unwilling to benefit from the department's reunification efforts, the court found that, "despite the many referrals and repeated efforts of the providers from the referral agencies, [the respondent] did not successfully address the issues [the department] identified as primary barriers to her reunification with Ava, namely, her repeated interactions with abusive men, especially [Michael M.], that resulted in her children and her being exposed to [intimate partner violence], mental and physical abuse." The respondent argues that the court improperly determined that she was unable or unwilling to benefit from reunification efforts because there was evidence that she had engaged in services, including therapy at Perception Programs, Inc., completed services such as Therapeutic Family Time, was consistent in her visitation with Ava, and was committed to working toward reunification, that all of her drug screens were negative for illicit substances, and that she maintained consistent housing, employment, and income.

We recognize that the evidence in the record shows that the department employees who worked closest

with the respondent acknowledged that she was consistent in visitation, showed significant interest in Ava's life, including knowing about Ava's schooling and medical needs, and implemented skills she had learned in programs during her visits with Ava. She highlights evidence of her strides and compliance with rehabilitative services offered by the department while discounting the uncontested subordinate factual findings of the court supporting its ultimate determination that she was unwilling or unable to benefit from reunification efforts.

In evaluating whether there is sufficient evidence to support the court's ultimate finding that the respondent was unable or unwilling to benefit from rehabilitation efforts, we do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. See *In re Gabriella A.*, supra, 319 Conn. 790. Rather, we ask 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, and, in so doing, we construe the evidence in the light most favorable to sustaining the judgment of the trial court. See *In re Cameron W.*, 194 Conn. App. 633, 667, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020).

The court's subordinate factual findings, which the respondent does not contest, provide sufficient support for its determination. The court's ultimate finding that the respondent was unable or unwilling to benefit from reunification efforts was supported by substantial evidence of her inability to provide a stable environment for Ava free of exposure to intimate partner violence, which factor was the primary reason that led to Ava's initial commitment to the petitioner's custody. Despite the department's repeated admonishments that the

respondent refrain from reengaging with Michael M., she reengaged with him three months after his release from prison for having assaulted M. Further, after giving birth to Ava, the respondent denied being in a relationship with Michael M. and agreed not to permit him to have contact with Ava. However, despite the department's strong recommendation that she cease all contact with Michael M., she was involved in an incident wherein Michael M. struck her in the head with a baby bottle and pulled her to the ground by her hair, causing her to retreat to another room to escape and telephone the police. She was involved in another violent incident with Michael M. wherein a neighbor telephoned the police and reported that she heard Michael M. beating M and that she had heard intimate partner violence incidents between the respondent and Michael M. every night. The respondent, however, repeatedly had denied to the department that she was continuing in a relationship with Michael M. As a result of a court-ordered psychological evaluation, Dr. Ciaramella noted that "[a]ny issue that comes up with respect to [the respondent] reengaging with [Michael M.] should be taken very seriously and [is] indicative of potential proof that [the respondent] has not internalized her treatment nor does she fully understand the impact of domestic violence or intimate partner violence on her children. This should be a zero tolerance policy at this point given the repeated setbacks over the years due to her continued engagement with [Michael M.] . . . . [The department] clearly conveyed this 'zero tolerance' position to [the respondent] and was pursuing a plan of reunification of the children with the [respondent] . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) However, in 2021, the respondent was in a romantic relationship with John P., wherein she was involved in another instance of intimate partner violence. The respondent then resumed her relationship

with Michael M. in 2022, after the petition to terminate her parental rights had been filed, yet continued to represent to the department that they were not in a relationship, despite clear evidence to the contrary. Due to the respondent's repeated reengagement with Michael M., despite his violent history toward the respondent and M, there was sufficient evidence to support the court's determination that she had failed to successfully address the issue that the department had identified as a primary barrier to her reunification with Ava, specifically her repeated involvement with violent and abusive men, and in particular Michael M., which involvement resulted in Ava's exposure to intimate partner violence.[5]

II

The respondent next claims that the court erred in finding that the termination of her parental rights was in Ava's best interest. We disagree.

We will not disturb a trial court's finding that termination of parental rights is in a child's best interest unless that finding is clearly erroneous. See *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008). During the dispositional phase, the trial court must determine whether termination is in the best interest of the child. Id., 487. According to § 17a-112 (k), in analyzing the child's best interest, the court is required to consider

[5] There was evidence at trial that the respondent made allegations to the department that two social workers, both of whom had been assigned to her case at one time, were sexually inappropriate toward her. There was testimony at the trial that one such social worker was on leave at the time of the incident and no longer works for the department and that the second social worker was removed from the respondent's case the day after the allegations were made and that he also no longer works for the department. To the extent that the respondent's brief can be read so as to allege that the inappropriate conduct of the two social workers undermined her ability to benefit from reunification efforts, we are not persuaded, as there is no nexus between the acts of the social workers and her inability or unwillingness to benefit from these efforts.

and make written findings regarding the seven factors delineated therein.

The respondent's argument focuses on the fourth statutory factor in § 17a-112 (k)[6] of the child's emotional ties. She contends that the court erred in finding that termination was in Ava's best interest "[g]iven the bond and the relationship that existed between the [respondent] and [Ava] as well as the damage that would likely ensue to [Ava] . . . ." She noted that Dr. Ciaramella testified at trial that completely severing the relationship between the respondent and Ava could manifest in behavioral and emotional difficulties for Ava.[7]

[6] General Statutes § 17a-112 (k) provides in relevant part that in determining whether to terminate parental rights under this section, "the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[7] The court noted in the fact section of its decision that Dr. Ciaramella had opined in her December 12, 2022 addendum to the second court-ordered psychological evaluation that if visits with the respondent were to be stopped or reduced it is likely that Ava may experience confusion and require extra

Although the court considered and made written findings with respect to all seven statutory factors as it was required to do under § 17a-112 (k), the respondent's argument focuses on the fourth factor of emotional ties. Relevant to Ava's emotional ties, the court made findings that Ava visits with the respondent weekly and that the respondent has been consistent with visitation. Specifically, in the dispositional phase, the court found, regarding the fourth statutory factor concerning Ava's emotional ties, that Ava "is thriving in her foster parents' care and bonded to them. Dr. Ciaramella, the court-ordered evaluator, suggests, and the court agrees, that despite Ava being bonded to [the respondent] . . . it is time for her to have stability and permanency in her young life." Although the court found that Ava has a bond with the respondent, the existence of such a bond between parent and child is not dispositive of a best interest determination. See *In re Sequoia G.*, 205 Conn. App. 222, 231, 256 A.3d 195, cert. denied, 338 Conn. 904, 258 A.3d 675 (2021). The court also found that Ava was bonded with her foster parents. The court concluded that it was time for Ava to have stability and permanency.

In its analysis of Ava's best interest, the court focused on Ava's need for stable, competent and reliable caretakers. "In addition to considering the seven factors listed in § 17a-112 (k), [t]he best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Furthermore, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives." (Internal quotation marks omitted.) *In re Autumn O.*, 218 Conn. App. 424, 444, 292 A.3d 66, cert. denied, 346 Conn. 1025, 294 A.3d

support as she adjusts to this change but that it is likely that she would be able to overcome her negative emotions with a great deal of consistent support, love, and reassurance.

1026 (2023). With respect to Ava's need for stability, the court found that the respondent was not willing or able to fulfill that role, as she "has not brought her conduct to even the minimal acceptable standards of parenting, even giving due credit to her compliance with treatment," in that "[s]he remains entwined with [Michael M.] and continues to lack insight as to the severity of [intimate partner violence] and its effect on [Ava]. Her actions with [Michael M.] as of late, which the court has carefully weighed, make clear that she is unwilling or unable to do what it takes to successfully rehabilitate within a reasonable time in the future." The court additionally found that, as it had detailed earlier in its decision, the respondent has not adjusted her personal circumstances to parent Ava. The court, earlier in its decision, had detailed that "Dr. Ciaramella succinctly opined, and the court agrees, that while [the respondent] may not have addiction issues concerning substances, she does exhibit tendencies that properly could and should be framed as an addiction to unhealthy and violent intimate partner relationships" and adopted Dr. Ciaramella's opinion that the respondent "lacks the capacity to prioritize the needs of [Ava] and put [Ava] first" and "lack[s] an understanding of [Ava's] needs and lack[s] the capacity to meet them as evidenced by [her] reengagement in a relationship with [Michael M.] which was, in part, the basis for why [Ava was] removed previously." (Internal quotation marks omitted.) Because the court's subordinate findings that the respondent was unable to provide the stable environment free from intimate partner violence that Ava needed were supported by clear and convincing evidence on the record before us, we conclude that the court's findings as to Ava's best interest are not clearly erroneous and we will not substitute our judgment for that of the trial court.

III

The respondent last claims that the court improperly denied her motion for posttermination visitation. We disagree.

In *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020), our Supreme Court held, in a case separate from the present one that involved neither Ava nor the respondent, that a trial court has the authority pursuant to General Statutes § 46b-121 (b) (1) to consider a motion for posttermination visitation and set forth, for the first time, the standard for trial courts to consider when evaluating whether posttermination visitation should be ordered within the context of a termination proceeding. Id., 569–85. That standard, as codified in § 46b-121 (b) (1), is whether posttermination visitation is necessary or appropriate to secure the welfare, protection, proper care, and suitable support of the child. Id., 580. "Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child." Id., 589–90.

The necessary or appropriate standard for deciding motions for posttermination visitation "is purposefully more stringent than the best interest of the child standard, as the trial court must find that posttermination visitation is necessary or appropriate—meaning

proper—to secure the child's welfare." (Internal quotation marks omitted.) *In re Annessa J.*, 343 Conn. 642, 674, 284 A.3d 562 (2022). "A more exacting standard is required in this context, particularly in light of the rare circumstance in which a trial court could simultaneously terminate parental rights and, in the same proceeding, order posttermination visitation." Id. "Whether to order posttermination visitation is . . . a question of fact for the trial court . . . ." *In re Ava W.*, supra, 336 Conn. 589. We review a trial court's exercise of authority under § 46b-121 (b) (1) for an abuse of discretion and we review a trial court's factual determinations for clear error. See *In re L. T.*, 220 Conn. App. 680, 702, 299 A.3d 1229 (2023).

In *In re L. T.*, this court disagreed with the respondent's claim that the frequency and quality of her visitation with her minor children prior to the termination of her parental rights precluded a finding that posttermination visitation with the minor children was neither necessary nor appropriate. Id., 701–705. In holding that the court did not err in determining that it was neither necessary nor appropriate for the respondent to have posttermination visitation with the minor children, this court reasoned that, "[a]lthough the respondent loves the minor children and may have had frequent and positive interactions with them, that is just one factor that the court *may* consider in evaluating whether posttermination visitation is necessary or appropriate. It was not required to do so. Moreover, even if the court did consider the nature of the respondent's previous visitation with the minor children, and agreed with her that it was frequent and positive in nature, that determination, in itself, would not have been dispositive of the required inquiry of whether posttermination visitation was necessary or appropriate. In denying the respondent's motion, the court properly considered the respondent's inability to parent the minor children and

the harm that they have suffered as a result of her shortcomings. The court also explained that the respondent's combative behavior with the foster parents, and her fixation on advice that she perceives might have come from the foster parents, demonstrate her difficulty coping with visitation." (Emphasis in original.) Id., 704.

In the present case, the respondent argues that the court made findings that supported continuing visitation posttermination and that such findings are inconsistent with its ultimate determination to deny the motion for posttermination visitation. The respondent is correct that the court made several findings supporting posttermination visitation. Specifically, the court stated that the respondent clearly desired posttermination visitation and sincerely believed that Ava would benefit from continued visitation, that the respondent's visits with Ava were consistent in their timing and frequency, that the respondent had strong emotional bonds with Ava, that Ava appears to have an emotional bond with the respondent, that there was no evidence that the respondent interfered with the petitioner's or the foster parents' custody of Ava and that there was scant evidence on whether posttermination visitation would impact the prospects of Ava being adopted. There was testimony at trial that the respondent was consistent in her weekly visitation with Ava that the court credited.

In making its ultimate factual finding that posttermination visitation was not necessary or appropriate, the court, in addition to the factors weighing in favor of visitation, also considered that the respondent continued to demonstrate issues in judgment that the court found "deeply concerning," namely, she continued to engage with Michael M. at the risk of losing Ava. Further, the court noted that the visits between the respondent and Ava were "not overwhelmingly positive such

that granting posttermination visitation [was] necessary or appropriate." When making findings concerning Ava's wishes, the court noted that, because Ava is under five years of age, there was no direct evidence to demonstrate her wishes but that the record demonstrated that she was tightly bonded to her foster parents in whose care she has been for three years and also bonded with the respondent. The court found that it was not clear that further work on strengthening the bond between the respondent and Ava was such that posttermination visitation was necessary or appropriate. Additionally, the court stated that Dr. Ciaramella generally opined that, although cessation of visitation could have a negative effect on Ava, the issue should be "significantly guided . . . by Ava's foster parents and/or providers who may assess how stress impacts her medically." (Internal quotation marks omitted.) Because the necessary or appropriate standard is a more stringent standard and because the court's determination of whether posttermination visitation is necessary or appropriate is a factual determination, we cannot say that the court erred in denying the respondent's motion for posttermination visitation.

The judgment is affirmed.

In this opinion the other judges concurred.

CHRISTOPHER AMBROSE *v.* KAREN AMBROSE (AC 45424)

Bright, C. J., and Alvord and DiPentima, Js.

Syllabus

The plaintiff in error, C, the former attorney for the defendant in the underlying dissolution action, filed a writ of error challenging the order of the first defendant in error, M, a Superior Court judge, disbarring her from the practice of law. C had filed a motion to disqualify the second defendant in error, A, a Superior Court judge, from the underlying action on the ground of bias, and a hearing was held on the motion to disqualify.

At the hearing, M asked C to indicate specific parts of the transcripts of the dissolution proceedings that explained her claims of bias. C stated that the record in its totality would show that A was biased against women who claim abuse, individuals with disabilities, and anyone not of the Jewish faith. In support of these claims, C provided only examples of A's rulings adverse to her client. M denied the motion to disqualify, reasoning that the claims of bias were unsupported and frivolous and finding that C had blatantly lied and made utterly empty claims. M further stated in his disqualification ruling that a hearing would be held on whether to act against C, and, if action was warranted, what action to take. At the disciplinary hearing, C made certain disparaging remarks against M. Subsequently, M issued a memorandum of decision disbarring C from the practice of law on the basis that she violated various Rules of Professional Conduct. *Held*:

1. C could not prevail on her claim that M violated her constitutional right to due process regarding the disciplinary hearing by failing to give her adequate notice and by limiting the hearing to the issue of sanctions: although M's procedure was unusual in that he made findings as to C's conduct in his ruling on the motion to disqualify A and then ordered a separate hearing on whether he should take action against C based on those findings, the disqualification ruling, which contained the notice for the disciplinary hearing, clearly stated that the disciplinary hearing would address the findings made in the disqualification ruling and adequately notified C of the parameters of the hearing, and it was sufficiently clear that the hearing was limited to the issue of whether the court would act, and, if so, what action to take against C for her conduct during the hearing on the motion to disqualify, leaving open the possibility, however slight, that, following the disciplinary hearing, C would be found not to have violated the Rules of Professional Conduct; moreover, M did not unfairly limit the disciplinary hearing to the imposition of sanctions, C was provided with the opportunity to be heard prior to her disbarment, the transcripts having clearly shown that C had a meaningful opportunity to be heard at both hearings and to explain her claims of bias, and, although C was not under oath at either hearing, as an officer of the court, she had an obligation to tell the truth and to not make frivolous claims; furthermore, although M reminded C at the start of the disciplinary hearing that the purpose of that hearing was to give her a chance to be heard on the issue of whether he should act upon the findings he had made as to her conduct at the disqualification hearing, he allowed her the opportunity to challenge those findings and to explain why there was a good faith basis for her conduct before determining that she had violated several of the Rules of Professional Conduct.
2. C could not prevail on her claim that the sanction of disbarment for her conduct in connection with the motion to disqualify constituted impermissible punishment for her exercise of her first amendment right to free speech; C was afforded a sufficient opportunity to be heard and

she directed this court to no law, nor was this court aware of any, providing either that she was entitled to additional process because her misconduct involved speech or that a different standard for the imposition of sanctions for attorney misconduct should apply when the misconduct involved speech.

3. C could not prevail on her claim that M's findings that she had violated the Rules of Professional Conduct were not factually supported by clear and convincing evidence, the record having contained sufficient evidence to support the decision under the requisite standard of proof: M's findings that C's allegations made in connection with the motion to disqualify were frivolous and intentionally inaccurate were supported by clear and convincing evidence, the transcript of the hearing on the motion to disqualify having shown that M admonished C not to say things for which she could not provide support and gave her opportunities to withdraw or temper her statements; moreover, instances cited in the disciplinary order, and apparent in the court file, provided clear and convincing evidence that C had failed to make reasonable efforts to expedite litigation consistent with the interests of her own client, and M also found that C's arguments in furtherance of her allegations of judicial bias had the corrupt motive to cloud the truth for the perceived benefit of her client and that she acted with reckless disregard for the truth; furthermore, the transcript from the hearing on the motion to disqualify supported the findings that C disrupted proceedings and prejudiced the system of justice by hurling baseless accusations, harassing parties, and using the system of justice to punish a party opponent and legal professionals.

4. C could not prevail on her claim that disbarment was an excessive penalty because it was disproportionate in light of the conduct involved and her lack of disciplinary history; M's sanction of disbarment was not an abuse of his discretion, as C did not demonstrate that M acted arbitrarily in imposing the penalty of disbarment, but, rather, the disciplinary order demonstrated a careful consideration of the nature of the misconduct in light of aggravating and mitigating circumstances, and this court deferred to M's determination of the appropriate sanction.

Argued September 19, 2023—officially released February 6, 2024

Procedural History

Writ of error from an order of the Superior Court in the judicial district of Fairfield, Regional Family Trial Docket, *Moukawsher*, *J.*, disbarring the plaintiff in error from the practice of law, brought to this court. *Affirmed.*

Nickola J. Cunha, self-represented, the appellant, with whom, on the brief, were *Norman A. Pattis* and *Christopher T. DeMatteo* (plaintiff in error).

Robert J. Deichert, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellees (defendants in error).

Opinion

DiPENTIMA, J. The primary issue in this writ of error challenging the disbarment of an attorney is whether her due process rights were violated by the procedure used by the first defendant in error, Hon. Thomas G. Moukawsher. The plaintiff in error, Nickola J. Cunha, who is the former attorney for a party in the underlying dissolution action, challenges in this writ of error the order of Judge Moukawsher disbarring her from the practice of law. Cunha claims that Judge Moukawsher (1) violated her constitutional right to due process by failing to give her adequate notice of a disciplinary hearing and by deciding that misconduct had occurred without an independent hearing on the issue, (2) violated her first amendment right to free speech by disbarring her for the arguments she made in connection with a motion to disqualify, (3) erred in finding that she had violated the Rules of Professional Conduct because those findings were not factually supported by clear and convincing evidence and (4) imposed an excessive penalty by disbarring her from the practice of law.[1] We conclude that no constitutional violation

[1] Cunha also claims for the first time in her appellate reply brief that, following Judge Moukawsher's order disbarring her, he continued to enter further orders that constitute "ex post facto orders and directly violate the guaranteed protections of due process." We decline to review this claim because Cunha raised it for the first time on appeal in her appellate reply brief. See *State* v. *Griffin*, 217 Conn. App. 358, 375 n.9, 288 A.3d 653 ("it is well established that we do not entertain arguments raised for the first time in a reply brief"), cert. denied, 346 Conn. 917, 290 A.3d 799 (2023).

occurred, the findings of violations of Rules of Professional Conduct were supported by clear and convincing evidence and there was no abuse of discretion in ordering Cunha disbarred. Accordingly, we affirm the judgment of the trial court.

The record discloses the following relevant facts and procedural history. In 2019, the plaintiff, Christopher Ambrose, commenced a dissolution action against the defendant, Karen Ambrose, who was represented by Cunha. Trial in the dissolution action began in March, 2021. As explained by the second defendant in error, Hon. Gerard I. Adelman, judge trial referee, in the April 26, 2022 memorandum of decision dissolving the marriage and explaining the delay in doing so, "the defendant began to simply not appear for the trial and [Cunha] began to make derogatory comments about the court and its proceedings. Accordingly, the court referred the complaints to the Regional Family Trial Docket's presiding judge, [*Moukawsher*, *J.*], for a hearing."

At a November 22, 2021 hearing concerning the referred matters, Judge Moukawsher noted that there was no pending motion to disqualify to decide. After the defendant, through Cunha, filed a motion to disqualify Judge Adelman from the proceedings on the ground of bias, on December 1, 2021, a hearing was held on the motion to disqualify. At that hearing, Judge Moukawsher asked Cunha to indicate specific parts of the transcripts of the dissolution proceedings that explained her claims of bias. Cunha stated that the record in its totality would show that Judge Adelman was biased against women who claim abuse, individuals with disabilities, and anyone not of the Jewish faith. In support of these claims, she provided only examples of Judge Adelman's rulings adverse to her client. Judge Moukawsher repeatedly requested that Cunha provide evidence to support her claims of bias rather than simply relying on the issuance of adverse rulings and stated at one point, "You're a

lawyer. You know I need to have evidence. You can't just assert things." Judge Moukawsher further stated at one point that, "it can't be just simply you don't like his rulings . . . ."

In a December 10, 2021 memorandum of decision (disqualification ruling), Judge Moukawsher denied the motion to disqualify, reasoning that the claims of bias were unsupported and noted that the motion was "entirely unsupported and frivolous. No reasonable person would question [Judge Adelman's] impartiality under these circumstances." Judge Moukawsher found that Cunha had "blatantly lied" and made "utterly empty claims." Judge Moukawsher stated that, "[b]ased upon what has occurred on the record in connection with the latest motion to disqualify Judge Adelman, on January 10, 2022, at 10 a.m. the court will hold a hearing on whether to act against Attorney Cunha, and, if action is warranted, what action to take." Judge Moukawsher noted that the matter was of "the utmost seriousness" and advised Cunha to be represented by counsel at the hearing. Judge Moukawsher further stated that "[t]he clerk will send a copy of this ruling to the chief disciplinary counsel. The court would welcome participation by any appropriate disciplinary entity to appear as a friend of the court for the upcoming hearing."

At the start of the January 10, 2022 disciplinary hearing, Judge Moukawsher, stated: "As the record will reflect, the court denied the motion to disqualify Judge Adelman and made conclusions that Attorney Cunha had substantially misrepresented on matters of fact to the court. And so the conclusions, in terms of Attorney Cunha, what she said and did have already been made. And the purpose of this is to consider potential discipline for Attorney Cunha with respect to what the court has already concluded." In response, Cunha, representing herself, stated that Judge Moukawsher's findings in the disqualification ruling regarding her conduct were

clearly erroneous and noted that she found "these proceedings to be intentionally harassing and intimidation and an attempt by Your Honor solely to shut me down for the corruption that I have raised before this court." Cunha further stated that the disqualification ruling "is a joke, and it is pathetic, and you should be ashamed of yourself for subjecting myself to that type of rhetoric. Frankly, Judge, I am ashamed to even be sitting before you with the type of conduct that you engaged in. You have engaged in material misrepresentation; you have lied to the public. You have done so solely to put me in a poor light . . . ." Judge Moukawsher reminded Cunha that "what I am dealing with today are the misstatements and false claims that you made before me" and that he was giving her "the opportunity before I determine what action should be taken against you to tell me any reasons in support of why I shouldn't take any action to you, or against you, or that I should take some lesser action against you. And I was going to suggest that you might tell me some of your professional background, that might be a basis for it, that you might describe why you, in good faith, believed the things that you asserted. You could name the documents you examined, you could name the people you spoke with, you could explain the reliability of these things." Cunha argued that Judge Moukawsher's findings in the disqualification ruling were clearly erroneous and questioned whether she would be allowed to engage in cross-examination of him as to those findings. Judge Moukawsher stated, "I am trying to give you a chance to be heard on what I have ordered. I have concluded, already from the record, from what you said to me in court, that you misrepresented to me material matters," and further explained that "[t]he question is what I'm going to do about it. I'm going to give you one more chance to address the various penalties I might impose before I'm concluding that you're not going to respond to your

opportunity to be heard." Cunha stated that Judge Moukawsher "should disqualify [himself] because [he] could not be the accuser, the trier of fact, the finder and the executioner," and suggested that Judge Moukawsher was "prejudiced in what it is that you have opined in this matter." Counsel for the plaintiff in the dissolution proceedings was given a chance to be heard over Cunha's objection. When Judge Moukawsher gave the disciplinary counsel an opportunity to be heard, Cunha objected, stating that he "seems to think nothing of to allow an attorney to speak on the record absent an appearance. We have due process in this country. What is so difficult for this court to comprehend? You are not the law maker." The court instructed Cunha to "stop," and Cunha responded, "I am frustrated, Judge, with your lack of acknowledgement of what your position is as a judge. You are not the legislature. There is something called the separations of power." Judge Moukawsher asked Cunha to "stop speaking," at which point Cunha stated, "I will obey, Your Honor, would you like me to bow"; Judge Moukawsher responded that Cunha was "bounding criminal contempt of court" because she was "abusing the court" and "not providing any useful information." The disciplinary counsel addressed Judge Moukawsher, listing in detail the rule violations and misconduct the evidence supported for a sanction of disbarment. Following that, Cunha stated that she never made a material misrepresentation to Judge Moukawsher and attempted to provide support for the claims of bias raised in the motion to disqualify. She urged Judge Moukawsher "to reconsider the findings" and reasoned that "they were entered by mistake." She further asked Judge Moukawsher "again to please reconsider" and listen to testimony of "March 31, 2021, April 1st, May 25th and 27th, June 2nd and 3rd, July 20th and, as Your Honor knows, October 20th and November 9th, all in 2021. I believe that those dates support, without a doubt, the claims that I've made and should be

listened to before Your Honor were to consider anything else. I believe Your Honor, unfortunately, was put in a predicament, like myself, and you acted on responses that I gave in a theoretical broad scope, which I understand why you would, and I did retract that day and I believe you need to take that into consideration because it's very important. Because I acknowledge on that day that these proceedings needed to be reined back in and I needed to accept responsibility that I allowed them to go awry and it wasn't okay and I needed to refocus the court's attention, which is exactly what I did. So, I ask the court to please consider that." The court responded, "I will consider everything you just said, I've written it down carefully and I can assure you that I am no happier about being in this position than anybody else is too. It's a very unfortunate position for all of us to have to deal with."

On January 25, 2022, Judge Moukawsher issued a memorandum of decision disbarring Cunha from the practice of law on the basis that she violated rules 3.1, 3.2, 3.3, 3.5, 8.2, 8.4 (3) and 8.4 (4) of the Rules of Professional Conduct (disciplinary order). In so doing, Judge Moukawsher stated that "[d]isbarment is the appropriate penalty for conduct as egregious as Ms. Cunha's" and noted that her conduct "not only involved a fraud on the court, but a scurrilous assault on the integrity of a judge. The offense was aggravated by its context and by Ms. Cunha's behavior at the hearing on potential punishment" wherein "she mocked and disregarded the court's authority. She will not be given a chance to do it again." Judge Moukawsher ordered Cunha permanently disbarred unless reinstated. Cunha, through counsel, filed a writ of error from the January 25, 2022 disciplinary order barring her from the practice of law.[2] Additional facts will be set forth as necessary.

[2] Although counsel filed the writ of error and Cunha's principal brief, Cunha subsequently filed her own appearance, personally filed her reply brief, and personally argued her claims to this court.

I

Cunha first claims that Judge Moukawsher violated her constitutional right to due process regarding the January 10, 2022 disciplinary hearing by (a) failing to give her adequate notice and (b) limiting it to the issue of sanctions.[3] Although we acknowledge that Judge Moukawsher's procedure was unusual in that he made findings as to Cunha's conduct in his ruling on the motion to disqualify Judge Adelman and then ordered a separate hearing on whether he should take action against Cunha based on those findings, we conclude that under the circumstances in the present case this procedure did not violate Cunha's due process rights.

"Because a license to practice law is a vested property interest and disciplinary proceedings are 'adversary proceedings of a quasi-criminal nature,' an attorney subject to discipline is entitled to due process of law. . . . Due process is inherently fact-bound because due process is flexible and calls for such procedural protections as the particular situation demands. . . . The constitutional requirement of procedural due process thus invokes a balancing process that cannot take place in a factual vacuum. . . . Accordingly, [t]he determination of the particular process that is due depends on the nature of the proceeding and the interests at stake. . . . In attorney disciplinary proceedings, two interests are of paramount importance. On the one hand, we must not tie the hands of . . . trial courts with procedural requirements so strict that it becomes virtually impossible to discipline an attorney for any but the most obvious, egregious and public misconduct. On the other

[3] Cunha claims a violation of her federal and state rights to due process. We confine our analysis of Cunha's claim to the federal constitution because she did not provide an independent analysis of her claim under the state constitution in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). See id. (defendant must provide independent analysis under particular provision of state constitution).

hand, we must ensure that attorneys subject to disciplinary action are afforded the full measure of procedural due process required under the constitution so that we do not unjustly deprive them of their reputation and livelihood." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Mottolese*, 267 Conn. 1, 19–20, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004). "At [its] core, the due process [clause] of the . . . federal [constitution] require[s] that one subject to a significant deprivation of liberty or property must be accorded adequate notice and a meaningful opportunity to be heard. . . . As a procedural matter, before imposing . . . sanctions, the court must afford . . . a proper hearing on the . . . [proposed] sanctions. . . . There must be fair notice and an opportunity for a hearing on the record. . . . [B]efore [discipline may be imposed], [an] attorney [is] entitled to notice of charges, fair hearing and [an] appeal to court for [a] determination of whether [s]he was deprived of due process . . . . These requirements apply to the imposition of sanctions." (Citations omitted; internal quotation marks omitted.) *Briggs* v. *McWeeny*, 260 Conn. 296, 318, 796 A.2d 516 (2002). The question of whether Cunha was deprived of her due process rights is a question of law subject to our plenary review. See *Mikucka* v. *St. Lucian's Residence, Inc.*, 183 Conn. App. 147, 160–61, 191 A.3d 1083 (2018).

A

Cunha first argues that the notice of the disqualification hearing violated her right to due process because it failed to notify her adequately of the misconduct for which she would be disciplined and that the disciplinary hearing was limited to the issue of sanctions. Cunha misreads the record. The notice clearly stated that the hearing would address the findings made in the disqualification ruling and adequately notified Cunha of the parameters of the hearing.

In the disqualification ruling, which contained the notice for the disciplinary hearing, Judge Moukawsher found that Cunha had lied and made baseless allegations against Judge Adelman; he made no conclusions that she had violated any specific Rules of Professional Conduct.[4] Rather, following the sections of the disqualification ruling concerning the denial of the motion to disqualify, there was a section entitled in bold letters: "The court will hold a hearing to consider whether to discipline Attorney Cunha." Below that title, Judge Moukawsher rhetorically queried, "[c]an a court stand idly by when it realizes a lawyer has blatantly lied to it, when the lawyer has made astounding and utterly empty claims against a judge based upon his race, and unsupported claims about his alleged biases against the disabled and women who allege abuse," and then, citing Practice Book § 2-45, stated that "[t]he rules say the court can't turn a blind eye to this. Indeed, for matters relating to courtroom conduct, judges have primary jurisdiction over lawyers who do not meet their obligations as officers of the court." He then stated that, "[b]ased upon what has occurred on the record in connection with the latest motion to disqualify Judge Adelman, on January 10, 2022, at 10 a.m., the court will hold a hearing on whether to act against Attorney Cunha, and, if action is warranted, what action to take. Attorney Cunha should have no illusions. The matter is of the utmost seriousness. She would be well advised to be represented at the hearing by an attorney." Accordingly, the disqualification ruling was sufficiently clear that the

[4] We do not suggest that this is a requirement for due process. See *Briggs* v. *McWeeny*, supra, 260 Conn. 319–20 (in order for notice of hearing on attorney misconduct to satisfy due process standards it must apprise attorney of transactions that form basis of allegations of misconduct and need not refer to specific sections of Code of Professional Responsibility); see also id., 319 n.16 (Code of Professional Responsibility was repealed on October 1, 1986, at the same time that the current Rules of Professional Conduct, as approved by the judges of the Superior Court, became effective).

January 10, 2022 hearing was limited to the issue of whether the court would "act," and if so, what action to take against Cunha for her conduct during the hearing on the motion to disqualify, leaving open the possibility, however slight, that following the disciplinary hearing Cunha would be found not to have violated the Rules of Professional Conduct.[5]

B

Cunha's second due process argument is that Judge Moukawsher unfairly limited the January 10, 2022 hearing to the issue of what, if any, sanction to impose and precluded her from challenging the findings of the disqualification ruling. After a review of the transcript from that hearing, we conclude that the court did not limit unfairly the January 10, 2022 disciplinary hearing to the imposition of sanctions.

In its disqualification ruling, Judge Moukawsher found that Cunha had "made astounding and utterly empty claims against a judge based upon his race, and unsupported claims about his alleged biases against the disabled and women who allege abuse" and had "lied to a judge emphatically, repeatedly, and with ample warning that the judge would check for the truth." A

[5] Cunha also argues that because the disciplinary order stated that she had "a tactic of stalling and diverting [the underlying dissolution] case," the notice violated her right of due process because it was limited to speech and conduct before Judge Moukawsher. The record does not support this argument. In fact, Cunha was on notice that her conduct in delaying the dissolution proceedings would be addressed in the disciplinary hearing because such conduct had been included in the disqualification ruling, which served as the notice for the January 10, 2022 hearing. Specifically, in the disqualification ruling, Judge Moukawsher stated that Cunha had "clogged the docket, delayed the trial, and cost the parties a fortune by repeatedly hurling baseless personal accusations against lawyers, judges, the guardian [ad litem], and many others. Rather than get the case tried and appeal if she doesn't like the result, Attorney Cunha has made every problem in the case worse. Indeed, her behavior has become the biggest problem in the case."

court has inherent authority pursuant to Practice Book § 2-44 to discipline attorneys, including disbarment, for just cause.[6] A court may exercise this inherent authority to discipline attorneys in a manner that "may be summary, and without complaint or hearing" when the attorney conduct at issue occurs in the presence of the court. Practice Book § 2-45.[7] In the present case, the court did not follow any specific procedure set out by our rules of practice or as established by case law. "[D]ue process, [however] unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [Rather] [d]ue process is flexible and calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) *Burton* v. *Mottolese*, supra, 267 Conn. 20. The procedure followed by Judge Moukawsher to discipline Cunha, however unprecedented, must comply with due process. See, e.g., *In the Matter of Presnick*, 19 Conn. App. 340, 349, 563 A.2d 299 (as long as there is no denial of due process, court may for good cause discipline attorneys who practice before it), cert. denied, 213 Conn. 801, 567 A.2d 833 (1989).

Notwithstanding the unprecedented procedure taken by Judge Moukawsher in this matter, in light of the totality of the circumstances, we conclude that Cunha was not unconstitutionally deprived of her opportunity to be heard prior to her disbarment. It is clear from the transcripts that Cunha had a meaningful opportunity

[6] Practice Book § 2-44 provides: "The Superior Court may, for just cause, suspend or disbar attorneys and may, for just cause, punish or restrain any person engaged in the unauthorized practice of law."

[7] Practice Book § 2-45 provides: "If such cause occurs in the actual presence of the court, the order may be summary, and without complaint or hearing; but a record shall be made of such order, reciting the ground thereof. Without limiting the inherent powers of the court, if attorney misconduct occurs in the actual presence of the court, the Statewide Grievance Committee and the grievance panels shall defer to the court if the court chooses to exercise its jurisdiction."

to be heard at both hearings and to explain her claims of bias. At the hearing on the motion to disqualify, Judge Moukawsher heard Cunha describe the rulings of Judge Adelman that were unfavorable to her client, directed her away from tangential commentary and gave her ample opportunity to provide supporting evidence. Judge Moukawsher repeatedly asked Cunha to clarify her arguments regarding each claim of bias. Cunha stated that she believed "wholeheartedly" that Judge Adelman was involved in a racketeering scheme with legal professionals of the Jewish faith. In response to the racketeering claim, Judge Moukawsher gave Cunha sufficient opportunity to be heard and stated, "that's, as you know, a very serious thing to say, so give me the evidence and I'll consider it." Cunha claimed to have a list of cases that supported her racketeering claim but, when pressed, could not produce it. Judge Moukawsher reminded her, "if you're not prepared to back the thing up, don't say it because I cannot keep saying—I keep saying, well, what's the evidence and something else gets said and I have to say what's the evidence." Judge Moukawsher gave Cunha sufficient opportunity to be heard on her other claims of bias against women alleging abuse and individuals with disabilities and repeatedly asked Cunha to provide support for the claims. Despite Judge Moukawsher's frequent reminder to Cunha not to state claims she could not support, Cunha persisted in her claims of bias, stating, "I do believe that there's outright bias here without a doubt. I believe that the record reflects that." Cunha also stated that exhibit 71, admitted in the dissolution action, would demonstrate that a multidisciplinary panel concluded that the plaintiff in the dissolution proceeding sexually assaulted his children, and Judge Moukawsher asked her multiple questions about the document, giving her the opportunity to withdraw her statements. Later in the disqualification ruling, Judge Moukawsher characterized those statements as lies.

At the beginning of the disciplinary hearing, instead of proceeding to argue her claim that Judge Moukawsher's findings in the disqualification ruling were clearly erroneous or explaining why her conduct did not violate the Rules of Professional Conduct, Cunha asserted that Judge Moukawsher was "intentionally harassing" her, that the disqualification ruling was "a joke," that he had "lied to the public," asked what was "so difficult for this court to comprehend" regarding the right to due process, and questioned whether Judge Moukawsher "would . . . like [her] to bow . . . ." She did so despite Judge Moukawsher's suggestion that she describe "why you, in good faith, believed the things that you asserted. You could name the documents you examined, you could name the people you spoke with, you could explain the reliability of these things." Rather than follow Judge Moukawsher's suggestion, Cunha continued to interrupt the court and asked whether she would have the opportunity to cross-examine Judge Moukawsher, as her accuser. The court attempted to stop her repeated interruptions and to refocus Cunha on the issues at hand before finally informing her that she should stop speaking as she was "bounding criminal contempt of court . . . ."

In the disqualification ruling, Judge Moukawsher gave Cunha notice that disciplinary counsel may participate in the disciplinary hearing by stating that "[t]he clerk will send a copy of this ruling to the chief disciplinary counsel. The court would welcome participation by any appropriate disciplinary entity to appear as a friend of the court for the upcoming hearing." At the disciplinary hearing, disciplinary counsel, further confirming that the hearing was not limited to the issue of the appropriate sanction, stated, "I believe the court can find, by clear and convincing evidence, several violations of the Rules of Professional Conduct" and argued that Judge Moukawsher should find that Cunha had

committed misconduct by violating several specific Rules of Professional Conduct and should disbar her as a sanction for that misconduct. Judge Moukawsher then addressed Cunha, stating that "[a] lot of time has gone by since you last spoke. And I'm hoping that during that time period you considered whether you should make some statement that might address the substance of any action I might take against you with respect to the findings I've made, again, advising you, in the strictest terms, to address what is actually before me. I'll give you a last opportunity to do so."

Cunha then addressed whether she engaged in any misconduct. For example, she stated, "I have never, ever made a misrepresentation to a court, or anyone else, knowingly, or intentionally, I stand by that principle." The court and Cunha then engaged in a lengthy exchange about whether her statements about the alleged sexual abuse were true. During that discussion, Judge Moukawsher stated: "It was a very specific statement about what I'd find in the [Department of Children and Families' (department)] report. And I found the opposite. So, if you'd like to address that, that's the narrow thing that we were having an extended discussion on, because I basically told you your credibility is on the line with this. I'm going to go and look at this exhibit and if it says what you say I'll credit it. If it says the opposite, then you've got something to answer for. And now, you're here to answer for it because it did say [the] opposite of what you represented to me. Now, if you'd like to address that, you may." Later, Cunha argued that Judge Moukawsher misconstrued or misunderstood her statements about the Jewish faith. She also argued that transcripts from other hearings support statements she made at the disqualification hearing.

Although Cunha was not under oath at either hearing, as an officer of the court, she had an obligation to tell the truth and to not make frivolous claims. See

Massameno v. *Statewide Grievance Committee*, 234 Conn. 539, 554–55, 663 A.2d 317 (1995) (as officers of court, attorneys are continually accountable to court for manner in which they exercise that privilege); see also Rules of Professional Conduct 3.3 (lawyer shall not knowingly make false statement of fact to tribunal); Rules of Professional Conduct 8.4 (3) ("[i]t is professional misconduct for a lawyer to . . . [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation").

In its disqualification ruling, Judge Moukawsher found that there was no basis for Cunha's representations before it that Judge Adelman was biased against persons not of the Jewish faith, women who allege abuse and individuals with disabilities, and that exhibit 71 made clear that neither the department nor a multidisciplinary panel concluded that the plaintiff in the dissolution action had abused his children. These representations, which Judge Moukawsher characterized in the disqualification ruling as blatant lies, and the claims of bias, which he characterized as "utterly empty claims against a judge," occurred before the court, and there was no contested factual issue as to what Cunha had said at the hearing on the motion to disqualify. See *In the Matter of Presnick*, supra, 19 Conn. App. 351 ("[t]he right to a hearing is limited to cases in which a hearing would assist the court in its decision, usually because there is a contested factual issue to be resolved"). Although it is true that Judge Moukawsher reminded Cunha at the start of the disciplinary hearing that the purpose of that hearing was to give her a chance to be heard on the issue of whether he should act upon the findings he had made as to her conduct at the disqualification hearing, he allowed her the opportunity to challenge those findings and to explain why there was a good faith basis for her conduct *before* determining that

she had violated several of the Rules of Professional Conduct. Accordingly, we reject this claim.

For the foregoing reasons, we conclude that Cunha cannot prevail on her due process claims that, regarding the disciplinary hearing, Judge Moukawsher failed to give her adequate notice and improperly limited that hearing to the issue of sanctions. We find no such violations of due process.

II

Cunha next claims that the sanction of disbarment for her conduct made in connection with the motion to disqualify constituted impermissible punishment for her exercise of her first amendment right to free speech. Our established law leads us to conclude otherwise.

"The [f]irst [a]mendment, applicable to the [s]tates through the [due process clause of the] [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade in ideas—even ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies [the government] the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence. . . . The [f]irst [a]mendment affords protection to symbolic or expressive conduct as well as to actual speech. . . . The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 351–52, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). "Whether the trial court's sanctions

constitute an impermissible restriction on the [plaintiff's] speech presents a question of law, over which our review is plenary. . . . [A]n appellate court is compelled to examine for [itself] the . . . statements [at] issue and the circumstances under which they [were] made to [determine] whether . . . they . . . are of a character [that] the principles of the [f]irst [a]mendment . . . protect." (Internal quotation marks omitted.) Id., 352.

Cunha argues that her "speech should not have been subject to discipline as it did not pose an imminent and likely threat to the administration of judicial proceedings." Her argument is misplaced. That standard only applies to extrajudicial speech by a party to litigation; the speech at issue in the present case was made in the presence of the court by an attorney. See id., 359. Thus, the question of whether the content of Cunha's arguments subjected her to discipline is answered by the Rules of Professional Conduct. Judge Moukawsher's conclusion that Cunha violated the Rules of Professional Conduct primarily was based on the finding that Cunha had lied and made misrepresentations during the hearing on the motion to disqualify. Cunha does not claim that those lies and misrepresentations constituted protected speech, nor does she specifically claim that any one of Judge Moukawsher's seven findings of violations of the Rules of Professional Conduct constituted a violation of her right to free speech.[8] Rather, she

[8] Judge Moukawsher found Cunha had violated rule 3.1 of the Rules of Professional Conduct (lawyer shall not assert frivolous claims), rule 3.2 of the Rules of Professional Conduct (lawyer shall make reasonable efforts to expedite litigation), rule 3.3 of the Rules of Professional Conduct (lawyer shall not knowingly make false statement of law or fact to tribunal), rule 3.5 of the Rules of Professional Conduct (lawyer is prohibited from engaging in conduct intended to disrupt tribunal), rule 8.2 of the Rules of Professional Conduct (lawyer shall not knowingly or with reckless disregard make statement concerning integrity of judge), rule 8.4 (3) of the Rules of Professional Conduct (lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation) and rule 8.4 (4) of the Rules of Professional Conduct (lawyer shall not engage in conduct that is prejudicial to administration of justice).

contends that the "court reasoned that lies and misrepresentations are not protected speech in the courtroom. It is certainly not being argued here that they should be. What is being argued is that the constitutional guarantees of free speech require greater consideration in sanctioning attorney conduct than were provided by the trial court." She argues that Judge Moukawsher should have permitted her "to refute [the] findings of misconduct. That is doubly important considering that the conduct at issue was speech. Such a lack of consideration could sanction or otherwise chill what may be controversial but meritorious arguments." Cunha also argues that Judge Moukawsher "did not narrowly tailor [his] sanctions in consideration of the conduct being attorney speech. The trial court could have imposed a fine, reprimand or suspension or made a referral to the grievance committee. Instead, it chose the most severe penalty to an attorney. It disbarred Ms. Cunha from the practice of law. It did so without regard to the potential chilling effects on advocacy that a swift disbarment for an argument could have on the legal profession." What we glean from this argument as stated is that Judge Moukawsher violated Cunha's right to free speech by (1) sanctioning her for misconduct without first conducting a hearing regarding whether misconduct had occurred and (2) not giving her a less severe sanction because of free speech concerns.

Neither of these arguments merit extensive discussion. We have addressed the first argument in our analysis of Cunha's due process claim in part I B of this opinion in which we concluded that she was afforded a sufficient opportunity to be heard. As to the second argument, Cunha has directed us to no law, nor are we aware of any, providing either that she is entitled to additional process because her misconduct involved speech or that a different standard than that described in part IV of this opinion for the imposition of sanctions

for attorney misconduct should apply when the misconduct involves speech. For the foregoing reasons, Cunha cannot prevail on the arguments she presents to this court implicating the first amendment.

III

Cunha next claims that Judge Moukawsher's findings that she had violated the Rules of Professional Conduct were not factually supported by clear and convincing evidence. We disagree as the record contains sufficient evidence to support the decision under the requisite standard of proof.

We begin with the applicable standard of review. "[W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . We also must determine whether those facts correctly found are, as a matter of law, sufficient to support the judgment. . . . Although we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses . . . we will not uphold a factual determination if we are left with the definite and firm conviction that a mistake has been made. . . . Additionally, because the applicable standard of proof for determining whether an attorney has violated the Rules of Professional Conduct is clear and convincing evidence . . . we must consider whether the trial court's decision was based on clear and convincing evidence." (Citations omitted; internal quotation marks omitted.) *Burton* v. *Mottolese*, supra, 267 Conn. 37–38.

Judge Moukawsher reasoned that Cunha had violated rules 3.1, 3.3 and 8.4 (3) of the Rules of Professional Conduct because she "intentionally and persistently

misrepresented the facts to the court" in order "to continue to pursue a false narrative about sexual abuse conclusions . . . ." See Rules of Professional Conduct 3.1 (lawyer shall not assert issue unless there exists basis in law and fact that is not frivolous); Rules of Professional Conduct 3.3 (lawyer shall not knowingly make false statement of law or fact to tribunal); Rules of Professional Conduct 8.4 (3) (it is professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

Judge Moukawsher stated that Cunha also claimed at the disqualification hearing that department records contained in exhibit 71 would reveal abuse by the plaintiff of his children, despite the fact that exhibit 71 reveals that the department stated that he did not pose any risk to the health, safety or well-being of the children.[9] Cunha's argument that Judge Moukawsher's findings were not supported in the record by clear and convincing evidence because her inaccurate representations were not made intentionally but rather were a result of poorly constructed arguments is belied by the transcript of the hearing on the motion to disqualify during which Judge Moukawsher admonished Cunha not to say things for which she could not provide support and gave her opportunities to withdraw or temper her statements.[10] On the basis of our review of the

[9] Cunha does not contest on appeal Judge Moukawsher's finding that exhibit 71 did not demonstrate what she had claimed it did.

[10] For example, at the hearing on the motion to disqualify the following colloquy occurred:

"[Attorney Cunha]: But they are complaining of sexual assault. It has been established that the complaints have been substantiated by a multidisciplinary taskforce team who—who recommended those children not be with their father. And, because of the lies presented to the court by the guardian ad litem and Attorney Aldrich manipulating the facts, Judge Adelman has ignored the real evidence. And—

* * *

"The Court: [I]f I look at that [department] document, within that document there are the conclusions of a multidisciplinary taskforce that Christopher Ambrose has sexually assaulted his children repeatedly and that—and

record, we conclude that Judge Moukawsher's findings that Cunha's allegations made in connection with the motion to disqualify were frivolous and intentionally inaccurate were supported by clear and convincing evidence.

Concerning rule 3.2 of the Rules of Professional Conduct, which provides that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client, Judge Moukawsher found that Cunha's "attack on Judge Adelman" and misrepresentations regarding exhibit 71 were "part of a tactic of stalling and diverting" the case. Cunha contends that there was no clear and convincing evidence that she made her filings to delay the case rather than in zealous strategic representation of her client. To the contrary, instances cited in the disciplinary order, and apparent in the court file, provide clear and convincing evidence that Cunha had failed to make reasonable efforts to expedite litigation consistent with the interests of her own client.

Regarding rule 8.2 of the Rules of Professional Conduct, which prohibits lawyers from making a statement

---

that the taskforce recommends that he—that they be taken away from him. Is that what—

"[Attorney Cunha]: Yes. Yes. And you will also find that the legal department for [the department] recommends that [the department] file a take into custody matter with the juvenile court.

* * *

"The Court: —the [department]—the [department] report—

"[Attorney Cunha]: Yes.

"The Court: —will quote this taskforce saying that—that the father committed sexual assault against the children and should be—and they shouldn't be allowed with him. That's what I'll find in there; right?

"[Attorney Cunha]: Yes. Absolutely."

* * *

"[Attorney Cunha]: It's exhibit number 71.

"The Court: 71. Okay. I'll look at that. And you want me to conclude from that that was a matter you brought to the court's attention, that it has a clear conclusion, essentially, that the children are in immediate danger—

"[Attorney Cunha]: Yes."

concerning the integrity of a judge that either the lawyer knows to be false or makes with reckless disregard as to its truth or falsity, Cunha argues that there was not clear and convincing evidence that she knowingly lied during court proceedings instead of "just making a poor, unprepared argument." Even if we were to assume, without deciding, that there was not clear and convincing evidence that Cunha had made the statements intentionally, Judge Moukawsher also found that Cunha's arguments in furtherance of her allegations of judicial bias had the corrupt motive "to cloud the truth for the perceived benefit of her client," or in other words, she acted with reckless disregard for the truth. Cunha makes no argument that the record fails to establish that she acted with reckless disregard. See Rules of Professional Conduct § 8.2 (a) ("[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office").

Concerning rule 3.5 of the Rules of Professional Conduct, which prohibits lawyers from engaging in conduct intended to disrupt a tribunal, Cunha argues that the record demonstrates that she argued aggressively but does not show that she used profane language or interrupted the court proceedings. The broad language of the rule prohibits "conduct intended to disrupt a tribunal" and does not limit such conduct either to the use of profanity or to the interruption of proceedings. Rules of Professional Conduct § 3.5 (4). The transcript from the hearing on the motion to disqualify supports the findings that Cunha disrupted proceedings and prejudiced the system of justice by "hurling baseless accusations," harassing parties, and using the system of justice to punish a party opponent and legal professionals. Judge Moukawsher's findings are rooted in (1) the

nature of Cunha's claims of bias against Judge Adelman, which required a referral to Judge Moukawsher, and (2) her arguments during the hearing on the motion to disqualify, which included unsupported claims of racketeering between Judge Adelman and legal professionals and factually incorrect claims that exhibit 71 would show certain inappropriate behavior on the part of the plaintiff in the dissolution action. The record provides clear and convincing evidence that Cunha had disrupted the dissolution proceedings by her arguments concerning the motion to disqualify.

Regarding rule 8.4 (4) of the Rules of Professional Conduct, which provides that it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice, Judge Moukawsher used the same reasoning as he used for finding a violation of rule 3.5 of the Rules of Professional Conduct and stated that Cunha disrupted proceedings and prejudiced the system of justice by using the judicial system to punish a party opponent and legal professionals. Cunha argues that she filed her motions in zealous and strategic advocacy of her client and not to stall the dissolution proceedings. Although this argument does not directly address the basis for the finding of a violation of rule 8.4 (4), as with rule 3.5, there is clear and convincing evidence in the record of the hearing on the motion to disqualify that she prejudiced the system of justice by using it to punish a party opponent and legal professionals.

For the foregoing reasons, we conclude that the court's findings of violations of the Rules of Professional Conduct were supported by clear and convincing evidence.

IV

Cunha last claims that disbarment was an excessive penalty because it was disproportionate in light of the

conduct involved and her lack of disciplinary history. We are not persuaded.

Practice Book § 2-44 provides in relevant part that "[t]he Superior Court may, for just cause . . . disbar attorneys . . . ." If a court in the exercise of its discretion disciplines an attorney, "it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession. . . . The trial court has inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it. . . .

"The American Bar Association has promulgated standards for the imposition of sanctions. . . . [A]fter a finding of misconduct, a court should consider: (1) the nature of the duty violated; (2) the attorney's mental state; (3) the potential or actual injury stemming from the attorney's misconduct; and (4) the existence of aggravating or mitigation factors. . . . The aggravating factors referenced in the standards include (a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; [and] (j) indifference to making restitution. . . . The mitigation factors include: (a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely

good faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (*l*) remorse; [and] (m) remoteness of prior offenses." (Citations omitted; internal quotation marks omitted). *Chief Disciplinary Counsel* v. *Rozbicki*, 150 Conn. App. 472, 487–88, 91 A.3d 932, cert. denied, 314 Conn. 931, 102 A.3d 83 (2014).

The disciplinary order states that "[d]isbarment is the appropriate penalty for conduct as egregious as [Cunha's]." It further states that there were aggravating factors, including that Cunha "has been disrupting this case for a long time with bogus motions, duplicate proceedings, baseless attacks on the lawyers and judges and experts. She didn't just lose her temper one day and do things she has regretted. She has systematically tried to use the justice system against itself" in order to frustrate and discredit it. (Footnote omitted.) Judge Moukawsher additionally noted that, during the disciplinary hearing, Cunha, an experienced lawyer, "berated the court, mocked it, and mocked the proceedings." Judge Moukawsher noted that "[t]hings might be different if there were substantial mitigating factors here. But there aren't. There is only [that Cunha] has not been disciplined before, but that is by no means enough to offset the seriousness of her wrongdoing."

In support of her position that Judge Moukawsher abused his discretion in imposing the sanction of disbarment for her misconduct, Cunha highlights other cases that she alleges involve "similar cases of misconduct" wherein a lesser penalty was imposed. Cunha, however, has not demonstrated that Judge Moukawsher acted arbitrarily in imposing the penalty of disbarment. Rather,

the disciplinary order demonstrates a careful consideration of the nature of the misconduct in light of aggravating and mitigating circumstances. Accordingly, we defer to Judge Moukawsher's determination of the appropriate sanction.[11] See *Disciplinary Counsel* v. *Serafinowicz*, 160 Conn. App. 92, 102, 123 A.3d 1279, cert. denied, 319 Conn. 953, 125 A.3d 531 (2015). On the basis of our review of the record, we cannot conclude that Judge Moukawsher's sanction of disbarment was an abuse of his discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

NATIONAL BANK TRUST *v.* ILYA YUROV ET AL.
(AC 46023)

Alvord, Cradle and Westbrook, Js.

Syllabus

Pursuant to statute (§ 50a-34 (b) (3)), a foreign judgment need not be recognized if the cause of action on which the judgment is based is repugnant to the public policy of this state.

The plaintiff bank, the majority of which was allegedly owned by the Central Bank of the Russian Federation, sought to enforce a foreign judgment against the defendant B, a shareholder of the plaintiff. The plaintiff filed a certification of the foreign judgment in the Superior Court, alleging that the judgment had not been satisfied, that the enforcement of the judgment had not been stayed, and that B owned property in Avon. B filed a motion to open and either dismiss or stay the enforcement of the certified foreign judgment, arguing, inter alia, that the issuance of a federal executive order and a United States Department of the Treasury directive related to, inter alia, certain transactions involving the Central Bank of the Russian Federation prohibited the trial court from enforcing the foreign judgment pursuant to § 50a-34 (b) (3). The trial court denied B's motion to open, and B appealed to this court. *Held* that the trial

[11] The defendants in error argue, citing footnote 51 in *Burton* v. *Mottolese*, supra, 267 Conn. 57, that this court may note postdisbarment events to illustrate the correctness of the court's disciplinary order. We do not read the footnote in *Burton* so broadly, and, under the circumstances of this case, we decline to consider Cunha's postdisbarment conduct.

court properly denied B's motion to open: B did not challenge on appeal the court's determination that the cause of action on which the foreign judgment was based was not repugnant to the public policy of this state; moreover, this court rejected B's claim that this court should interpret § 50a-34 (b) (3) to apply to the foreign judgment itself and not merely to the cause of action on which the judgment was based, as that interpretation was inconsistent with the plain language of § 50a-34 (b) (3).

Argued December 6, 2023—officially released February 6, 2024

Procedural History

Action to enforce a foreign judgment, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Baio*, *J.*, denied the defendant Sergey Belyaev's motion to open and dismiss or stay the enforcement of the certified foreign judgment, from which the defendant Sergey Belyaev appealed to this court. *Affirmed.*

Jeffrey Hellman, for the appellant (defendant Sergey Belyaev).

Kellianne Baranowsky, with whom, on the brief, was *Jeffrey M. Sklarz*, for the appellee (plaintiff).

Opinion

ALVORD, J. The defendant Sergey Belyaev[1] appeals from the trial court's denial of his second motion to open and dismiss or stay the enforcement of a certified foreign judgment filed by the plaintiff, National Bank Trust. On appeal, the defendant claims that the court improperly denied the motion to open the judgment pursuant to General Statutes § 50a-34 (b) (3). We disagree and, accordingly, affirm the judgment of the court.

The following procedural history, as set forth in a prior opinion of this court, is relevant to the resolution of the defendant's claim on appeal. "On January 23,

[1] Ilya Yurov, Nikolay Fetisov, Nataliya Yurova, Irina Belyaeva, and Elena Pischulina also were named as defendants in this action, but they did not appear in the trial court and are not participating in this appeal. Accordingly, any reference herein to the defendant is to Sergey Belyaev only.

2020, the Commercial Court of the Queen's Bench Division of the High Court of Justice of England and Wales (UK court) issued a judgment in favor of the plaintiff, finding that the plaintiff had suffered significant financial losses as a result of fraud perpetrated by the defendant and certain of his codefendants.[2] On June 30, 2020, the plaintiff filed a certification of the judgment in the Superior Court pursuant to General Statutes §§ 50a-33 and 52-605 (a).[3] In the certification, which was signed by counsel for the plaintiff, the plaintiff alleged that the judgment had not been satisfied, that the enforcement of the judgment had not been stayed, and that the approximate amount due to the plaintiff, as of June 12, 2020, was $900 million. The certification also alleged that the defendant owns property located at 85 Bishop Lane in Avon.

"On August 17, 2020, the defendant filed a motion to open and either dismiss or stay the enforcement of the certified judgment on the grounds that the foreign judgment was not entitled [to] recognition because (1) it was not a judgment of a 'foreign state granting or

[2] "The defendant and certain of the other defendants named in this case were shareholders of the plaintiff and also owned the companies to which they made fraudulent loans or conducted fraudulent transactions. The UK court found those defendants liable for the financial ruin of the plaintiff." *National Bank Trust* v. *Yurov*, 210 Conn. App. 776, 778 n.2, 271 A.3d 171 (2022).

[3] "General Statutes § 50a-33 provides: 'Except as provided in section 50a-34, a foreign judgment meeting the requirements of section 50a-32 is conclusive between the parties to the extent that it grants or denies recovery of a sum of money. The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit.'

"General Statutes § 52-605 (a) provides: 'A judgment creditor shall file, with a certified copy of a foreign judgment, in the court in which enforcement of such judgment is sought, a certification that the judgment was not obtained by default in appearance or by confession of judgment, that it is unsatisfied in whole or in part, the amount remaining unpaid and that the enforcement of such judgment has not been stayed and setting forth the name and last-known address of the judgment debtor.' " *National Bank Trust* v. *Yurov*, supra, 210 Conn. App. 778–79 n.3.

denying recovery of a sum of money' as required by [General Statutes] § 50a-31 (2); (2) it was not a 'final and conclusive' judgment under [General Statutes] § 50a-32 because it was 'in the process of being appealed'; (3) the certification was signed by counsel for the plaintiff, rather than the judgment creditor, as required by §§ 50a-33 and 52-605; (4) the defendant was entitled to a stay of the enforcement of the judgment because he was in the process of appealing it; and (5) the UK court did not have personal jurisdiction over the defendant. On September 29, 2020, the court summarily denied the defendant's motion." (Footnotes in original.) *National Bank Trust* v. *Yurov*, 210 Conn. App. 776, 778–79, 271 A.3d 171 (2022). The defendant filed an appeal with this court and sought an articulation of the court's denial of his motion. Id., 779.

"In its articulation, the court indicated that it had considered and rejected all of the arguments raised by the defendant in his motion to open and either dismiss or stay the enforcement of the certified judgment. The court held that the certified judgment was a final and conclusive foreign judgment that granted the recovery of a sum of money, that the plaintiff's counsel was not prohibited from signing the certification of that judgment, that the defendant had waived the issue of personal jurisdiction when he appeared before the UK court, that the defendant did not dispute receiving a copy of the filed certification, and that there was no appeal pending of the certified judgment." Id., 780. This court affirmed the court's denial of the defendant's first motion to open. Id., 788.

While the first appeal was pending, on May 25, 2021, the defendant filed a second motion to open the judgment. The defendant argued, inter alia, that the judgment should be opened in accordance with § 50a-34 (b) (3) because, on April 15, 2021, President Joseph R.

Biden, Jr., had issued Executive Order No. 14,024 pursuant to the International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq., the National Emergencies Act, 50 U.S.C. § 1601 et seq., § 212 (f) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182 (f), and 3 U.S.C. § 301 (Executive Order);[4] see Executive Order No. 14,024, 86 Fed. Reg. 20,249 (April 19, 2021), and the Office of Foreign Assets Control of the United States Department of Treasury (OFAC) had issued a directive pursuant to the Executive Order, titled "Directive 4 Under Executive Order 14,024: Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation [CBR], the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation,"[5] both of which the defendant

[4] Section 6 of the Executive Order provides in relevant part: "For the purposes of this order . . . (b) the term 'Government of the Russian Federation' means the Government of the Russian Federation, any political subdivision, agency, or instrumentality thereof, including the Central Bank of the Russian Federation, and any person owned, controlled, or directed by, or acting for or on behalf of, the Government of the Russian Federation." Executive Order No. 14,024, Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation, 86 Fed. Reg. 20,249, 20,251 (April 19, 2021). Section 8 provides in relevant part: "The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President . . . as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may, consistent with applicable law, redelegate any of these functions within the Department of the Treasury. All departments and agencies of the United States shall take all appropriate measures within their authority to carry out the provisions of this order." Id., 20,252.

[5] The April 15, 2021 OFAC directive was amended twice; see 87 Fed. Reg. 32,303 (May 31, 2022); 88 Fed. Reg. 36,648 (June 5, 2023); both amendments made technical, nonsubstantive changes that are not relevant to this appeal. For purposes of clarity, we refer to the current revision of the OFAC directive.

Accordingly, the OFAC directive provides in relevant part: "Pursuant to sections 1 (a) (iv), 1 (d), and 8 of Executive Order 14,024, 'Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation' . . . the Director of [OFAC] has determined, in consultation with the Department of State, that the [CBR and the two other entities] . . . are political subdivisions, agencies, or instrumentalities of the

argued prohibited the enforcement of the judgment. In support of this contention, he argued, inter alia, that the court need not recognize a foreign judgment if either the judgment, or its underlying cause of action, is repugnant to public policy.[6]

On June 25, 2021, the plaintiff filed an objection to the defendant's second motion to open. The plaintiff argued, inter alia, that the defendant's second motion to open should be denied because the cause of action on which the judgment is based is not repugnant to the public policy of the state of Connecticut as expressly required by § 50a-34 (b) (3).

The court, *Baio, J.*, held oral argument on the defendant's second motion to open on October 11, 2022. On November 2, 2022, the court issued a memorandum of decision denying the defendant's second motion to open. In its conclusion, the court determined that the language of the relevant statute, § 50a-34 (b) (3),

Government of the Russian Federation, and that the following activities by a United States person are prohibited, except to the extent provided by law, or unless licensed or otherwise authorized by [OFAC]:

"Any transaction involving the [CBR or the two other entities] . . . including any transfer of assets to such entities or any foreign exchange transaction for or on behalf of such entities.

"All other activities with entities determined to be subject to the prohibitions of this Directive, or involving their property or interests in property, are permitted, provided that such activities are not otherwise prohibited by law, the [Executive] Order, or any other sanctions program implemented by [OFAC].

"Except to the extent otherwise provided by law or unless licensed or otherwise authorized by [OFAC], the following are also prohibited: (1) any transaction that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions of this Directive; and (2) any conspiracy formed to violate any of the prohibitions of this Directive. . . ." Publication of Directive 4 (as Amended) Under Executive Order 14,024 of April 15, 2021, 88 Fed. Reg. 36,648, 36,649 (June 5, 2023).

[6] The defendant also argued that, because the CBR is subject to the Executive Order and OFAC directive, and the CBR owns approximately 97 percent of the plaintiff, the plaintiff also is subject to the Executive Order and OFAC directive.

involves the consideration of whether the *cause of action* on which the judgment is based would conflict with the public policy of the state. The court concluded that consideration of whether the resulting *judgment* would conflict with public policy was outside the ambit of § 50a-34 (b) (3). The court determined that "the plaintiff's argument is correct that the defendant has provided no evidence of a public policy of the United States or the state that is in conflict with the UK judgment. The motion to open judgment on this basis is denied." This appeal followed.

We first set forth our standard of review. "[I]ssues of statutory interpretation constitute questions of law over which the court's review is plenary. The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply. . . . When construing a statute, [the court's] fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Commissioner of Public Health* v. *Colandrea*, 221 Conn. App. 631, 654, 302 A.3d 370 (2023), cert. denied, 348 Conn. 932, A.3d (2024).

We now turn to the defendant's claim on appeal that the court improperly denied his second motion to open

under § 50a-34 (b) (3).[7] Section 50a-34, titled "Grounds for nonrecognition," is part of Connecticut's Uniform Foreign Money-Judgments Recognition Act, codified at General Statutes § 50a-30 et seq., and provides in relevant part: "(b) A foreign judgment need not be recognized if . . . (3) The *cause of action* on which the judgment is based is repugnant to the public policy of this state . . . ." (Emphasis added.) General Statutes § 50a-34 (b) (3). The defendant maintains that the trial court adopted "a very restrictive view" of the statute and argues that this court should interpret § 50a-34 (b) (3) to apply "to the judgment itself and not merely the cause of action." We disagree.

"[A] court must construe a statute as written. . . . Courts may not by construction supply omissions . . . or add exceptions merely because it appears that good reasons exist for adding them. . . . The intent of the legislature, as this court has repeatedly observed, is to be found not in what the legislature meant to say, but in the meaning of what it did say. . . . It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is the function of the legislature." (Internal quotation marks omitted.) *Marciano* v. *Jiminez*, 324 Conn. 70, 77, 151 A.3d 1280 (2016). The defendant's interpretation is inconsistent with the plain language of § 50a-34 (b) (3), which directs the court to determine whether "[t]he *cause of action* on which the judgment is based is repugnant to the public policy of this state." Thus, we reject the defendant's proposed interpretation.[8]

[7] Specifically, the defendant argues that the court incorrectly determined that the enforcement of the judgment will not be repugnant to the public policy of this state on the basis of what he claims are erroneous findings that (1) the plaintiff is not a sanctioned entity, (2) the sanctions on the CBR do not prohibit the plaintiff's collection activity, and (3) the funds collected by the plaintiff will not fund Russian aggression in Ukraine.

[8] The defendant argues that "[t]he new version of the [Uniform Foreign-Country Money Judgments Recognition] Act which has been adopted by a majority of states, including New York, Maine, and Rhode Island, makes clear that it applies to the judgment itself and not merely the cause of

We also note that the defendant's only claim on appeal relates to whether the court properly interpreted § 50a-34 (b) (3). As the plaintiff recognizes in its appellate brief, the defendant does not challenge on appeal the court's determination that the cause of action on which the UK judgment is based is not repugnant to the public policy of this state. Accordingly, that issue is not before this court.[9]

On the basis of the foregoing, we conclude that the court properly denied the defendant's motion to open.

The judgment is affirmed.

In this opinion the other judges concurred.

DARRYL ANDREW BONDS, JR. *v.* COMMISSIONER OF CORRECTION
(AC 46191)

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

Syllabus

The petitioner, who had been convicted of felony murder, robbery in the first degree, and conspiracy to commit robbery in the second degree,

---

action. See Uniform Foreign-Country Money Judgments Recognition Act § 4, comment 8 (2005). While Connecticut has not yet modernized its version of the act, there is no reason to believe that the Connecticut legislature will not adopt the new act. Moreover, as a uniform act, its interpretations are meant to be uniform around the country. [General Statutes] §50a-38. Thus, the restrictive interpretation used by the Superior Court that the cause of action must be against the policy of the United States should not apply." Because the court was required to interpret and apply the version of the act adopted by our legislature, we decline to entertain the defendant's argument.

[9] Because we conclude that the court properly denied the defendant's second motion to open on the basis that the cause of action on which the UK judgment is based is not repugnant to the public policy of this state; see General Statutes § 50a-34 (b) (3); we need not address the defendant's remaining arguments that the court improperly determined that (1) the plaintiff is not a sanctioned entity, (2) the sanctions on the CBR do not prohibit the plaintiff's collection activity, and (3) the funds collected by the plaintiff will not support Russia's invasion of Ukraine, as those arguments attack the judgment itself.

sought a writ of habeas corpus, claiming that his trial counsel, S, had provided ineffective assistance during plea negotiations by, among other things, failing to adequately advise him to accept a plea deal and failing to adequately advise him regarding the strength of the state's case. The petitioner alleged that, but for his counsel's allegedly deficient performance, he would have pleaded guilty and received a more favorable disposition. The habeas court rendered judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court, claiming, inter alia, that the court incorrectly concluded that he had failed to prove that he was prejudiced by S's deficient performance because there was a reasonable probability that, but for S's failure to give specific and appropriate advice, he would have accepted the plea offer. *Held* that the habeas court's determination that the petitioner did not prove that he was prejudiced by S's allegedly ineffective assistance was not clearly erroneous: the habeas court found that the petitioner's testimony that he would have pleaded guilty instead of proceeding to trial was not credible and therefore concluded that the petitioner did not establish that he would have accepted a plea offer had S advised him any differently about the plea offer or the state's evidence, and the court's findings regarding whether the petitioner would have accepted the plea offer, which were made solely on the basis of the court's credibility determinations, were entitled to deference; moreover, the court did not single out the petitioner's testimony with respect to whether he would have accepted the state's plea offer but, rather, rejected his testimony as a whole, the court having heard the petitioner admit on cross-examination at the habeas trial that he had told the sentencing judge six times that he was innocent and that he would not admit to something that he did not do, and, accordingly, the court reasonably could have concluded that a petitioner who maintained his innocence so strongly on a felony murder charge was unlikely to plead guilty to the lesser charge of manslaughter offered by the state; furthermore, regardless of whether the court erred in its conclusion that there was no evidence that the trial court would have accepted the state's plea offer, and, although there was no dispute that the plea offer would have involved a conviction and a sentence that was less severe than that which was imposed, the petitioner's failure to prove that he would have accepted the plea offer was fatal to his appeal.

Argued December 5, 2023—officially released February 6, 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.*

Judie Marshall, for the appellant (petitioner).

Danielle Koch, deputy assistant state's attorney, with whom, on the brief, were *Joseph Valdes*, senior assistant state's attorney, and *Erin Stack*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

SCHUMAN, J. The petitioner, Darryl Andrew Bonds, Jr., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly rejected his claim of ineffective assistance of trial counsel. We affirm the judgment on the ground that the habeas court properly found that the petitioner did not prove that he was prejudiced by any ineffective assistance.

The following facts and procedural history are relevant to our disposition of this appeal. On November 4, 2009, the petitioner and his friend, Tyrone Tarver, participated in the robbery and shooting of the victim, Denny Alcantara. *State* v. *Bonds*, 172 Conn. App. 108, 112–14, 158 A.3d 826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). The suspects took a black leather jacket, gold chain, cell phone, money, and marijuana from the victim, and the victim was shot twice in the stomach. Id., 113. The victim ultimately died of a gunshot wound to the abdomen. Id.

In December, 2010, the petitioner was arrested for this incident pursuant to a warrant. Id., 114. In May, 2014, prior to trial, the state filed a second substitute information charging the petitioner with one count of felony murder in violation of General Statutes (Rev. to 2009) § 53a-54c, one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and

one count of conspiracy to commit robbery in the second degree in violation of General Statutes § 53a-48 (a) and General Statutes (Rev. to 2009) § 53a-135. Id., 114–15. A jury found the petitioner guilty of all counts. Id., 115. The court, *White, J.*, sentenced the petitioner to a total effective term of fifty-five years of incarceration, followed by five years of special parole. Id. This court affirmed the conviction on direct appeal. Id., 138.

The petitioner subsequently filed the present habeas action and, in his third amended petition, alleged that his criminal trial counsel, Stephan Seeger, had rendered ineffective assistance during plea negotiations prior to his criminal trial.[1] Specifically, the petitioner alleged that Seeger provided constitutionally deficient performance by, among other things, failing to adequately advise him to accept a plea deal and failing to adequately advise him regarding the strength of the state's case. The petitioner also alleged that, but for his counsel's allegedly deficient performance, he would have pleaded guilty and he would have received a more favorable disposition. The respondent, the Commissioner of Correction, filed a return denying the allegations in the operative petition or leaving the petitioner to his proof.

The court, *M. Murphy, J.*, held a trial on the habeas petition on May 17 and 26, 2022, at which five witnesses testified: the petitioner; Seeger; Joseph Valdes, the prosecutor at the petitioner's criminal trial; Brian Carlow, an attorney whom the petitioner presented as a legal expert; and Yvania Collazo, the petitioner's cousin, who

[1] The third amended petition included additional counts against the petitioner's trial counsel, a claim against his appellate counsel, and a due process count alleging that the state had failed to preserve certain evidence. The petitioner withdrew these counts at the start of the habeas trial, and they are not subjects of this appeal. In addition, the operative petition included a count alleging that the state knowingly presented false testimony. The habeas court concluded that the petitioner had abandoned this claim and, in the alternative, that there was no merit to the claim. The petitioner does not challenge that determination on appeal.

testified at the petitioner's criminal trial. The parties also submitted documentary evidence to the court, including an email exchange between Seeger and Valdes that took place after Tarver's trial but more than six months prior to the petitioner's criminal trial, which described aspects of the plea negotiations.

On November 17, 2022, the court issued a memorandum of decision denying the petition for a writ of habeas corpus. The court summarized the evidence and made the following relevant findings in support of its decision. "[The petitioner] was represented by [Seeger] at all criminal proceedings at issue in the present matter. Seeger reviewed police reports, witness statements, conducted discovery, and met with [the petitioner] to discuss the case and the state's evidence. Seeger determined that the state's evidence against [the petitioner] and Tarver was significant. Seeger advised [the petitioner] about the risk of going to trial and that, although a jury could acquit him . . . the evidence connecting [the petitioner] and Tarver at the time of the murder could result in the jury convicting him. Seeger described his advice as making sure that [the petitioner] 'knew exactly moving forward there were consequences of him not taking the plea.' . . . The decision whether to accept the state's plea offer or proceed to trial was solely [the petitioner's].

"Tarver's trial occurred prior to [the petitioner's trial]. Thus, Tarver's trial and outcome—a jury convicted him of felony murder, robbery in the first degree, and conspiracy to commit robbery in the third degree[2]—served as a barometer for [the petitioner's] upcoming jury trial. Seeger's advice, primarily premised on the identical evidence in both Tarver's and [the petitioner's] cases,

[2] See *State* v. *Tarver*, 166 Conn. App. 304, 141 A.3d 940, cert. denied, 323 Conn. 908, 150 A.3d 683 (2016). Tarver received a total effective sentence of fifty years to serve, followed by ten years of special parole. Id., 309. The jury returned its verdict in that case on January 18, 2013. Id.

was unaltered by the result of Tarver's trial. Seeger recalled that he may have informed [the petitioner] that the state might want Tarver to cooperate and testify in his case, which could benefit Tarver at his sentencing.[3] Otherwise, the evidence in both defendants' cases was the same." (Citation omitted; footnotes added; footnote omitted.)

On the basis of the email exchange and testimony from Seeger and Valdes, the court also found that, after the Tarver trial, the state offered the petitioner a sentence of either twenty-five years of incarceration or, alternatively, twenty years of incarceration, followed by ten years of special parole, in exchange for a guilty plea to a charge of reckless manslaughter. Although the habeas court specifically found that Seeger communicated the twenty year offer to the petitioner and also stated that "Seeger advised [the petitioner] about the plea *deals*," at no point did the habeas court find that Seeger had specifically recommended or advised the petitioner to accept or reject either offer. (Emphasis added.)

The court made the following additional findings. "Seeger discussed the state's evidence with [the petitioner] and gave him the pros and cons. Seeger noted that juries can be fickle, and it is difficult to predict what a jury will decide. [The petitioner] had to weigh and balance the plea offer versus going to trial. Seeger testified that he generally advises the client, but the ultimate decision to go to trial is made by the client. Regarding [the petitioner's] case, Seeger testified that he did not tell [the petitioner] that he would win the case if he went to trial, and he advised [the petitioner] of the consequences of not taking the plea.

[3] The court noted that Valdes had explained that, "in the state's opinion, based on the evidence, Tarver was not the shooter. The state offered Tarver the ability to testify against [the petitioner], but Tarver declined to do so."

"On cross-examination, Seeger noted that [the petitioner] was still quite young at the time his criminal case was being prosecuted. Seeger wanted to make sure that [the petitioner] paid attention to the offer because a trial would likely lead to a fifty to sixty year sentence. Seeger strove to make sure that [the petitioner] understood the consequences of going to trial following Tarver's conviction.

"[The petitioner] testified that he never saw a police report and that Seeger never reviewed a police report with him. Nor did Seeger review any witness statements with him. According to [the petitioner], Seeger immediately prior to trial conveyed the twenty-five year plea offer to him and advised him to not take the plea offer because Seeger did not think the evidence was sufficient and there was no eyewitness to the shooting. [The petitioner] said that Seeger never explained to him what the state needed to prove to convict him of felony murder. [The petitioner] also stated that he never received two offers, only one just prior to trial. . . . [The petitioner] stated that had he fully understood the offer of twenty years plus ten years [of] special parole, then he would have accepted that plea offer.

"On cross-examination, [the petitioner] acknowledged that it was his decision to go to trial instead of pleading guilty. However, he stated that, after Tarver's conviction and fifty year sentence, he asked Seeger what he should do. Seeger, according to [the petitioner], told him to still go to trial, and that he trusted that advice because Seeger felt that [a certain witness] statement would not be admitted and that he could impeach Collazo with her multiple statements."

On the basis of its findings, the court rejected the petitioner's claim of ineffective assistance of counsel. The court first concluded that Seeger did not render deficient performance during plea negotiations. The

court explained: "As to the allegation that Seeger failed to adequately advise [the petitioner] of the evidence against him, the court concludes that this claim has no merit. The court does not credit [the petitioner's] testimony that Seeger did not show him and review items such as police reports and witness statements, nor does the court credit his testimony that Seeger never explained to him what the state needed to prove to convict him of felony murder. The court credits Seeger's testimony about his review, investigation, and discussions with [the petitioner]. Therefore, the claim that Seeger failed to adequately advise [the petitioner] of the evidence against [him] must fail.

"The court also does not find credible [the petitioner's] testimony regarding plea offer communications. . . . The court does not find credible [the petitioner's] testimony that, after Tarver's conviction and fifty year sentence, he asked Seeger what he should do and that Seeger told him to go to trial, and that he trusted that advice because Seeger felt that [a certain witness] statement would not be admitted and that he could impeach Collazo with her multiple statements. To summarize: the court does not find [the petitioner] to be a credible witness regarding the salient plea negotiation issues."

The court further found that "Seeger advised [the petitioner] about the plea deals and the strength of the state's case. Seeger balanced the need to advise [the petitioner] of what could happen if he did not accept the plea deal and being prepared to go forward with the trial if that is what [the petitioner] wanted to do. [The petitioner] was aware from Seeger's advice and the outcome of Tarver's trial that his own trial might result in his conviction. In other words, [the petitioner] fully understood the risk of proceeding to trial and chose a trial knowing the significant risk he was taking. [The petitioner's] persistence in maintaining his innocence molded his decision to proceed with the trial.

[The petitioner] continued to proclaim his innocence even at the sentencing hearing."

The court concluded that the petitioner also failed to establish that he was prejudiced by his counsel's allegedly deficient performance, explaining: "The court does not find credible [the petitioner's] present day testimony that he would have pleaded guilty instead of proceeding to trial. Furthermore . . . there is no evidence establishing with a reasonable probability that a judge would have conditionally accepted any of the state's plea offers as communicated in the negotiations with Seeger. [The petitioner] has also not persuaded this court that he would have accepted a plea offer had Seeger advised him any differently about the plea offer or the state's evidence." Thereafter, the court granted the petitioner's petition for certification to appeal, and this appeal followed.

On appeal, the petitioner claims that the habeas court erred in determining that Seeger did not render deficient performance in two related respects: (1) Seeger did not make a direct recommendation to the petitioner about whether to accept the state's offer; and (2) Seeger failed to advise the petitioner about the desirability of pleading guilty in light of Tarver's conviction, the risk of a significantly higher sentence following trial, and the admissibility of some of the key evidence that the state would offer. Both of these claims implicate our Supreme Court's recent decision in *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 298 A.3d 588 (2023), which the petitioner cites.[4] The petitioner also claims

[4] In *Maia*, the Supreme Court held: "There is no per se requirement that defense counsel must recommend whether a client should accept a plea offer. . . . This is because providing a specific recommendation implicates two critical and sometimes conflicting rights: On the one hand, defense counsel must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty. . . . As part of this advice, counsel must communicate to the defendant the terms of the plea offer . . . and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he

that the court erred in concluding that he had failed to prove that he was prejudiced by Seeger's deficient performance because there is a reasonable probability that, but for Seeger's failure to give specific and appropriate advice, he would have accepted the plea offer and therefore resolved his case more favorably. In support of his claim, the petitioner relies on his testimony from the habeas trial that, had he been advised to take the plea offer, he would have done so.

The petitioner bears the burden of proving ineffective assistance of counsel under the well established standard of *Strickland* v. *Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 281–82, 267 A.3d 120 (2021); *Quintana* v. *Warden*, 220 Conn. 1, 5, 593 A.2d 964 (1991). In cases such as this one, involving plea negotiations, to prevail on a claim of ineffective assistance of counsel the petitioner must establish that "(1) counsel's performance was deficient, and (2) there was a reasonable probability that—but for the deficient performance—the petitioner would have accepted the plea offer, and that the trial court would have assented to the plea offer." *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 340, 258 A.3d 40 (2021). "An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland*

will most likely be exposed . . . . On the other hand, the ultimate decision whether to plead guilty must be made by the defendant. . . . And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer. . . . The need to provide a specific recommendation in any particular case depends on a number of factors, including the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea . . . whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." (Citations omitted; internal quotation marks omitted.) *Maia* v. *Commissioner of Correction*, supra, 347 Conn. 463.

test], whichever is easier." (Citation omitted; internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, 176 Conn. App. 616, 625–26, 170 A.3d 736 (2017). As stated in *Strickland*, 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." *Strickland* v. *Washington*, supra, 697.

We resolve this case on the basis of the prejudice prong. "[T]o satisfy the prejudice prong of the *Strickland* test when the ineffective advice of counsel has led a defendant to reject a plea offer, the habeas petitioner must show [1] that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), [2] that the court would have accepted its terms, and [3] that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 355–56, 273 A.3d 680 (2022).

As previously recited, the habeas court stated that it "does not find credible [the petitioner's] present day testimony that he would have pleaded guilty instead of proceeding to trial. . . . [The petitioner] has also not persuaded this court that he would have accepted a plea offer had Seeger advised him any differently about the plea offer or the state's evidence." We review these findings deferentially. Ordinarily in a habeas appeal, the ultimate question of whether a habeas petitioner's right to the effective assistance of counsel is "a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary

review by this court unfettered by the clearly erroneous standard. . . . In the context of rejected plea offers, however, the specific underlying question of whether there was a reasonable probability that a habeas petitioner would have accepted a plea offer but for the deficient performance of counsel is one of fact, which will not be disturbed on appeal unless clearly erroneous." (Citations omitted; internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, supra, 343 Conn. 356–57.

Not only does a clearly erroneous standard apply in the present case on the issue of prejudice, but the habeas court made its findings regarding whether the petitioner would have accepted the plea offer solely on the basis of credibility determinations, which calls for further deference. "The habeas court had the opportunity to observe firsthand the conduct, demeanor and attitude of the witnesses, and, therefore, it is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) Id., 358. In this case, the habeas court heard and saw the petitioner testify at considerable length.

There were several other factors supporting the habeas court's determination that the petitioner was not a credible witness on the issue of prejudice. First, the habeas court did not single out the petitioner's testimony with respect to whether he would have accepted the state's guilty plea offer but, rather, rejected the petitioner's testimony across the board. The court ultimately found that it "does not find [the petitioner] to be a credible witness regarding the salient plea negotiation issues." Second, the court heard the petitioner admit on cross-examination that he had told the judge at sentencing six times that he was innocent and that he was not going to admit to something that he did not do. The court reasonably could have concluded that a petitioner who maintained his innocence so strongly on a felony

murder charge was unlikely to plead guilty to a manslaughter charge.[5] Thus, the habeas court had good reason not to accept the petitioner's testimony that he would have pleaded guilty had Seeger advised him differently about the state's plea offer.

The petitioner also attacks, as clearly erroneous, the court's finding on the issue of prejudice that "there is no evidence establishing with a reasonable probability that a judge would have conditionally accepted any of the state's plea offers as communicated in the negotiations with Seeger." The petitioner points to testimony from Valdes, the prosecutor handling the case, that "the judge wanted this case to be resolved," and that he had "no reason to believe that the judge would have gone on the record and said that he would have found the offer . . . unacceptable." We decline to reach this issue. Regardless of whether the habeas court erred in its conclusion with respect to the second factor of the prejudice test, that the court would have accepted the plea offer but for his trial counsel's alleged deficient performance, the petitioner still did not prove the first factor, that he would have pleaded guilty to the offer. See, e.g., *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 346 n.6, 221 A.3d 81 (2019) ("[b]ecause we conclude that the habeas court properly found that the petitioner failed to meet his burden of demonstrating that it is reasonably probable that he would have accepted the plea deal but for his trial counsel's alleged deficient performance, we do not address the second prong of the prejudice test"). Indeed, there is also no

[5] There was no discussion about whether the petitioner indicated a willingness to plead guilty under the *Alford* doctrine, pursuant to which a defendant "does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Higgins*, 88 Conn. App. 302, 303 n.1, 869 A.2d 700, cert. denied, 274 Conn. 913, 879 A.2d 893 (2005); see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

dispute about the third factor of the prejudice test, namely, that the plea offer would have involved a conviction and sentence less severe than that which was imposed. As is the case with the second factor, however, the petitioner's failure to prove the first factor, that he would have accepted the plea offer, is fatal to his appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

JAMIE LOVE *v.* COMMISSIONER OF CORRECTION (AC 45738)

Elgo, Suarez and Seeley, Js.

Syllabus

The petitioner, who had been convicted, on a plea of guilty, of the crimes of assault in the first degree and carrying a pistol without a permit, sought a writ of habeas corpus, claiming that his trial counsel, T, had rendered ineffective assistance because she failed to consult with and retain an eyewitness identification expert to testify at a pretrial hearing to suppress evidence and at his criminal trial. The habeas court rejected the petitioner's claim of ineffective assistance of counsel, concluding that the petitioner had failed to establish that T's decision not to consult with or use an eyewitness identification expert constituted deficient performance. The court determined that, although T was aware that the petitioner's prior trial counsel, B, had intended to use an eyewitness identification expert at the criminal trial, there was no evidence that established what B's basis was for believing it necessary to retain such an expert. The court further determined that T had a reasonable strategic basis for concluding that there was nothing an identification expert would have contributed to the petitioner's defense. The court rendered judgment denying the petition, and the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly determined that the petitioner failed to show that T's performance was deficient, the petitioner having failed to present sufficient evidence to overcome the presumption that T's decision not to consult with or present the testimony of an identification witness expert was sound trial strategy: the habeas court credited the testimony of T, an experienced public defender who was familiar with eyewitness identification experts, that her review of the state's case, B's file and the identification evidence had led her to conclude that an eyewitness identification expert

was unnecessary and that there was nothing such an expert would have contributed to the defense, as T's own investigation led her to conclude that the state's identification witnesses were sure that the petitioner was the gunman in the underlying shooting incident and that enhanced video evidence showed that the petitioner and the shooter had similar characteristics; moreover, T pursued other reasonable avenues of discrediting the state's case, including seeking an alibi for the petitioner, filing a motion to suppress the witnesses' identifications of the petitioner, and cross-examining the witnesses about weaknesses or discrepancies in their identifications; furthermore, this court found unavailing the petitioner's assertion that the fact that B, whom the petitioner had retained privately, had withdrawn specifically so that the defense would be able to afford an eyewitness identification expert should have prompted T to consult such an expert once she was appointed to represent the petitioner, as that was not the standard to determine whether counsel performed deficiently, and, although B may have believed that an eyewitness identification expert was necessary, the fact that one attorney may have opted for an expert did not signify that another attorney's decision not to consult an expert constituted deficient performance.

Argued September 18, 2023—officially released February 6, 2024

Procedural History

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

J. Christopher Llinas, for the appellant (petitioner).

Linda F. Rubertone, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Marc G. Ramia*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. Following the granting of his petition for certification to appeal, the petitioner, Jamie Love, appeals from the judgment of the habeas court denying

his amended petition for a writ of habeas corpus, in which he alleged a claim of ineffective assistance of trial counsel. On appeal, the petitioner claims that the habeas court improperly concluded that his trial counsel's failure to consult with and retain an eyewitness identification expert for assistance and testimony at the petitioner's pretrial suppression hearing and at his criminal trial did not constitute deficient performance that prejudiced the petitioner. We disagree with the petitioner and, accordingly, affirm the judgment of the habeas court.

The following facts, as found in the record and set forth by the habeas court in its memorandum of decision, and procedural history are relevant to this appeal. "On September 4, 2015, Waterbury police [were] dispatched to 262 Hill Street regarding a shooting. Police officers . . . respond[ed] to that location and identified one or two witnesses [who] had been involved or had witnessed a shooting. Police officers simultaneously also went to St. Mary's Hospital where they [met with] the [victim] in this case . . . William Compress [victim]. He . . . indicate[d] [that] he was shot in the leg by a Black male, approximately [five feet, ten inches tall], wearing a white T-shirt. [The shooter] was also with another individual later identified as Aaron Velez, who is a codefendant. . . .

"When police officers [met] with . . . [the victim], he . . . indicate[d] that there was a verbal altercation between himself and . . . Velez. . . . Velez . . . instruct[ed] the [shooter], later identified as [the petitioner], to shoot [the victim], which he did, in fact, do at the time." (Internal quotation marks omitted.)

On the basis of information obtained from witnesses at the scene, as well as information from a confidential informant, the officers "were able to develop a name,

specifically, Jamie Love. They . . . compare[d] an in-house booking photo[graph] to the surveillance video [that] was recovered at the scene and, based upon that information . . . present[ed] a photo[graphic] lineup to two separate witnesses, one being the victim in this case . . . and also Placido Rivera, who was present during the altercation. Both [the victim] and . . . Rivera identified [the petitioner] as the [man] who [shot] the victim in this case." (Internal quotation marks omitted.)

The petitioner subsequently was charged with assault in the first degree in violation of General Statutes § 53a-59, conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59, unlawful discharge of a firearm in violation of General Statutes § 53-203, criminal use of a firearm in violation of General Statutes § 53a-216, and carrying a pistol without a permit in violation of General Statutes (Rev. to 2015) § 29-35. The petitioner initially had obtained private counsel, Peter G. Billings, to represent him. On October 21, 2016, Billings submitted a motion to withdraw on the ground that, "[i]n order to provide the effective assistance of counsel, undersigned counsel believes it is absolutely necessary to retain an eyewitness identification expert to act as a consultant and testify at the upcoming trial. . . . [T]he [petitioner] does not have sufficient funds to retain the necessary expert. . . . Consequently, undersigned counsel does not believe he can provide the effective assistance of counsel as required by the state and federal constitutions or uphold his ethical obligations to the [petitioner] under these circumstances." The trial court, *Fasano, J.*, granted Billings' motion to withdraw on December 21, 2016, and appointed the Office of the Public Defender to represent the petitioner. Subsequently, TaShun Bowden-Lewis, a senior assistant public defender (trial counsel), filed an appearance on behalf of the petitioner.

According to the habeas court, trial counsel "received . . . Billings' case materials and received discovery from the state, which included . . . [surveillance] videos. [Trial counsel] noted that . . . Billings had used an investigator and that the videos had been enhanced to allow for [a] side-by-side comparison of the shooter and the petitioner. [Trial counsel] explained that the . . . description [of the shooter] . . . and the petitioner's appearance were quite similar, including several distinct facial features. [Trial counsel] additionally conducted her own research but did not consult with an eyewitness identification expert. [Trial counsel] explained to the petitioner her reasons for not consulting with such an expert.

"The petitioner discussed with [trial counsel] the efforts by . . . Billings directed toward obtaining an expert [on] eyewitness identification. The petitioner, who is Black, described the eyewitness to the shooting (i.e., Rivera) as being Hispanic and the victim (i.e., Compress) as being white. The petitioner stated that [trial counsel] discredited anything . . . Billings had said about an eyewitness identification expert; instead, [trial counsel] said that the eyewitnesses had identified him."

Before trial began, trial counsel "challenged the photo[graphic] identification procedures with a motion to suppress.[1] [Trial] [c]ounsel considered using an expert

[1] Specifically, in the motion to suppress, filed October 24, 2017, and amended October 26, 2017, the petitioner argued that the identification procedures were unnecessarily suggestive such that they violated his due process rights. During the arguments on the motion, the petitioner argued, inter alia, that the procedures were unnecessarily suggestive because one of the detectives remarked to Rivera that they had a suspect before he looked at the photographs, and also told the victim before showing him the photographs "to try to pick out the person who shot him . . . ." The petitioner further argued that Rivera and the victim, in their identifications, were not "[100] percent positive that this was the person who actually did the shooting." In ruling on the motion, the court noted that "[t]he detectives did not inform [Rivera] or [the] victim that the [petitioner's] photo[graph] was included . . . . Informing [Rivera] or [the] victim that they would be looking [to] see if the suspect was there is not the same as telling them

on eyewitness identification but concluded that an expert would not assist her arguments. The motion to suppress was argued after the jury had been selected and the matter was ready to proceed to trial. [At the suppression hearing], [a]fter both [Rivera] and the victim testified[2] and identified the petitioner as the shooter, which was consistent with [their identifications of] the petitioner from their respective photo[graphic] arrays, the court took a recess before issuing its ruling." (Footnotes added.) During the recess, the petitioner asked his trial counsel if a plea offer that previously had been made by the state was still available. Trial counsel then approached the prosecutor, who was amenable to the plea offer.

After the recess, the court, *Crawford*, *J.*, ruled on the petitioner's motion to suppress the identifications and denied the motion to suppress. Later that same day, trial counsel informed the court, *Fasano*, *J.*, that the petitioner wanted to accept the state's plea offer. The petitioner then pleaded guilty, pursuant to the *Alford* doctrine,[3] to assault in the first degree and carrying a pistol without a permit. The state recommended a sentence of eight years to serve, five years of which

that the suspect was included. The detectives did not do anything to influence the identification of the [petitioner]. Although neither [Rivera] [n]or the victim [stated that either one had] 100 percent certainty, [the victim] wrote that he was 'quite sure' [in his identification], and . . . Rivera wrote, 'it looks like the guy. I'm pretty sure it is him.' " The court concluded that "the procedure used, viewed in light of the factual circumstances, is not unnecessarily suggestive," and denied the motion to suppress.

[2] At the suppression hearing, in addition to presenting the testimony of the victim and Rivera, the petitioner called four police officers to testify regarding the statements taken from the victim and Rivera, including their descriptions of the shooter, and concerning the administration of the photographic lineup and the identification procedures used in conducting that lineup.

[3] A defendant who pleads guilty under the *Alford* doctrine does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept entry of a guilty plea. See generally *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

was a mandatory minimum, with ten years of special parole, for a total effective sentence of eight years to serve and ten years of special parole. The court canvassed the petitioner and found that his guilty plea was "voluntary and understandingly made with the assistance of competent counsel." The court found that there was a factual basis for the plea and accepted it. The court scheduled the sentencing hearing for January 31, 2018.

The petitioner subsequently regretted his decision to plead guilty. Prior to his sentencing hearing, the petitioner wrote letters to his trial counsel, the prosecutor, and the court asking for help in revoking his plea because he did not believe he had been provided with effective assistance of counsel. In the letters, he complained that his trial counsel had not sufficiently communicated with him and had not provided him with materials obtained during discovery. At sentencing, the petitioner addressed the court and requested that he be permitted to vacate his plea on the basis of ineffective assistance of counsel. The court informed the petitioner that, although ineffective assistance of counsel could be the basis of a habeas petition, it was not a basis for withdrawing his guilty plea. Before the court imposed the agreed upon sentence, the petitioner stated, "I definitely want to take my plea back. I was wrongly accused. She did nothing to represent me." The court then, having previously accepted the petitioner's plea, imposed the agreed upon sentence.

Subsequently, the petitioner filed the operative amended habeas petition on June 16, 2021. The petitioner alleged, inter alia, that his trial counsel rendered ineffective assistance because she failed to procure an eyewitness identification expert to aid in the petitioner's defense. Specifically, he alleged that trial counsel's representation was ineffective "in that she failed to

consult with and engage an expert in the field of eyewitness identification regarding the strengths and weaknesses of the state's alleged eyewitnesses, and to offer expert testimony regarding the same at the hearing on the motion to suppress . . . as well as at trial . . . ." The petitioner also claimed that, but for trial counsel's deficient performance, he "would not have pleaded guilty and would have insisted on continuing with the trial for which the jury already had been selected . . . ."

On March 16, 2022, the habeas court, *M. Murphy, J.*, held a one day trial on the amended habeas petition, at which the petitioner testified and presented testimony from his trial counsel; Dr. John Bulevich, an expert in human memory and psychology; and Attorney Christopher Duby, an expert in criminal law.

The habeas court summarized the testimony presented by the petitioner and trial counsel as follows. The petitioner testified that "he felt pressured by [trial counsel] to accept the plea and not proceed to trial. The petitioner testified that, after the discussion with [trial counsel] during the recess following the motion to suppress hearing, he contacted . . . Billings and consulted with his former attorney. The petitioner testified at the habeas trial that he felt that he had no option, after it became clear that there would be no eyewitness identification expert at trial, but to plead guilty."

Trial counsel testified that "she has encountered identification issues in other cases during her twenty-four years as a public defender. She has conducted research in this area on an ongoing basis. Based on her review of the state's case and the identification issues, [trial counsel] concluded that an expert on eyewitness identification was unnecessary, both in general and regarding cross-racial identification purposes in this case, and informed the petitioner accordingly."

In a memorandum of decision dated June 30, 2022, the habeas court rejected the petitioner's ineffective assistance of counsel claim. The habeas court concluded that the petitioner failed to establish that trial counsel's failure to call an eyewitness identification expert constituted deficient performance. The court noted that, although trial counsel "did not consult with or use an eyewitness identification expert . . . counsel did review the materials in Billings' file, which included his investigation and assessment of the eyewitness identifications based on the enhanced videos that allowed for [a] side-by-side comparison of the shooter and the petitioner. It has not been established by any evidence what . . . Billings' basis was for believing it necessary to retain an eyewitness identification expert to act as a consultant and testify at the criminal trial. Thus, although [trial counsel] was aware that Billings intended to use an eyewitness identification expert at trial, she concluded after her review of the state's file, the video recording, [her] predecessor counsel's file, and her own investigation, that there was nothing an eyewitness expert would contribute to the defense. [Trial counsel's] decision not to have an identification expert was corroborated by the transcripts of the motion to exclude the video and the motion to suppress the photo[graphic] arrays. The court finds [trial counsel's] testimony to be both credible and persuasive, and that her representation was not deficient."[4] Accordingly, the court denied the amended habeas petition. Thereafter, the court granted the petition for certification to appeal, and the petitioner appealed to this court.

[4] The habeas court rested its decision on its conclusion that trial counsel's performance was not deficient and did not address the issue of prejudice. In light of our determination that the habeas court did not err in its finding that trial counsel's performance was not deficient, we need not address the prejudice prong. See *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 667, 289 A.3d 1206 (failure of petitioner to demonstrate either deficient performance or prejudice is fatal to habeas petition), cert. denied, 348 Conn. 917, 303 A.3d 1193 (2023).

Before we address the substance of the petitioner's ineffective assistance of counsel claim, we first set forth our standard of review and general principles governing such a claim. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. 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." (Internal quotation marks omitted.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703–704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018); see also *Maia* v. *Commissioner of Correction*, 347 Conn. 449, 460, 298 A.3d 588 (2023). "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. . . . It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Internal quotation marks omitted.) *Grant* v. *Commissioner of Correction*, 342 Conn. 771, 780, 272 A.3d 189 (2022). To establish prejudice in cases involving guilty pleas, "the petitioner must show a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Internal quotation marks omitted.) *O'Reagan* v. *Commissioner of Correction*, 211 Conn. App. 845, 862, 274 A.3d 189, cert. denied, 343 Conn. 926, 275 A.3d 1213 (2022); see also *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

With respect to the first prong of *Strickland*, "[i]n order for a petitioner to prevail on a claim of ineffective

assistance on the basis of deficient performance, he must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, 222 Conn. App. 713, 729, A.3d (2023), petition for cert. filed (Conn. January 24, 2024) (No. 230287). Furthermore, "we are mindful that judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that [the] conduct [of trial counsel] falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Doan* v. *Commissioner of Correction*, 193 Conn. App. 263, 274–75, 219 A.3d 462, cert. denied, 333 Conn. 944, 219 A.3d 374 (2019). "Indeed, our Supreme Court has recognized that [t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing

court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . .'' (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, supra, 730.

''[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'' (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 142 Conn. App. 744, 753, 68 A.3d 111 (2013). The decision of whether to call a witness ''is a tactical decision for defense counsel, and to the extent that the decision might be considered sound trial strategy, it cannot be the basis of a finding of deficient performance.'' (Internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 855, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

As this court has consistently recognized, ''there is no per se rule that requires a trial attorney to call an expert in a criminal case.'' (Internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 222 Conn. App. 278, 294, 304 A.3d 862 (2023), cert. denied, 348 Conn. 940, A.3d (2024); *Doan* v. *Commissioner of Correction*, supra, 193 Conn. App. 276 (same); see also *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 100–101, 52 A.3d 655 (2012) (noting that our Supreme Court ''has never adopted a bright line rule that an expert witness for the defense is necessary in every sexual assault case''); *Antonio A.* v. *Commissioner of Correction*, 148 Conn. App. 825, 833, 87 A.3d 600 (''there is no per se rule that requires a trial attorney to seek out an expert witness'' (internal quotation marks

omitted)), cert. denied, 312 Conn. 901, 91 A.3d 907 (2014). Instead, "[o]ur appellate courts repeatedly have rejected a petitioner's claim that his trial counsel rendered deficient performance by failing to call an expert witness at trial on the ground that trial counsel's decision was supported by a legitimate strategic reason." *Brown* v. *Commissioner of Correction*, supra, 295; see also *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 521, 964 A.2d 1186 ("the decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel . . . [however] it does not follow necessarily that, in every instance, trial counsel's strategy concerning these decisions is sound" (citation omitted)), cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

As this court observed in *Brown*, "[f]ailing to retain or utilize an expert witness is not deficient when part of a legitimate and reasonable defense strategy. . . . [T]he selection of an expert witness is a paradigmatic example of the type of strategic choic[e] that, when made after thorough investigation of [the] law and facts, is *virtually unchallengeable*." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, supra, 222 Conn. App. 295. Even in cases in which "an expert may have been helpful to the defense, there is always the possibility that an expert called by one party, upon cross-examination, may actually be more helpful to the other party. . . . [T]he right to counsel is the right to effective assistance, and not the right to perfect representation." (Citation omitted.) *Michael T.* v. *Commissioner of Correction*, supra, 307 Conn. 101.

Applying the foregoing principles, we agree with the habeas court's conclusion that trial counsel's decision

not to consult with an expert on eyewitness identification to evaluate potential weaknesses in the state's eyewitness testimony, and to offer expert testimony at the hearing on the motion to suppress, was supported by a reasonable strategic basis. Trial counsel, an experienced senior assistant public defender, testified during the habeas trial that she was familiar with eyewitness identification experts and had considered the petitioner's request for an eyewitness identification expert, but opted not to pursue one because it would not have done "anything to enhance what was already there. The case dealt with . . . the identification . . . from the witness[es], [one of whom] indicated that he was pretty sure that [the petitioner] was the person who shot him, as well as a witness . . . [who] said the same thing . . . . The videos that we saw, my own investigation, as well as the previous investigation from . . . Billings, where [they] indicated that they did an enhancement of the videos [and a] side-by-side comparison, and [there are] characteristics of the shooter and [the petitioner that] were quite similar, including the very prominent crease that [the petitioner] has in his forehead." After considering these factors, trial counsel opted not to call an eyewitness identification expert. Trial counsel also pursued other avenues of discrediting the state's case. In addition to the motion to suppress the identifications, she sought an alibi for the petitioner and had continued to investigate the petitioner's case and planned to cross-examine the witnesses about potential weaknesses or discrepancies in their identifications of the petitioner, including varying descriptions given to the police regarding the petitioner's hairstyle.

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Corbett* v. *Commissioner of Correction*, 133 Conn. App. 310, 316, 34 A.3d 1046 (2012). The habeas

judge found credible trial counsel's testimony that "there was nothing an eyewitness expert would contribute to the defense." This court is obligated under *Strickland* to indulge the presumption that trial counsel's tactical decision not to call an expert witness falls within the broad range of reasonable trial strategy. See, e.g., *Brown* v. *Commissioner of Correction*, supra, 222 Conn. App. 296–97 (trial counsel's decision not to call eyewitness identification expert "was supported by a legitimate strategic basis . . . [where trial counsel] was aware of the benefits that an eyewitness identification expert could provide . . . [but] nevertheless determined, on the basis of his investigation of the facts, that the testimony of an eyewitness identification expert . . . would not have been helpful at trial primarily because of the compelling nature of the victim's identification of the petitioner"). Given the facts in the present case, we conclude that trial counsel's strategy to undermine the impact of the eyewitness identifications through cross-examination and other means, rather than to call an expert on eyewitness identification, was reasonable.

The petitioner claims that, under the circumstances of this case, the holdings in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), and *United States* v. *Nolan*, 956 F.3d 71 (2d Cir. 2020), necessitated the hiring of an eyewitness identification expert on the petitioner's behalf. We are not persuaded.

As this court recently noted, "*Guilbert* was not a habeas case but, instead, was a direct appeal in which our Supreme Court reversed its precedent to conclude that testimony by a qualified expert on the fallibility of eyewitness identification is admissible when that testimony would aid the jury in evaluating the state's identification evidence." *Brown* v. *Commissioner of Correction*, supra, 222 Conn. App. 300. In reaching that holding in *Guilbert*, our Supreme Court enumerated

eight factors relevant to the unreliability of eyewitness identifications, and thus, the admissibility of expert testimony concerning such identifications. Those factors are "that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." (Footnotes omitted.) *State* v. *Guilbert*, supra, 306 Conn. 237–39.

In *Nolan*, the United States Court of Appeals for the Second Circuit addressed the issue of whether, in that case, the failure to call an eyewitness identification expert could constitute deficient performance for purposes of a claim of ineffective assistance of counsel. See *United States* v. *Nolan*, supra, 956 F.3d 76. In *Nolan*, the defendant's trial counsel "did virtually nothing to contest the admissibility of [eyewitness] identifications"; id.; that "bore significant indicia of unreliability" and were central to the prosecution's case. Id., 75. The court in *Nolan* noted the following important factors that were relevant to the eyewitness identifications, namely, the perpetrators were wearing disguises; the victims

were Black and Hispanic, whereas the defendant was white; there was a weapon present; many weeks had elapsed between the instigating incident and the victims' identifications of the defendant in a photographic array; and, finally, "the police employed highly irregular procedures in pursuing the witnesses' identification[s] of [the defendant]." Id., 80, 81. In light of those factors, the court concluded that "counsel could not render effective assistance without input from an expert. Counsel therefore had a duty at least to consult an expert and consider whether to call her to the stand." Id., 82.

The petitioner argues that, because some of the factors concerning the unreliability of an eyewitness identification considered by the courts in *Guilbert* and *Nolan* exist in the present case, and because the petitioner's prior counsel had withdrawn specifically so that the petitioner might be able to have an expert on eyewitness testimony testify on his behalf, "even the most minimally competent attorney would at least consult an expert suggested to her by a credible source where the expert's testimony might raise reasonable doubt, at trial, regarding a defendant's guilt." We conclude, however, that the petitioner's reliance on *Guilbert* and *Nolan* is misguided.

First, *Guilbert* addresses only the issue of the admissibility of testimony from an eyewitness identification expert; it does not address whether the decision to call or not to call an expert constitutes deficient performance. Second, although the petitioner is correct that some of the factors from *Nolan* and *Guilbert* exist in the present case, including a cross-racial identification and the presence of a weapon, there are crucial differences that could lead a reasonable attorney to make a different choice regarding the decision to call an expert witness. Unlike in *Guilbert* or *Nolan*, in the present case there was a face-to-face confrontation of some

length between the victim and the petitioner immediately prior to the shooting, but before a weapon was introduced into the confrontation. During that confrontation, the petitioner and the victim had an exchange of sufficient length that they moved from inside the convenience store to the area outside the store, and an onlooker had time to attempt to intervene. Additionally, the petitioner in the present case was not wearing a disguise during the confrontation,[5] as the perpetrators did in *Nolan*, and, unlike in *Nolan* or *Guilbert*, the confrontation in the present case was caught on surveillance video, which the state intended to offer at trial to corroborate the testimony of the eyewitnesses. Although a jury did not have a chance to review the surveillance video footage in this case, the state's position was that the video showed the events leading up to the shooting and depicted the shooter. Had the case proceeded to trial, as recognized by trial counsel, the jury would have had a chance to compare the surveillance video footage to the testimony of the eyewitnesses and draw its own conclusions. Furthermore, unlike in *Nolan*, the court in the present case already had found that there was nothing unnecessarily suggestive or irregular about the procedure used in administering the photographic array to the victim and other testifying eyewitnesses. We conclude that, as a result of the significant factual distinctions between the present case and *Guilbert* or *Nolan*, neither of those decisions required trial counsel to retain an eyewitness identification expert.

Finally, the petitioner argues that the fact that his previous counsel had withdrawn specifically so that the

[5] The petitioner likens the fact that he was wearing a hoodie at the time of the shooting to wearing a disguise. The petitioner fails to explain how the hoodie would constitute a "[disguise] . . . that partially obscured [his] features" as was the case in *Nolan*, in which the defendants wore a "half ski mask" and a "skully." (Internal quotation marks omitted.) *United States* v. *Nolan*, supra, 956 F.3d 80.

petitioner's defense would be able to afford an eyewitness identification expert should have prompted trial counsel to do the same once she was appointed to the petitioner's case. That, however, is not the standard for deficient performance. Although the petitioner's previous counsel may have believed that an eyewitness identification expert was necessary, a competent attorney also reasonably could have reached the opposite conclusion. As discussed previously in this opinion, as a reviewing court, we must extend significant latitude in determining what constitutes legitimate trial strategy. The fact that one attorney may have opted for an expert does not signify as to whether the choice by an attorney not to consult an expert constitutes deficient performance.

Accordingly, we conclude that the habeas court properly determined that the petitioner failed to show that trial counsel's performance was deficient, as the petitioner failed to present sufficient evidence to overcome the presumption that trial counsel's choice not to consult with, or to present the testimony of, an expert witness was sound trial strategy. Therefore, the petitioner's claim of ineffective assistance of counsel fails.

The judgment is affirmed.

In this opinion the other judges concurred.