GUILLERMO BALBUENA *v.* COMMISSIONER OF CORRECTION
(AC 45965)
(AC 45966)

Bright, C. J., and Suarez and Clark, Js.*

Syllabus

The petitioner, who previously had been convicted in 2004 of sexual assault and unlawful restraint in the first case and, in 2014, of conspiracy to commit murder in the second case, appealed, on the granting of certification in each case, from the judgments of the habeas court dismissing his petition for a writ of habeas corpus in the first case and dismissing in part and denying in part his petition for a writ of habeas corpus in the second case. The petitioner claimed, inter alia, that the court improperly denied his claim of ineffective assistance of counsel in the second case. *Held*:

The habeas court properly dismissed the petition in the first case for lack of subject matter jurisdiction as the petitioner was no longer in custody on the 2004 conviction when he filed the petition, and he did not satisfy any exception to the custody requirement recognized in *Lackawanna County District Attorney* v. *Coss* (532 U.S. 394).

This court declined to review the petitioner's inadequately briefed claim that the habeas court improperly dismissed the count of the petition in the second case alleging actual innocence as to both the 2004 and 2014 convictions for failure to state a claim upon which relief could be granted.

The habeas court properly rejected the petitioner's claim, in the second case, of ineffective assistance of counsel predicated on his trial counsel's failure to investigate and present the petitioner's alibi defense, as the record demonstrated that trial counsel did investigate the petitioner's alleged alibi

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

and the petitioner failed to demonstrate that trial counsel's strategy not to present the petitioner's alibi defense was objectively unreasonable.

The habeas court did not improperly deny the petitioner's claim, in the second case, of ineffective assistance of counsel predicated on his trial counsel's failure to confront the state's three eyewitnesses on cross-examination, as trial counsel's strategic decision not to undermine favorable evidence as to the first witness was not objectively unreasonable, the petitioner could not demonstrate that he was prejudiced by trial counsel's failure to cross-examine the second witness on specific issues because the second witness did not testify at the habeas trial, and the court reasonably concluded that cross-examining the third witness regarding her prior inconsistent statement would have only served to reinforce her trial testimony that she did not see the shooting but did see the petitioner at the scene.

The petitioner's claim, in the second case, that the habeas court improperly concluded that trial counsel's failure to move to preclude the presentation to the jury of the 2004 conviction did not prejudice the petitioner necessarily failed because he failed to challenge the court's conclusion that trial counsel did not perform deficiently regarding the evidence of the petitioner's 2004 conviction and he failed to establish that he was prejudiced by trial counsel's alleged ineffectiveness in stipulating as to the existence of the 2004 conviction.

Argued October 16, 2024—officially released March 18, 2025

Procedural History

Amended petition, in each case, for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Oliver*, *J.*, granted the respondent's motion, in the first case, to dismiss the petition in its entirety and rendered judgment thereon and granted the respondent's motion, in the second case, to dismiss count one of the petition; thereafter, the court, *Oliver*, *J.*, granted the petition for certification to appeal in each case and the petitioner filed separate appeals to this court; subsequently, the remaining count in the second case was tried to the court, *Bhatt*, *J.*; judgment denying the petition in the second case; thereafter, the court, *Bhatt*, *J.*, granted the petition for certification to appeal the judgment of denial in the second case and the petitioner filed an amended appeal in the second case; subsequently, this court dismissed the original appeal for lack of a final

judgment in the second case and granted the petitioner's motion to consolidate the appeals. *Affirmed.*

Robert J. Sullivan, Jr., for the appellant in each case (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee in each case (respondent).

Opinion

BRIGHT, C. J. These consolidated appeals arise from separate petitions for writs of habeas corpus filed by the petitioner, Guillermo Balbuena, challenging his 2004 conviction of sexual assault and unlawful restraint (amended first petition) and his 2014 conviction of conspiracy to commit murder (amended second petition). In Docket No. AC 45965, the petitioner appeals from the judgment of the habeas court dismissing his amended first petition for lack of subject matter jurisdiction, and he claims that the court improperly concluded that it lacked jurisdiction over the amended first petition because the petitioner no longer was in custody on the 2004 conviction when he filed it. In Docket No. AC 45966, the petitioner appeals from the judgment of the court dismissing in part and denying in part the amended second petition, and he claims that the court improperly (1) dismissed the actual innocence count for failure to state a claim upon which habeas relief could be granted and (2) denied the ineffective assistance of counsel count after trial. We affirm the judgments of the habeas court.

The record reveals the following undisputed facts regarding the petitioner's 2004 conviction. On March 29, 2004, the petitioner pleaded guilty to sexual assault in the third degree and unlawful restraint in the first

degree. On June 10, 2004, the court imposed a total effective sentence of ten years of incarceration, execution suspended after eighteen months, followed by ten years of probation. In December, 2005, the petitioner was deported to Mexico, but he subsequently returned to the United States.

The following facts, either as found by the habeas court or as set forth by this court in the petitioner's direct appeal from his 2014 conviction, and procedural history are relevant to our resolution of the appeal in AC 45966. "On January 8, 2011, the victim, Erick Cruz, was at his aunt's home in New Britain for a Three Kings Day celebration. While the victim and his family were celebrating, the [petitioner], his brothers Yair Balbuena [(Yair)] and Mario Balbuena [(Mario)], and three other individuals arrived at the scene in two vehicles. Upon their arrival, the [petitioner's] group began to vandalize a car belonging to the victim's brother, Mario Cruz [(Cruz)], who was also at the Three Kings Day celebration. After receiving a call from Cruz, the victim and his cousin, Marcelino Bermejo [(Marcelino)], ran downstairs and emerged from the building, whereupon they encountered the [petitioner's] group.

"The [petitioner] and his five cohorts advanced on the victim. In response to the group's advance, the victim began to back away toward a garage located behind the building and urged [Marcelino] to call the police. [Marcelino] ran back into his aunt's home to make the telephone call. . . . The group pursued the victim around a car, around the garage, and back into the street. Members of the group then shot at the victim multiple times, and one of the shots struck the victim in the neck, exiting through his jaw.

"Santa Bermejo [(Santa)], a cousin of the victim and sister of [Marcelino], was in a building across the street when she heard a gunshot. In response to the noise,

she stepped onto the second floor porch and lay on her stomach where she could look through a gap between the floor and the solid railing. From her location on the porch, [Santa] was able to observe and identify the [petitioner] and his two brothers. . . . Once the [petitioner] and his cohorts fled, she went onto the street. Shortly thereafter, [Marcelino] and [Santa] found the victim lying on the ground, bleeding from his wounds. The police and ambulance arrived, and the victim was taken to Saint Francis Hospital and Medical Center in Hartford, where he was treated for his injuries.

"The victim gave two statements to the police following the incident, one at the hospital on January 13, 2011, and one at the New Britain Police Department on May 18, 2011. On both occasions, the victim stated that the [petitioner] was one of the six individuals who had pursued him, that two of the individuals had guns, and that the [petitioner's] brother, [Mario], was the individual who had shot him. The victim was unclear as to the [petitioner's] exact role in the pursuit; on January 13, 2011, the victim identified the [petitioner] as the other individual with a gun, while on May 18, 2011, the victim was uncertain if the [petitioner] had a gun.

"The [petitioner] was arrested on October 3, 2012, and charged with attempt to commit murder . . . conspiracy to commit murder . . . assault in the first degree . . . and criminal possession of a firearm . . . ." (Footnote omitted.) *State* v. *Balbuena*, 168 Conn. App. 194, 196–98, 144 A.3d 540, cert. denied, 323 Conn. 936, 151 A.3d 384 (2016). The petitioner was represented by Attorney Dennis McMahon throughout the criminal proceedings. Because the existence of a prior felony conviction is a necessary element of the criminal possession of a firearm offense, McMahon agreed to submit a stipulation to the jury that the petitioner previously was convicted of an unnamed felony

to avoid evidence regarding the 2004 conviction of sexual assault. Specifically, at the criminal trial, the parties stipulated that the petitioner "was previously convicted of a felony on March 29, 2004."

After a jury trial, "the [petitioner] was convicted of conspiracy to commit murder and acquitted of all other charges. The court subsequently denied the [petitioner's] motion for a judgment of acquittal and sentenced the [petitioner] to eleven years [of] incarceration." *State* v. *Balbuena*, supra, 168 Conn. App. 198. This court affirmed the petitioner's conviction on direct appeal, concluding that "the jury reasonably could have found that the evidence established beyond a reasonable doubt that the [petitioner] was guilty of conspiracy to commit murder." Id., 207. We reasoned that "[t]he jury had sufficient evidence to support the reasonable inference that it was not mere coincidence that the [petitioner] and his cohorts arrived on the scene together and vandalized the car of the victim's brother. Moreover, upon seeing the victim, the group, armed with guns and knives, began to advance on, and subsequently to pursue, the victim. . . . Members of the group taunted the victim, stating, 'how does it feel to have a pistol in your face?' and that they were going to kill him. . . . Accordingly . . . a jury reasonably could have found that taunting the victim that they were going to kill him and advancing on the victim with weapons in hand indicated that the [petitioner] and his cohorts agreed to kill the victim. Furthermore, even if the [petitioner] was not armed with a gun while he and his group pursued the victim, testimony reveals that the group's weapons, two of which were guns, were visible during the pursuit. The jury thus reasonably could have inferred that the [petitioner] was aware that some of his cohorts were armed and intended to use their weapons." (Citations omitted.) Id., 203–204.

On April 21, 2017, the petitioner filed the underlying habeas petitions, and he filed the operative amended petitions in January, 2022. In the amended first petition, he alleged that he is actually innocent as to the 2004 conviction (count one) and that his 2004 guilty plea was the product of ineffective assistance of counsel (count two). In the amended second petition, the petitioner alleged that he is actually innocent as to both the 2004 and 2014 convictions (count one) and that McMahon provided ineffective assistance in connection with the 2014 conviction (count two). In support of his actual innocence claims, the petitioner alleged that the victim in the 2004 sexual assault case recanted[1] and that the recantation was newly discovered evidence that was not available at the time of either his guilty plea in 2004 or the trial in 2014.

The respondent, the Commissioner of Correction, moved to dismiss the amended first petition for lack of subject matter jurisdiction, arguing that the petitioner was no longer in custody on the challenged 2004 conviction when he filed the amended first petition. The petitioner filed a memorandum in opposition to the respondent's motion to dismiss, arguing that he "is physically incarcerated on the 2014 case. His 2004 wrongful conviction not only enhanced his sentence in the 2014 case, it actively contributed to the finding of guilt that produced it. Even if the 2004 wrongful conviction had enhanced his sentence without contributing to guilt, the petitioner is 'in custody' as contemplated by [*Lackawanna County District Attorney* v. *Coss*, 532 U.S. 394, 121 S. Ct. 1567, 149 L. Ed. 2d 608

[1] Specifically, the petitioner alleged that, in 2015, the victim in the sexual assault case recanted and committed the recantation to writing in a statement obtained by an investigator engaged by the petitioner's counsel. We note that, although the petitioner referred to the recantation throughout the proceedings before the habeas court, the recantation was neither offered by the petitioner nor admitted into evidence at trial.

(2001)].'' In addition, the petitioner argued that he satisfied ''an exception [to the custody requirement] for cases in which 'no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own.' [*Daniels* v. *United States*, 532 U.S. 374, 383, 121 S. Ct. 1578, 149 L. Ed. 2d 590 (2001)].''

The respondent also moved to dismiss count one of the amended second petition for failure to state a claim on which habeas relief could be granted. In a supporting memorandum of law, the respondent argued that the petitioner's allegations that he was wrongly convicted of crimes in 2004 and that evidence of that conviction was wrongfully admitted at his 2014 trial failed ''to raise a cognizable claim of actual innocence—i.e., they do not support a finding that the petitioner has newly discovered evidence that he did not participate in the [shooting] of [the victim] . . . .'' The petitioner filed a memorandum in opposition to the respondent's motion to dismiss, arguing that ''the 2015 recantation is newly discovered evidence in both the 2004 and 2014 cases. The cases are inextricably intertwined. . . . It is reasonable to conclude, therefore, that elimination of the enormous negative impact of this prior conviction would have caused an already skeptical jury to fully acquit [the petitioner].''

On September 9, 2022, the habeas court, *Oliver*, *J.*, granted the motions to dismiss pursuant to Practice Book § 23-29 (1) and (2).[2] The court dismissed the amended first petition pursuant to § 23-29 (1), concluding that it lacked subject matter jurisdiction over the

[2] Practice Book § 23-29 provides in relevant part: ''The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that:

(1) the court lacks jurisdiction;

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

petition because "the petitioner was not in custody, at the time of filing, for the challenged 2004 [conviction]." The court dismissed count one of the amended second petition pursuant to § 23-29 (2), concluding that it failed to "assert a cognizable claim of actual innocence as it does not claim or support a finding of newly discovered evidence." The court granted the petitions for certification to appeal, and these appeals followed.[3]

Thereafter, the court, *Bhatt*, *J.*, held a trial on count two of the amended second petition, in which the petitioner alleged that McMahon provided ineffective assistance of counsel in connection with his 2014 conviction. Specifically, the petitioner alleged that McMahon performed deficiently by failing (1) to investigate and present an alibi defense that the petitioner was with his brother Yair at a gas station at the time of the shooting, (2) "to confront, effectively or at all, critical purported eye/ear witnesses . . . who provided [prior inconsistent] statements," and (3) "to keep out the fact of the petitioner's [2004] conviction." At trial, the petitioner called several witnesses to testify in support of the petition, including himself, his brothers, Yair and Mario, and his sister, Rocio Balbuena (Rocio). The petitioner also presented testimony from McMahon and his investigator, Diane Kalinowski; Silvia Gutierrez, the mother of the petitioner's child; Porfiria Cardoso (Porfiria), a family friend of the petitioner; Saleem Siddique, the owner of the gas station where the petitioner claimed to have been on the night of the shooting; and Dan Markle, habeas counsel's investigator.

The parties filed their posttrial briefs and reply briefs in May, 2023, and the court issued a memorandum of

[3] After filing these appeals, the petitioner filed in the habeas court a motion pursuant to Practice Book § 61-4, seeking a written determination that the issues resolved by the dismissal of count one of his amended second petition were of such significance to the determination of the outcome of the case that the delay incident to the appeal would be justified. The court, *Oliver*, *J.*, denied the motion.

decision denying the amended second petition on May 31, 2023. The court rejected the petitioner's ineffective assistance of counsel claims, concluding that the petitioner failed to prove either that McMahon performed deficiently in any respect or that he was prejudiced by any of the alleged deficiencies. Upon the granting of his petition for certification, the petitioner amended his appeal in AC 45966 to challenge the final judgment on the amended second petition.[4] He subsequently filed a motion to consolidate the appeals in AC 45965 and AC 45966, as amended, which this court granted on July 25, 2023. Additional facts and procedural history will be set forth as necessary.

I

In AC 45965, the petitioner claims that the court improperly concluded that it lacked jurisdiction over the amended first petition because the petitioner was no longer in custody on the 2004 conviction when he filed it. The petitioner does not dispute that his sentence for the 2004 conviction had expired completely by the time that he filed the amended first petition. Instead, he contends that he satisfies an exception to the custody requirement first recognized in *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 394, because the state relied on the allegedly invalid 2004 conviction at his 2014 trial. The respondent contends that the court properly dismissed the amended first petition because

[4] On May 25, 2023, this court ordered the parties to file memoranda addressing whether the petitioner's appeal in AC 45966 from the judgment dismissing count one of the amended second petition should be dismissed for lack of a final judgment because count two remained pending in the habeas court. On June 28, 2023, after receiving the parties' responsive memoranda and after the petitioner amended his appeal, this court dismissed the original appeal for lack of a final judgment but noted that "[t]he amended appeal filed on June 28, 2023, may proceed." See Practice Book § 61-9 ("[i]f the original appeal is dismissed for lack of jurisdiction, any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed").

it challenged only the expired 2004 conviction.[5] We conclude that the habeas court properly dismissed the amended first petition for lack of subject matter jurisdiction.

Before addressing the petitioner's arguments, we set forth the applicable standard of review and relevant legal principles. "General Statutes § 52-466 (a) (1) provides in relevant part that '[a]n application for a writ of habeas corpus . . . shall be made to the superior court, or to a judge thereof, for the judicial district in which the person whose custody is in question is claimed to be illegally confined or deprived of such person's liberty.' It is well established that, for a court to have jurisdiction to entertain a habeas petition seeking to challenge the legality of a criminal conviction, the petitioner must be in the custody of the respondent

[5] In his appellate brief, the respondent initially claimed that AC 45965 is moot because "there is no dispute that, by virtue of the [amended second] petition filed in AC 45966, the petitioner properly alleged that he was ultimately seeking relief in that petition from the judgment of conviction in his 2014 conspiracy case, albeit by making a subsidiary challenge to the lawfulness of his 2004 conviction, and that this petition corrected any jurisdictional defect that existed in his other petition."

"Mootness is a question of justiciability that must be determined as a threshold matter because it implicates this court's subject matter jurisdiction. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Samsel* v. *Parks*, 228 Conn. App. 583, 587, 325 A.3d 334 (2024).

During oral argument before this court, however, the respondent's counsel abandoned the mootness claim, explaining that, upon further reflection, it became apparent to the respondent's counsel that the petitioner ultimately sought relief only as to the expired 2004 conviction in the amended first petition. By contrast, the petitioner sought relief only as to the 2014 conviction in the amended second petition. Thus, because AC 45965 concerns the only case in which the petitioner sought relief from the 2004 conviction, the respondent's counsel acknowledged, and we agree, that there remains a meaningful dispute as to whether the habeas court had jurisdiction to vacate the expired 2004 conviction as requested in the amended first petition. Accordingly, the petitioner's appeal in AC 45965 is not moot.

as the result of that conviction at the time that the petition is filed." (Emphasis in original.) *Goguen* v. *Commissioner of Correction*, 341 Conn. 508, 528, 267 A.3d 831 (2021). Both our Supreme Court and this court "consistently [have] construed the custody requirement in § 52-466 to require a petitioner [to] be in custody on the conviction under attack at the time the habeas petition is filed, and that the collateral consequences of an expired conviction, such as deportation, are insufficient to render a petitioner in custody within the meaning of the statute." (Footnote omitted; internal quotation marks omitted.) *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 653, 224 A.3d 147 (2020); see also *Foote* v. *Commissioner of Correction*, 170 Conn. App. 747, 754–55, 155 A.3d 823, cert. denied, 325 Conn. 902, 155 A.3d 1271 (2017).

"[W]hether the petitioner is in custody for purposes of a habeas petition implicates the habeas court's subject matter jurisdiction." *Pentland* v. *Commissioner of Correction*, 200 Conn. App. 296, 302, 238 A.3d 778, cert. denied, 335 Conn. 973, 241 A.3d 129 (2020). A determination regarding a habeas court's subject matter jurisdiction is a question of law over which we exercise plenary review. See id. "[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore [also] is plenary. . . . [T]he modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing

party, we will not conclude that the [petition] is insufficient to allow recovery." (Emphasis omitted; internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021) (certification improvidently granted).

On appeal, the petitioner argues that he was in custody on the 2014 conviction when he filed the amended first petition and that "[h]is 2004 wrongful conviction not only enhanced his sentence in the 2014 case, it contributed to the finding of guilt that produced it. Even if the 2004 wrongful conviction had enhanced his sentence without contributing to guilt, the petitioner was 'in custody' as contemplated by *Lackawanna* [*County District Attorney* v. *Coss*, supra, 532 U.S. 394]. Moreover, the United States Supreme Court has also provided an exception for cases in which 'no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own.' *Daniels* v. *United States*, [supra, 532 U.S. 374]. . . . He did not receive the victim's recantation until 2015, after his 2014 conviction, which is now inextricably intertwined with the 2004 conviction." Neither argument is persuasive.

"In *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 394, the United States Supreme Court held that, if a conviction that is no longer subject to direct or collateral attack 'is later used to enhance a criminal sentence, the defendant generally may not challenge the enhanced sentence through a [habeas] petition . . . on the ground that the prior conviction was unconstitutionally obtained.' Id., 403–404. The court recognized three exceptions to this general rule for cases in which 'the prior conviction [that was] used to enhance the sentence was obtained [when] there was a failure to appoint counsel in violation of the [s]ixth [a]mendment'; id., 404; the petitioner '[cannot]

be faulted for failing to obtain timely review of a constitutional claim'; id., 405; and the petitioner obtains 'compelling evidence that he is actually innocent of the crime for which he was convicted, and which he could not have uncovered in a timely manner.' Id. The court observed that, '[i]n such situations, a habeas petition *directed at the enhanced sentence* may effectively be the first and only forum available for review of the prior conviction.' . . . Id., 406.

"Thus, the court in *Lackawanna County District Attorney* 'merely . . . consider[ed] the extent to which *the* [*prior expired*] *conviction itself* may be subject to challenge *in the attack* [*on*] *the* [*current*] *senten*[*ce*] which it was used to enhance.' . . . The court in *Lackawanna County District Attorney* did *not* permit the filing against a government official who no longer has custody of the petitioner of a habeas petition that directly and solely challenges the conviction for which the petitioner is no longer serving the sentence." (Citations omitted; emphasis in original.) *Goguen* v. *Commissioner of Correction*, supra, 341 Conn. 528–29.

In the present case, both counts of the amended first petition challenged only the expired 2004 conviction. In count one of the amended first petition, the petitioner alleged that he is actually innocent of the 2004 conviction and that he "was compelled to enter a guilty plea based on the false allegation that he had committed sexual assault . . . ." In count two, he alleged that his guilty "plea was the product of ineffective assistance of counsel." Furthermore, in paragraph 7, he alleged that "he entered a plea of guilty to sexual assault . . . and unlawful restraint . . . . On June 10, 2004, conviction entered (*subject conviction*)." (Emphasis added.) As relief, the petitioner asked that the 2004 conviction be vacated. Although he requested that he be immedi-

ately released from custody, he did not request that the 2014 conviction be vacated.[6]

By contrast, in the amended second petition, which also was pending before the court when it dismissed the amended first petition, the petitioner specifically challenged the 2014 conviction in both counts of that petition. In particular, the first paragraph provided that the petitioner "hereby challenges his [2014] conviction . . . ." In count one, the petitioner again alleged that he is actually innocent of the 2004 conviction but also that he was actually innocent of the 2014 conviction. In count two, the petitioner alleged that the 2014 conviction was the product of the ineffective assistance of McMahon. Because the petitioner ultimately challenged the 2014 conviction in accordance with *Lackawanna County District Attorney* in count one of the amended second petition, the respondent did not move to dismiss that count on the ground that the petitioner was not in custody on the 2004 conviction.

Considering the allegations in the amended first petition referring to the 2004 conviction as the "subject conviction" together with the allegations in count one of the amended second petition, which included the same actual innocence claim as to the 2004 conviction but ultimately challenged the petitioner's 2014 conviction, the amended first petition cannot reasonably be

[6] The petitioner further alleged that he "is also subject to sentencing for the federal crime of reentering the country following the deportation which was promulgated by the underlying sexual assault conviction. . . . [S]aid federal crime would not have been chargeable against him but for the sexual assault conviction of which he is not guilty. . . . [U]pon completion of [his] current sentence and any such sentence imposed by the federal court, he will, again, be deported, with the mandate that he never return to the United States. . . . The petitioner alleges that all of these sentences, penalties, restrictions, and requirements are direct products of the [2004] conviction." As previously noted in this opinion, collateral immigration consequences of an expired sentence are insufficient to meet the custody requirement necessary for a court to have jurisdiction over a habeas corpus petition. See *Jobe* v. *Commissioner of Correction*, supra, 334 Conn. 653.

construed as attacking the 2014 conviction. We therefore conclude that the court properly construed the petition as challenging only the 2004 conviction. Consequently, because the amended first petition challenged only the expired 2004 conviction, the habeas court properly rejected the petitioner's reliance on *Lackawanna County District Attorney* and dismissed the petition for lack of subject matter jurisdiction. See *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 547–48, 911 A.2d 712 (2006) ("[T]he petitioner does not challenge his current federal custody, but, rather, challenges his expired . . . convictions directly. Accordingly, *Lackawanna County District Attorney* has no bearing on the petitioner's claim." (Footnote omitted.)); *Lebron* v. *Commissioner of Correction*, 274 Conn. 507, 528, 876 A.2d 1178 (2005) ("[b]ecause the habeas petition in the present matter does not attack the petitioner's current, allegedly enhanced sentence, but instead attacks the petitioner's expired conviction directly . . . *Lackawanna County District Attorney* has no bearing on the petitioner's claim" (citation omitted)).[7]

II

In AC 45966, the petitioner claims that the court improperly (1) dismissed the actual innocence count for failure to state a claim upon which habeas relief could be granted and (2) denied the ineffective assistance of counsel count after trial. We address each claim in turn.

A

The petitioner first claims that the court, *Oliver*, *J.*, improperly dismissed count one of the amended second petition alleging actual innocence as to both the 2004

[7] Finally, because the petitioner was able to seek review of his expired 2004 conviction as part of his challenge to the 2014 conviction in the amended second petition pursuant to *Lackawanna County District Attorney*, we reject his argument that " 'no channel of review was actually available' " to him as to the 2004 conviction.

and 2014 convictions for failure to state a claim upon which relief could be granted. We decline to review this claim due to an inadequate brief.

As previously noted in this opinion, the respondent moved to dismiss count one of the amended second petition because those allegations "do not support a finding that the petitioner has newly discovered evidence that he did not participate in the [shooting] of [the victim] . . . ." During oral argument on the motion, the respondent's counsel argued that "saying that evidence was erroneously admitted at your trial does not state a claim of innocence. And because there are no facts that would support such a claim, we're moving to dismiss that count." In response, the petitioner's counsel argued that "count one really adds a significant component to what count two alleges, which is that the state had the opportunity to argue the prior conviction and did so very vigorously in the 2014 case. They argued it four separate times, and the closing arguments ended with [it being] a very big part of the claim they made. There were four counts charged in the 2014 case. The jury acquitted on three counts, only convicted on one count, and they asked for readback of the testimony of all three . . . eyewitnesses. It was a very weak case to begin with. Now, if you'd add that on top of that, the state should not have had the ability to introduce the prior conviction, which we are challenging in the [amended first petition], the—we think it's overwhelming evidence of innocence [that] has been properly alleged." The habeas court rejected the petitioner's arguments and granted the motion to dismiss count one because it failed to "assert a cognizable claim of actual innocence as it does not claim or support a finding of newly discovered evidence."

On appeal, the petitioner notes that the court dismissed count one of the amended second petition on the ground that "the recantation was not newly discovered

evidence *as to the 2014 conviction* . . . .'' (Emphasis added.) In his principal appellate brief, however, the petitioner neither discusses the legal standard for newly discovered evidence of actual innocence nor explains how the alleged recantation of the victim in the 2004 sexual assault case demonstrates his factual innocence as to the 2014 conviction. Given the absence of any argument in this regard, the respondent contends that the petitioner's purported challenge to the judgment dismissing count one of the amended second petition is inadequately briefed and, therefore, we should decline to consider the issue. The respondent also argues, in the alternative, that the court properly dismissed count one because ''[n]one of the petitioner's allegations . . . constituted 'affirmative proof that the petitioner did not commit the crime' of *conspiracy*'' and, therefore, count one fails ''to state a legally sufficient claim that [the petitioner] is actually innocent of the [2014] conviction . . . .'' (Emphasis in original.)

In his reply brief, the petitioner argues that he ''extensively briefed'' the dismissal of count one and the application of the principle set forth in *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 394. We are unpersuaded and decline to review the petitioner's purported challenge to the court's dismissal of count one of the amended second petition due to an inadequate brief.

''We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [When] a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on

appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *Reiner* v. *Reiner*, 214 Conn. App. 63, 84–85, 279 A.3d 788 (2022).

During oral argument before this court, counsel for the petitioner maintained that count one of the amended second petition alleged that the petitioner is actually innocent of both the 2004 and 2014 convictions. In the statement of issues in his principal appellate brief, the petitioner states: "Is the recantation of the victim in a 2004 sex[ual] assault conviction, which did not exist until after the 2004 sex[ual] assault conviction [had] been used prejudicially against him to obtain a conviction in a 2014 shooting case, 'newly discovered evidence' for habeas purposes, when the 2004 sex[ual] assault conviction is challenged through a habeas challenging the 2014 shooting conviction, as contemplated by *Lackawanna* [*County District Attorney*]?" In the argument section of his brief, however, the petitioner never discusses the legal sufficiency of his actual innocence claim as to the 2014 conviction. Instead, he focuses exclusively on the issue of whether he was in custody on the 2004 conviction and the application of *Lackawanna County District Attorney* v. *Coss*, supra, 532 U.S. 394. Although the petitioner argues that *Lackawanna County District Attorney* applies to both of the court's rulings, that case has no bearing on the legal sufficiency of an actual innocence claim as to the 2014 conviction. Thus, because the petitioner failed to address the legal sufficiency of his actual innocence claim as to the 2014 conviction, any purported challenge to the dismissal of count one of the amended second petition is inadequately briefed.[8]

[8] Moreover, when questioned during oral argument before this court, the petitioner's counsel conceded that the petitioner cannot state a legally sufficient claim of factual innocence as to the 2014 conviction by tying the alleged recantation by the victim in the 2004 case to the 2014 conviction. Counsel nevertheless argued that he hoped to develop "new standards," though he failed to articulate the parameters of his desired standard. Given

B

The petitioner also claims that the court, *Bhatt*, *J.*, improperly denied the ineffective assistance of counsel claims in count two of the amended second petition. More specifically, he claims that the court improperly concluded that (1) McMahon did not perform deficiently by failing (a) to investigate and present the petitioner's alibi defense and (b) to confront the state's three eyewitnesses regarding their prior inconsistent statements, and (2) McMahon's failure to move to preclude the presentation to the jury of the 2004 conviction did not prejudice the petitioner. The following additional facts, as found by the court, are relevant to our resolution of the petitioner's ineffective assistance of counsel claims.

In its memorandum of decision, the court set forth the following additional facts regarding the petitioner's ineffective assistance of counsel claims. "[The victim] testified at the criminal trial that on the night of the shooting, he was at a party at . . . 76 Putnam Street [in New Britain]. . . . [H]is brother [Cruz] alerted [Marcelino] that someone was hitting Marcelino's car. Marcelino, [Cruz] and [the victim] went downstairs to investigate. When he went downstairs, he saw Mario,

counsel's concession, even if we were to review the court's dismissal of count one of the amended second petition, the petitioner's challenge necessarily would fail.

The victim's alleged recantation in the 2004 case, even if fully credited, is insufficient as a matter of law to establish the petitioner's factual innocence as to the 2014 conviction. Indeed, the gravamen of the petitioner's actual innocence claim is that the jury would have acquitted him of all of the charges if the state had not been able to inform the jury that the petitioner had a prior, unnamed felony conviction. In other words, he claims that, without the evidence regarding his 2004 conviction, there was insufficient evidence to prove his guilt beyond a reasonable doubt. At most, such a claim raises only legal innocence and does little more than cast "doubt on evidence presented at [the 2014] trial" and, therefore, fails to state a legally sufficient claim of actual innocence as to the 2014 conviction. (Internal quotation marks omitted.) *Ross* v. *Commissioner of Correction*, 217 Conn. App. 286, 295–96, 288 A.3d 1055, cert. denied, 346 Conn. 915, 290 A.3d 374

Gregorio Cid (Gregorio), Roberto Cardoso (Roberto), Silvers Arenas (Arenas), and Yair at a store at the intersection of Putnam and Oak Streets. He did not see [the petitioner] there. The other group saw [the victim] and [approached] him. [The victim] told Marcelino to call the police. He walked around the back of the building but was followed by the men who said they were going to kill him . . . .

"He heard eight shots. While being fired at, Marcelino was standing near the entrance to his aunt's building. [The victim] was hit and went to the hospital. He remained in the hospital for two weeks and underwent surgeries. Shortly after the incident, while he was still in the hospital, officers came to speak to him [with] a Spanish speaking officer who served as a translator. Since he could not speak comfortably, he wrote out his responses on paper during that interview. However, he testified that he did not understand much of what was being asked of him.

"On May 18, 2011, a few months after he was discharged from the hospital, he again spoke to officers at the New Britain Police Department and provided a second statement. He was accompanied to the police department by [Santa], who translated for [the victim] from Spanish to English. In his statement, he told [the police that] the individuals involved with shooting him were [the petitioner], Yair, Mario, Arenas, Gregorio, and Roberto and [that] they were associated with the gang Vato Locos. He told the police that even though they were from the same place in Mexico, he believed that the Vato Locos apparently did not like him because he refused to join their gang. In that statement he said that Arenas, [Roberto] and Gregorio had knives in their hand and Yair had a pistol. He accused Yair and Mario of

(2023). Accordingly, the court properly dismissed count one of the amended second petition pursuant to Practice Book § 23-29 (2).

shooting at him five or six times. He thought [the petitioner] had a gun but could not be sure that [the petitioner] was holding something. [At the criminal trial], he reiterated that Mario and Yair shot him but testified that [the petitioner] was not present.

"Sometime before the criminal trial, he met with and gave a statement to [McMahon's] investigator in which he stated that [the petitioner] was not present during the shooting. He was asked about this statement during his testimony at the criminal trial and denied being threatened by anyone to change his testimony. He testified that during the first statement to the police, he was on a lot of pain medication and was 'unconscious,' and the second time he spoke to the police he told them [the petitioner] was not there. He reiterated [at trial] that [the petitioner] did not shoot him and was [not] present at the scene. . . .

"Santa, sister of Armando Bermejo (Armando) and Marcelino and cousin to [the victim] and [Cruz], provided a statement to an Officer Banos at the scene of the incident. She told [Banos] that she saw [the petitioner] shoot [the victim] and that Mario, Roberto, Arenas and Gregorio were also involved. She stated that all the males involved had guns. According to her, Gregorio was outside yelling at [Cruz] until his father came out and dragged him into their house. She told [Banos] that Mario, [the petitioner], and Arenas left in three separate vehicles.

"Santa then provided a statement to the police on January 9, 2011. In that statement she told the police that she was at home when she heard a loud gunshot. She went to her porch and looked outside and saw Marcelino, [the victim], and a 'group of five guys'— Mario, Yair, [the petitioner], Roberto, and Gregorio—of whom [the petitioner], Yair, and Roberto were holding guns. Contrary to [the victim's] version, she did not identify

Arenas as being part of the group. The five [men] were yelling, asking for the whereabouts of Armando. She 'ducked down' and saw [the petitioner] raise his right arm and shoot [the victim] one time with a black gun. [The victim] fell to the ground, while Yair and Roberto were pointing their guns around to keep others at bay. All of them returned to their vehicles and drove off. She saw Gregorio's father grab him and pull him into their house. . . .

"On March 8, 2014, she was interviewed by [McMahon's] investigators. When they spoke to her, she repeated that she saw Mario and [the petitioner] at the scene but stated that she did not see the shooting. She gave the impression that she was 'making up her story as she went along' and did not want to get involved, thinking the case was already over.

"She testified at the criminal trial that she was . . . at the party on the night of the shooting. She heard one shot and went to the porch of her aunt's house. She lay down on the porch and from a three inch slat at the bottom of the porch she saw Yair, Mario, [the petitioner], [Roberto] and [Gregorio]. She did not identify Arenas as being present. In her statement to the police, she identified [the petitioner], Yair and Roberto with guns. She stated that she saw [the petitioner] shoot [the victim] but did not state that Mario shot at [the victim]. After the three of them left, she went downstairs and found [the victim] unconscious. She saw them leave in a car.

"On cross-examination, she testified that her vantage point for seeing the incident was a slat at the bottom of the porch and she was lying on her stomach to be able to see what was happening across the street from her. . . .

"On January 8, 2011, Marcelino was approached by [Banos] at the scene of the incident. She asked him if

he knew who shot [the victim], but he did not answer. Marcelino then later approached an Officer Halt . . . and was transported to the police department to provide information. He told [Halt] that he was attending a family party when 'three to five' vehicles pulled up. Mario, Yair, Roberto and [the petitioner] got out of the vehicles and started [to] ask him where Armando was. He believed that because Armando had shot someone known to the men, they were looking for him. Marcelino told them he did not know. At that point, [the victim] and others came outside. Mario and [the petitioner] then took out guns, and [the victim] pushed Marcelino out of the way. He then heard gunshots but was unsure of how many. [The victim] yelled he was shot, and Marcelino ran inside a building to call 911. He handed his phone to someone and ran back outside to [the victim's] aid. [The victim] told him that Mario and [the petitioner] shot him. Marcelino believed that Gregorio had set him up and that he was the intended target of the shooting. He told officers that Mario, Yair and [the petitioner] were part of the Vato Locos gang.

"That same night, a Detective Webster also took a statement from Marcelino. In it, he explained that he was getting ready to leave his uncle's house when Mario and [the petitioner] 'pulled up with a bunch of people.' There were 'three car loads of people,' including Mario and [the petitioner]. According to Marcelino, the men started demanding to know the whereabouts of Armando. He then heard a gunshot, and [the victim] pushed him to the side and told him to call the cops. He grabbed a doorknob and slipped on the floor. He crawled up the stairs back to his uncle's apartment. While crawling, he heard three or four more shots. He called 911 and then went back downstairs. [The victim] told him that Mario and [the petitioner] shot him. [Marcelino] did not see Mario or [the petitioner] with a gun but believed that [the victim] may have seen them with guns.

"[At the criminal trial] Marcelino testified that he was at the party at his aunt's house on the night of the shooting. He was outside the building with his cousin [Cruz] when he saw two cars with people arrive. In those cars were [Mario], [the petitioner], and others. It happened very fast, it was snowing and he heard gunshots. He tried to run up the stairs but fell, and during that time, [the victim] was shot. He called the cops while running back down the stairs and saw [the victim] on the ground bleeding. He testified that [Mario], [the petitioner], and the others ran away. He testified that [the victim] told him [Mario] shot him and [that the victim] mumbled something else that he did not hear. He was impeached by the state with his own statement to the police in which he said that [the victim] also identified Memo, known to be [the petitioner]. On cross-examination, Marcelino testified that he did not see the shooting. . . .

"[Cruz] spoke to [Banos] and [Webster] and provided a statement. He told them that while he was sitting inside his uncle's vehicle, he was approached by Gregorio and Arenas, who began to hit the vehicle. Gregorio opened the driver's side door and began to punch him and tried pulling him out of the car. Arenas also punched him in the face. . . .

"[Webster] testified at the criminal trial that he was tasked with interviewing Marcelino and [Cruz] and also prepared photographic arrays to show [Cruz]. [Cruz] was able to identify [Mario] and Arenas from two separate photographic arrays but was unable to identify [the petitioner] from a third [array]. . . .

"Sergeant Gray testified at the criminal trial that, when he interviewed [the victim], [the victim] affirmatively communicated that [the petitioner] shot him.

Through him, the state introduced portions of [the victim's] two statements to the police as substantive evidence. In both those statements, he identified [the petitioner] as being present. . . .

"Gregorio was not called to testify at the criminal trial or the habeas trial. On March 7, 2014, [McMahon's] investigator spoke to Gregorio. Gregorio told her that on the night of the incident he was hanging out with Arenas and Mario at Mario's residence. He was very drunk, so Mario and Arenas accompanied him home. At the scene, Mario and Arenas began to fight with [Cruz] and [the victim]. . . . Gregorio told the investigator that [the petitioner] was not there. He was extremely intoxicated and did not hear any gunshots. The investigator determined that Gregorio's statement did not match up with Arenas', so she did not take a statement from him. . . .

"Dario Cid, [Gregorio's] father, was questioned by the police on the night of the incident. He told them that he was sleeping when his wife woke him up to tell him that Gregorio was outside fighting. He went out and dragged Gregorio back in[side]. Then he went back to sleep. His wife woke him up again an hour later and said that she heard a bang outside. He was not called as a witness at either . . . trial but provided a statement to [McMahon's] investigator on May 1, 2013. In that statement, he said that [Porfiria] came to his house to tell him that Gregorio was fighting with [Cruz]. He went outside and pulled Gregorio into his house just before he heard gunshots. He told the investigator that he was certain that [the petitioner] was not present. . . .

"Arenas was not called to testify at either the criminal trial or the habeas trial but provided a statement to [McMahon's] investigator on February 27, 2014. In that

statement, he recounted that, on the night of the incident, he was drinking at Mario's house with Mario and Gregorio. They went to drop Gregorio off at his house. [Arenas] left Mario's car to walk to a nearby convenience store. While in the store, he heard up to two gunshots. A few minutes later, Mario came into the store and together they left quickly and went to Mario's house. There, Mario confessed to shooting [the victim]. Arenas then went to [the petitioner's] house to tell him what happened. [The petitioner] and Arenas returned to Mario's house, and Arenas was driven home by them. In his statement, [Arenas] stated that [the petitioner] was not present for the shooting. . . .

"Mario was charged with the shooting of [the victim], as was Yair. He was convicted of that crime. Shortly after the shooting, he was arrested by the police. Initially, on January 14, 2011, he invoked his rights and refused to speak to the police until after he had spoken to an attorney . . . . On January 16, 2011, Mario asked to speak to [Gray]. He waived his rights and provided a statement to the police. He told them that he shot [the victim] and that Yair and [the petitioner] had nothing to do with the shooting. He said that he changed his mind while being held in the cellblock . . . .

"Mario told the police that over the summer his cousin Kevin Mejia [(Kevin)] had been shot by Armando as retaliation for a fight Kevin had with [the victim]. On the night of January 8, 2011, Mario and Gregorio were at Mario's house drinking and since his car was dead, he decided to walk Gregorio back to his house. He had a nine millimeter black handgun in his pocket because he was afraid of Armando, who had been threatening his family. As he approached the scene, he saw Marcelino and [the victim] along with their family members. Mario believed that Armando was there as well and became afraid that he was going to get jumped. Gregorio got into a fight with [Cruz] and Mario pulled

out the gun for safety. According to Mario, neither Yair nor [the petitioner] were there. He believed [the victim] was running to get a gun, so he followed [the victim] and pointed his gun at [him]. According to Mario, everyone was yelling, and he was drunk, so he felt threatened and shot at [the victim] in the shoulder. He shot only once. He then shot one time into the air to scare others away before running off.

"The next day, the police again spoke to Mario to get his consent to search his vehicle. He provided consent. They asked him if he could contact [the petitioner]. . . . Mario offered to speak to Yair to get that number. Mario and Yair called [the petitioner], who said he was in New York and would turn himself in. Yair then also volunteered to speak to the police.

"Mario spoke to [McMahon's] investigator and provided a written statement on April 17, 2013. In that statement, he repeated what he told the police. He added that he was with Roberto, Arenas and Gregorio, but his brothers Yair and [the petitioner] were not present but rather at their mother's house.

"Mario was repeatedly identified as a defense witness during trial by [McMahon]. [McMahon] asked the court to ensure that Mario was transported to court to testify. At the time the court took a recess shortly before lunch, Mario was anticipated to testify following the recess. However, when court reconvened after the lunch recess, [McMahon] stated 'as I told [the prosecutor] during the break, and I've told this to my client as well, we do not intend to put on a case. We are not going to call the brother.' [The petitioner] was also not called as a witness and the court canvassed him on his decision not to testify.

"Mario testified at the habeas trial that he shot [the victim] and [that neither the petitioner nor Yair] was . . . present at the time of shooting . . . . [He further

testified that] [n]either [the petitioner] nor Yair had anything to do with the shooting. Mario testified that, on the night of the shooting, he was having drinks with his cousin Gregorio at Mario's house. Mario's car was not working that night so he and his cousin walked home together. Gregorio was intoxicated and that was one reason why Mario was walking Gregorio home, to ensure he reached there safely. On the way to Gregorio's house, which was next to the scene of the shooting, he saw a group of guys with whom he had prior confrontations when a family member of Mario had been shot by that rival group a few months prior. He did not know that they lived in the building. Mario believed that at this point, Gregorio was either entering his house or in his house. He recognized them to be Armando, [the victim] and [the victim's] brother [Cruz]. He believed that Armando had been the one who shot his family member. They surrounded him and they started to threaten him. They were threatening to go after Mario and his family members next. There were about five people on the street. Mario panicked. He saw [Cruz] go to a car and believed they were grabbing something from the car. He was afraid for his safety and shot [the victim]. He shot [the victim] and let out two more shots in the air to prevent anyone else from jumping him. He then left the scene and ran to the back of a building with a big yard. He was scared so he started jumping fences and ran across streets until he felt far enough away to be safe from there. He dropped the gun while running. He then ended up at a friend's house.

"He was arrested a few days later and initially refused to speak to the police. He told them that he had spoken to his lawyer and would not be speaking to them. However, sometime later that day, the police arrested Yair and placed him in a cell near Mario. The two of them talked while being held at the police department. Mario then volunteered to speak to the police and told them

that he did the shooting and that his brother was not involved. He was aware that his brothers could be deported if they were convicted. He provided this information to the police and told them that [the petitioner] and Yair were not present at the scene. At the time [Mario] gave his statement to the police, [the petitioner] had not been arrested for the incident. However, the police did not believe him because [the petitioner] and Yair continued to be prosecuted.

"Mario entered a guilty plea because he knew he was guilty and admitted that guilt. He knew that [the petitioner] was going to trial and volunteered to be a witness at [the petitioner's] trial. During [the petitioner's] defense investigation, Mario . . . told [McMahon's] investigator that he was prepared to testify that [the petitioner] was not present at the scene and provided a written statement to that investigator.

"Mario was transported to court to testify pursuant to arrangements made by [McMahon]. [McMahon] went to see Mario at the prison to talk to him about his potential testimony. He also spoke to Mario at the courthouse. At all times when [McMahon] spoke to Mario, Mario had been sentenced for the charges arising from [the 2014 shooting]. Mario was willing to testify but during his conversation with [McMahon], he felt that [McMahon] believed he was lying and expressed that Mario could be charged with perjury if he was lying. Mario was never called as a witness despite being ready to testify for [the petitioner].

"Arenas is [Mario's] former brother-in-law. [Mario] did not recall if Arenas was present during the confrontation. Mario knows Roberto but did not recall if [he] was present during the confrontation. However, in his statement to the police, he told them that Arenas, [Roberto], and Gregorio were there with him during the confrontation. He recalled that Gregorio came back

out of his house and got into a confrontation with [Cruz]. He also recalled Gregorio's father coming out to drag Gregorio back into their house. . . .

"Yair is the brother of [the petitioner] and Mario. He speaks and understands very little English. He was arrested and charged with the shooting of [the victim] but testified at the habeas trial that he did not shoot [the victim] and was not present when [the victim] was shot but instead was at a gas station with [the petitioner].

"He spoke to the police before and after he was arrested. When they first came looking for him, he initially did not want to speak to them before speaking to his lawyer. However, he then voluntarily spoke to them. During that interrogation, he told them the above recitation of his whereabouts that night. He was then arrested and provided another statement to the police reiterating the above. When he gave his statement to the police, he was not aware that Mario had confessed to shooting [the victim]. He indicated that the bank records would corroborate his story. He volunteered to take a lie detector test. The police did not ask for the records and did not provide him with a lie detector test despite asking him if he was willing to take one. He turned over two phones to the police and provided them with his mother's telephone number. He invited them to call his mother to confirm that he was telling the truth about his whereabouts.

"On April 9, 2013, [Yair] was interviewed by [McMahon's] investigator while incarcerated. He provided a written statement, in which he repeated what he told the police: that he was with [the petitioner] at a gas station at the time of the shooting and both of them were not present for [the] shooting. In that statement, he also told the investigator that the gas station records would show that he and [the petitioner] were filling gas

at the time of the shooting. He was not called to testify at the criminal trial.

"On February 24, 2014, [McMahon's] investigator once again spoke to Yair. His story remained exactly the same, so she did not take another statement from him.

"Yair testified at the habeas trial that when [the victim] was shot, [Yair] was on his way from [the petitioner's] home to his own home. He received a call from [the petitioner] who wanted to come over for dinner. He got up and went to get [the petitioner] in his van. He went to his [brothers'] house on Kelsey Street. He picked up [the petitioner] and started driving back. On the way back they stopped at a gas station to get gas. The gas station was on East Main and Stanley Street. He put . . . $30 [or] $40 [of] gas in the van using a debit card from Webster Bank. He shared the account with Elizabeth Mejia, the mother of his children. Both of them had cards in their respective names.

"When locked up at the police station, he was in a cell near his brother Mario. They did not get together to come up with a story absolving him and [the petitioner] but did talk about why they were arrested.

"He ultimately [pleaded] guilty based on the advice of his attorney, wanting to take advantage of the plea agreement. He [did so] because his attorney only spoke to him in English and told him it was the only thing left to do. He was aware that [the petitioner] had also been arrested for this incident. He would have testified at [the petitioner's] trial that [the petitioner] was not guilty. Yair did not recall being approached by [McMahon] or his investigator. Nobody approached him to ask him if he was willing to testify, but he would have done so. When he was sentenced, [the petitioner] had not yet been arrested. . . .

"Rocio is the sister of Mario, Yair and [the petitioner]. She testified at the habeas trial that she is familiar with

the area where [the victim] was shot, having lived in New Britain for twenty-three years. She would have helped her brothers with their legal troubles in this case, if called upon to do so. She provided [the petitioner's] habeas attorney with the Webster Bank debit card that was admitted as an exhibit in this case. Prior to [the petitioner's criminal] trial, no one asked her to assist in tracking down and obtaining the Webster Bank debit card. . . .

"Gutierrez is the mother of [the petitioner's] child. She testified at the habeas trial that [the victim] is a cousin of her sister's husband. . . . She spoke to an investigator for [the petitioner] and [said] that she texted [the victim] after she found out [about the shooting] and told him to tell the truth. [The victim] told her that he had already said that [the petitioner] was not present and instead that Mario and some others were present. She told the investigator that [the victim] conveyed to her that 'Goyo' and 'Neno' or 'Nene' were present and shot him. She did not know their real names but knew that 'Goyo' is [the petitioner's] cousin. She [testified that she] was not contacted by an investigator again, nor was she called to testify at the [criminal] trial.

"[McMahon's] investigator's notes, however, reveal that she made several attempts to locate and contact Gutierrez. She spoke to Gutierrez on October 28, 2013, and in that phone call Gutierrez told the investigator that she was dating [the victim] around October, 2012. At that time, [the victim] told her that [the petitioner] had nothing to do with him getting shot. She explained that she had not come forward earlier because she was not aware that [the petitioner] was charged with shooting [the victim] and instead believed that he was in jail for immigration purposes.

"On November 14, 2013, [McMahon] asked his investigator to get a statement from Gutierrez. Over the course

of seven dates between November 15 and December 6, 2013, the investigator left several messages for Gutierrez but did not receive a call back. She informed [McMahon] of this via a letter dated December 6, 2013.

* * *

"[Porfiria] lived in the vicinity of the location of the shooting. She knew [the victim] from the neighborhood. She was going from her house toward a store near the scene of the shooting but did not make it there. There was police presence that prevented her from going to the store. She learned that there was a shooting so she could not go further. She heard an individual on the street screaming that Memo—identified as [the petitioner]—did it, but the individual did not specify what Memo was alleged to have done. She then returned home and called [the petitioner] to tell him what she had heard. [The petitioner] did not know what she was talking about. [The petitioner] told her that [he] was at home. He appeared calm on the phone but expressed surprise at being accused of the shooting. She did not speak to any private investigator at the time of the trial. She did speak to [the petitioner's] current investigator, [Markle].

"[McMahon's] investigator made several attempts to speak to Porfiria in May and June, 2013. The investigator enlisted the help of [the petitioner's] sister, Rocio, in attempting to make contact with Porfiria but ultimately was unsuccessful. . . .

"The Webster Bank records showing that [the petitioner] was at the gas station were not admitted as exhibits in the habeas trial. No phone records were admitted either. Any surveillance footage was also not available due to the passage of time and, thus, was not admitted as an exhibit in the habeas trial. . . .

"[The petitioner's] primary language is Spanish. He is not a United States citizen and hails from Mexico.

. . . He moved to New Britain in 2000 [or 2001], when he was about fifteen years old. He went to high school in New Britain. As a result of a prior conviction, he was deported. He eventually returned to the [United States] and lived in New Britain with his family, including his mother.

"[The petitioner] had seen [the victim] before the shooting but did not have contact with him. He testified that he did not shoot [the victim] and was not in [the victim's] vicinity on the night of the shooting. He was at his house with his brothers Yair [and] Mario, his cousin Gregorio and some others. They were all drinking together. He went to sleep after drinking some beers. He woke up hungry and saw that there was nobody in the house. He called his mother to ask her to make him something to eat. Yair was living with his mother at that time. His mother asked Yair to pick [the petitioner] up and bring him to her house for dinner. Yair and [the petitioner] stopped at a gas station on their way to their mother's house. This was at the same time that the shooting occurred. He received a call from [Porfiria] who told him that his brother had shot [the victim] and [that] he was also being accused of it. He heard sirens from patrol cars driving by. [The petitioner] explained to Yair that Mario had shot [the victim] and that he had also been accused of shooting [the victim]. In that moment he panicked that he was going to be arrested and deported again. They continued to their mother's house and [the petitioner] explained what he knew to his mother.

"Panicked, he left Connecticut and went to the Bronx. He remained there for one year but returned to New Britain to be with his family and support them. During that year, he heard that Mario and Yair had been convicted for the shooting of [the victim]. Five or six months later, he was arrested. . . .

"During the pendency of his criminal case, his grasp of the English language was very weak. [McMahon] visited him approximately four times at the jail and met with him at the courthouse. There was no interpreter present at any of their meetings in jail. [The petitioner] did not recall speaking to him on the phone. Up until the time of trial, none of his conversations with [McMahon] were assisted by a Spanish speaking interpreter. At trial, there was an interpreter present. He wrote several letters to [McMahon] explaining his lack of understanding of English. Some of the letters were written with the assistance of other incarcerated individuals who wrote and spoke English. [McMahon] did not respond to these letters.

"During the pendency of [the criminal] case, [McMahon] did not share any police reports with him. Prior to the trial, he was aware that [Santa], Marcelino, and [the victim] were accusing him of shooting [the victim] along with Mario. He was aware that they claimed that he and Mario went to the scene demanding to see Armando. He knew the state's theory revolved around retaliation for Armando shooting [Kevin] a few months before this incident. [The petitioner] was present when Armando shot [Kevin]. He spoke to the police about this incident but did not want to due to his immigration concerns. [McMahon] asked him about this incident, and [the petitioner] told him the [foregoing information].

"According to [the petitioner], he attempted to speak to [McMahon] about this case, but [McMahon] would instead repeatedly refer to his prior sexual assault case. [McMahon] kept stating that since he owed five years on probation for the prior case, he should take a five year offer in this case. [The petitioner] repeatedly told [McMahon] that he was innocent. He told [McMahon] he wanted to testify at trial that he was innocent of the

shooting. [McMahon] told him that it was not convenient because his brother Mario had already lied and was protecting him and Yair so that is why Mario [pleaded] guilty. [The petitioner] believed that [McMahon] thought Mario was lying about who was at the scene. [The petitioner] told [McMahon] that Mario had admitted to shooting [the victim] alone and [the petitioner] was not present. [The petitioner] testified that he got the impression that [McMahon] did not believe him. He and [McMahon] discussed whether to call witnesses to support his alibi defense. [McMahon] told him they would need witnesses, but they were never called to testify. During [the criminal] trial, he believed that Mario would be called to testify, but on the same day Mario was supposed to, [the petitioner] learned that Mario was not going to be called. [McMahon] did not have any discussions with him about investigating the presence of surveillance cameras at the gas station or attempting to secure receipts of his pumping gas.

"[The petitioner] also maintained his innocence in the prior sexual assault case. He did not know why that was mentioned during his criminal trial and had expressed his innocence to [McMahon], telling him that he could speak to the complainant in that case to confirm. The state made several offers to resolve the case but [the petitioner] rejected them all because he was innocent. . . .

"[McMahon] represented [the petitioner] from the end of 2012 through trial. He met with [the petitioner] numerous times both at the jail and in court. According to [McMahon], [the petitioner] communicated with him in English and his English was 'good.' [McMahon] received discovery from the state and hired an investigator. The investigator spoke to several witnesses, and [McMahon] told her to follow all leads. The investigator would then report back to [McMahon] about the results of the investigation.

"During their conversations, [the petitioner] told [McMahon] that he was not involved in the shooting and provided three different explanations for his whereabouts. First, [he said] that he was driving to New York with a friend named Guillermo, for whom he had no contact information. Second, he said that he did not recall where he was. Third, he said he and his brother were together going somewhere. [The petitioner] did tell [McMahon] that he was at a gas station with his brother. [McMahon] investigated this by having his investigator speak to possible witnesses to corroborate this, but he did not speak to any witnesses himself. [McMahon] did speak to Mario and Yair. He did not recall whether he asked his investigator to go to the gas station to try and obtain records or any other evidence to show that [the petitioner] was at the gas station at the time of the shooting.

"[McMahon] did not recall [the petitioner] telling him that [the petitioner] received a phone call from Porfiria telling [the petitioner] that he was accused of shooting [the victim]. [McMahon] had some issues with [the petitioner's] alibi. The witnesses were not consistent—they were not cooperating and 'everyone was giving different stories.' He thought the alibi was weak. His investigator reported that the stories did not match up and the witnesses were not cooperating with them. He could not recall which witnesses were investigated, however. He also was unaware of the use of the Webster Bank debit card used to pay for gas.

"[The petitioner] did not testify at [his criminal] trial. He made the decision not to testify based on the manner in which the state's evidence was presented. [McMahon] agreed with this decision and recommended that he not take the stand. [McMahon] was able to keep gang references out of the case and believed that if [the petitioner] had taken the stand, it would have opened the door to that testimony. He did not pressure [the

petitioner] to forgo his right to testify and [the petitioner] was free to testify if he wanted to. Based on their discussions, [McMahon] did not believe that [the petitioner] would testify well on the stand [and] that his testimony would not have helped their case, because his story changed on multiple occasions and there was the specter of the involvement of gangs.

"[McMahon] thought that the state's evidence was not very strong and was favorable to the defense. There was some harmful evidence, but he believed he was able to demonstrate those witnesses' lack of credibility.

"[McMahon] and [the petitioner] spoke about [the petitioner's] prior sexual assault conviction. [The petitioner] denied committing that crime. [McMahon] did not investigate the veracity of his claim or those prior allegations."

Before turning to the petitioner's specific claims, we set forth the well settled standard of review for ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court. . . .

"[I]t is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitu-

tion and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

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

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner] as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, 222 Conn. App. 713, 722–23, 306 A.3d 1073 (2023), cert. denied, 348 Conn. 953, 309 A.3d 303 (2024).

1

The petitioner first claims that the court improperly denied his ineffective assistance of counsel claim predicated on McMahon's failure to investigate and present the petitioner's alibi defense. We disagree.

In its memorandum of decision, the court concluded that "there is no deficient performance with regard to any claim relating to the failure to investigate or present an alibi defense." As to McMahon's alleged failure to pursue the gas station records and the bank records identified by the petitioner and Yair, the court concluded that "[a]ny claim as to the failure to present corroborating records must . . . be denied because this court was not presented with the bank records or gas station records demonstrating that Yair and [the petitioner] were there at the time of the shooting." The court also concluded that the evidence established that McMahon did investigate the petitioner's alibi. The court found that Kalinowski, McMahon's investigator, "spoke to Mario, Yair, and Gutierrez and obtained statements from them and unsuccessfully attempted to speak to Gutierrez again and also could not contact Porfiria." The court further concluded that McMahon made a reasonable tactical decision not to present an alibi defense, reasoning that "McMahon had Mario's statement[s] to the police and his investigator and had spoken to him personally. Mario testified that [McMahon] told him that he did not believe him. [McMahon] testified that he decided not to put on an alibi defense because the stories of the witnesses were different from one another and some, like Gutierrez and Porfiria, were nonresponsive. This assessment is validated by the inconsistencies in the testimon[y] of [the petitioner], Yair, and Porfiria. . . .

"The court notes the circumstances surrounding the arrest[s] of Mario and Yair and how they eventually decided to speak to the police. This could have been used to impeach them with the implication that Mario decided to take sole responsibility. Yair also [pleaded] guilty to being involved in [the conspiracy] offense and the court does not have the transcript of his guilty plea and sentencing and thus is unable to determine what

his role was alleged and acknowledged to have been. . . . [A]t the time of [the petitioner's criminal] trial, Yair had already been sentenced and thus, his supposed testimony that he and [the petitioner] were elsewhere at the time of the shooting would have been severely undermined by the fact that he had admitted involvement in the shooting. Further, there are significant inconsistencies between the statements of Yair and [the petitioner] as to their whereabouts at the time of the shooting and when they discovered that they were implicated in it. . . . There is no independent corroborating evidence that [the petitioner] was not present during the shooting: only the testimony of Mario, Yair, and [the petitioner]. Thus, any claim pertaining to the failure to investigate and present the testimony of alibi witnesses is also denied as lacking proof."

Notwithstanding its conclusion that the petitioner failed to satisfy *Strickland*'s performance prong, the court also determined that "there is no prejudice stemming from any alleged deficient performance. There was ample evidence from which the jury could conclude as it did—that [the petitioner] did not shoot [the victim] but was present for the shooting. All of the inconsistencies in the witnesses' statements were put before the jury, who asked for playback of critical testimony. [The victim] himself testified that [the petitioner] was not present for the shooting. Despite this, the jury concluded that [the petitioner] conspired to shoot [the victim]. Given the credibility problems with the alleged alibi testimony, the court is not convinced that had [McMahon] called Mario, Yair or any of the other alibi witnesses to testify, the outcome of the trial would have been different. The jury clearly believed that [the petitioner] was present but did not shoot [the victim] and there is no reasonable likelihood that the outcome would have been different."

On appeal, the petitioner argues that "[a]libi and third-party culprit defenses[9] were available to trial counsel when the case began. . . . [The gas] station owner [Siddique] was available and would have provided corroborative video and transaction records. Porfiria confirmed making the telephone call to [the petitioner]. Rocio confirmed the existence of the Webster Bank cards which were specifically identified to the police in the police reports, corroborated by Yair's diagram and his willingness to take a lie detector test. . . . In this extremely weak case in which the jury acquitted on three of the four counts, without having been presented with the plausible alternative described herein, a full acquittal is a reasonable expectation." (Footnote added.) We are not persuaded.

First, the habeas court properly rejected the petitioner's claims related to the gas station records and Webster Bank card on the ground that the petitioner failed to introduce those records to demonstrate that the petitioner and Yair were at the gas station at the time of the shooting. Indeed, without demonstrating that the records supported the petitioner's claimed alibi, he cannot establish that he was prejudiced by the alleged failure to pursue those records. See, e.g., *Shaheer* v. *Commissioner of Correction*, 207 Conn. App. 449, 472, 262 A.3d 152 ("this court will not second-guess defense counsel's decision not to . . . investigate potential defenses . . . when . . . the petitioner fails to present, at the habeas hearing, evidence . . . that he argues

[9] Although the petitioner also claims that McMahon was deficient in failing to investigate and present a "third-party culprit" defense, he fails to present any meaningful argument in that regard. Moreover, as the respondent correctly notes in his appellate brief, "the offense of conspiracy—the only offense for which the petitioner stands convicted as a result of this incident—does not exclude the possibility of other guilty parties. . . . Thus, the fact that others might also be guilty of participating in the conspiracy would not exclude the possibility that the petitioner also was guilty of participating in it, an inference essential to showing a defendant's innocence in the usual situation of a third-party culpability defense."

counsel reasonably should have discovered during the pretrial investigation" (internal quotation marks omitted)), cert. denied, 340 Conn. 903, 263 A.3d 388 (2021).

Second, because the evidence establishes that McMahon investigated the petitioner's alibi, the habeas court properly concluded that McMahon did not perform deficiently in failing to do so. See *Roberto A.* v. *Commissioner of Correction*, 229 Conn. App. 104, 115, 325 A.3d 1192 (duty to investigate defendant's alibi defense requires that counsel "make all reasonable efforts to identify and interview potential alibi witnesses" (internal quotation marks omitted)), cert. denied, 350 Conn. 935, 327 A.3d 384 (2024). The evidence admitted at the habeas trial confirms McMahon's testimony that he investigated the petitioner's alibi defense but rejected it as weak. The excerpts from Kalinowski's investigative report reflect that she obtained written statements from several witnesses, including the petitioner, Mario, Yair, and the victim, and documented the various attempts that she made to speak with and obtain statements from Porfiria and Gutierrez.[10] Although McMahon testified that he did not recall the petitioner mentioning Porfiria's phone call, Kalinowski's notes confirm that she was unable to obtain Porfiria's statement despite several attempts and that it appeared that Porfiria did not want to get involved in the matter. Similarly, although Kalinowski was able to speak with Gutierrez on October 28, 2013, Kalinowski informed McMahon in a letter dated December 6, 2013, that she had "made several attempts on several days to contact [Guiterrez]. To this date she has not returned any of my phone calls." Accordingly, because the record demonstrates that McMahon investigated the petitioner's alleged alibi, the court properly rejected the petitioner's claim to the contrary.

[10] At the habeas trial, the court admitted into evidence portions of Kalinowski's report and supplement thereto, which included several of the written statements Kalinowski obtained from the various witnesses and her notes regarding the investigation.

The petitioner's claim that McMahon was deficient in failing to present the alibi defense is likewise unavailing. "Our review of an attorney's performance is especially deferential when his or her decisions are the result of relevant strategic analysis. . . . Thus, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken. . . .

"[T]he presentation of testimonial evidence is a matter of trial strategy. . . . Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of a witness and that the attorney . . . without adequate explanation . . . failed to call the witness at trial. . . . Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. . . .

"[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . . Thus, an attorney's choice to pursue a defense that focuses on casting doubt on the state's case rather than on calling his or her own witnesses can be a reasonable choice. . . . To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 166 Conn. App. 95, 140–

41, 140 A.3d 1087 (2016), aff'd, 330 Conn. 520, 198 A.3d 52 (2019).

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Roman* v. *Commissioner of Correction*, 229 Conn. App. 219, 225, 325 A.3d 1208 (2024).

At the habeas trial, McMahon discussed his reasoning for declining to present the petitioner's alibi defense: "I've done, in my career, about a half a dozen alibis and they've all been rock solid. They've all done very well. Two of them I've taken to trial, and I've done well with them but they were always very consistent. In this case, nobody was consistent. Everybody was not cooperating. They were telling different stories. I thought that the—an alibi defense was weak and I told him that. . . . [M]y investigator said that . . . everybody was telling different stories. Everybody didn't want to speak with her. She had to track them down. They were not cooperating, and a lot of the stories just did not match up. And I found that unless an alibi is on all fours, it's just not something that should be advanced at trial." He later added that he "did not think the alibi was strong. I just did not, especially when he said to me three different things as to where he was, finally landing on the gas station thing with his brother. I find that when you have an alibi, your story never changes. It's what it is on day one and it is [the same] on day 101." At trial, rather than presenting the "weak" alibi defense, McMahon focused on "what the state had put in and not put in." He explained: "I had argued that the witnesses were all not credible. I argued that there was substantial physical evidence that had been removed from the scene, which would've compromised the results of the investigation and that the main thing was that the victim himself did not put my client at the scene."

The petitioner has failed to demonstrate that McMahon's strategy was objectively unreasonable. To the contrary, the evidence presented at the habeas trial demonstrates that McMahon made a reasonable strategic decision after a full investigation. The transcripts from the 2014 trial reflect that, in each count of the long form substitute information, the state alleged that the shooting of the victim occurred on January 8, 2011, "at approximately 10:36 p.m." in the vicinity of 76 Oak Street in New Britain. In their statements to Kalinowski in 2013, both the petitioner and Yair stated that Yair picked up the petitioner at 236 Kelsey Street around 9 or 9:30 p.m. on the night of the shooting and that, on their way back to 110 Winter Street, they stopped for gas at a gas station on the corner of Stanley Street and East Main Street.[11] They both stated that they stayed at 110 Winter Street for a few hours before the petitioner left to go to a friend's house.

There are several issues with the petitioner's alibi that support McMahon's decision not to pursue such a

[11] Specifically, Kalinowski noted that, on April 9, 2013, she obtained a statement from the petitioner in which he stated that Yair "picked him up around [9 p.m.]" on the night of the shooting, that he and Yair "went and got gas for the car," and that Yair "used his debit card so there should be a record. He said they then went to [Yair's] house to eat. He said they were there for a few hours. [The petitioner] then said that a friend of his, [Porfiria] called his cell to tell him that there was a shooting and people were blaming [the petitioner]. At that time, [the petitioner] said he left to go to a friend's house."

Kalinowski also obtained a written statement from Yair on April 9, 2013, in which Yair similarly provided that he "picked [the petitioner] up around 9 or 9:30 p.m. [They] stopped to get gas at a gas station across the street from the Army recruitment office. I think it was a Citgo station. I filled up the gas tank with my Webster Bank [d]ebit [c]ard. My baby's mama was also on the account so she might have the records. After we filled the tank up, we went to my apartment to eat. [The petitioner] was there with me and our mom for a few hours. After a few hours a friend of [the petitioner's] picked [the petitioner] up and brought him back to his apartment. I found out about the shooting the next day. My Uncle Dario Cid called me to tell me that my brother Mario was involved. [The petitioner and I] were at my mother's the night this happened. We were not part of this crime. We were not even there."

defense. This was the third purported alibi offered by the petitioner, and the primary alibi witness was his brother, Yair. In addition, given that the time required to drive from Kelsey Street to Winter Street is approximately six minutes and that 110 Winter Street is only a few blocks from the scene of the shooting,[12] the petitioner's alleged alibi placed the petitioner within minutes of the scene of the shooting around the time that the shooting occurred. Leaving aside that Yair is the petitioner's brother, McMahon also had reason to doubt the strength of Yair's proposed testimony that neither he nor the petitioner were present for the shooting in light of Yair's guilty plea to conspiracy to commit assault in connection with the shooting of the victim. Equally problematic for the petitioner's alibi defense was the fact that, although the victim had recanted his prior statements in which he had identified the petitioner as being present at the scene of the crime with a gun, he maintained that Yair was present for the shooting. Consistent with that statement, the victim testified at the criminal trial that he saw Mario, Arenas, Roberto, Yair, and Gregorio immediately before being shot. Thus,

[12] At the habeas trial, Yair testified that, at the time of the shooting, he was living at his mother's house located at 110 Winter Street in New Britain and that the petitioner was living with their brother Mario at 236 Kelsey Street. Both Yair and the petitioner testified that 110 Winter Street is only three or four blocks from where the shooting occurred on Oak Street, and Mario testified that it would have taken approximately thirty or forty minutes to walk from Kelsey Street to Oak Street. Although there is no evidence in the record regarding the specific distances between the relevant locations or the time required to drive from one location to the other, we take judicial notice that the distance between 236 Kelsey Street and 110 Winter Street via Stanley Street is approximately 1.6 miles and the approximate driving time is six minutes. See Google Maps (2025), available at https://www.google.com/maps/dir/110+Winter+St,+New+Britain,+CT+06051/236+Kelsey+St,+New+Britain,+CT+06051/ (last visited February 28, 2025); see also, e.g., *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 786 n.15, 138 A.3d 908 (2016) (because parties "cited no evidence in the record regarding the time required to drive from Bridgeport to New Haven," Supreme Court took judicial notice of distance and driving time between cities in considering petitioner's failure to adequately investigate claim).

the petitioner's alibi was inconsistent with the favorable testimony from the victim, which McMahon specifically highlighted as "the main thing" for the defense.

Given the victim's testimony placing Yair at the scene of the shooting and considering Yair's guilty plea to a conspiracy charge for his role in the shooting, we cannot conclude that McMahon's decision to forgo the petitioner's alleged alibi defense and to focus instead on the weaknesses in the state's case was objectively unreasonable. Indeed, electing not to advance an alibi defense predicated on the petitioner being with an admitted coconspirator at the time of the shooting reflects sound professional judgment. See *Johnson* v. *Commissioner of Correction*, supra, 166 Conn. App. 141–42 ("The petitioner failed to demonstrate that defense counsel's general strategy to keep the jury's focus on weaknesses in the state's case, instead of diverting focus to an alibi defense, was unreasonable under the circumstances. This is particularly true in light of the weakness in the state's case following [the eyewitness'] recantation. Moreover, even if the petitioner could demonstrate that such a general strategic decision was unreasonable, in the present case, defense counsel raised many reasonable concerns about the overall strength of the alibi evidence, including its potential to benefit the state's case by placing the petitioner near the scene of the crime at the time that it was committed."). Therefore, the habeas court properly rejected the petitioner's ineffective assistance of counsel claim predicated on McMahon's alleged failure to present the petitioner's alibi defense.

2

The petitioner next claims that the court improperly denied his ineffective assistance of counsel claim predicated on McMahon's failure "to confront the state's three witnesses with significant glaring falsehoods

directly relating to [the petitioner's] absence from the scene." We disagree.

The following legal principles are relevant to the petitioner's claim. It is well settled that "[o]nce an attorney makes an informed, strategic decision regarding how to cross-examine a witness, that decision is virtually unchallengeable. . . . An attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls short of establishing deficient performance." (Internal quotation marks omitted.) *Mercer* v. *Commissioner of Correction*, supra, 222 Conn. App. 746.

"It is axiomatic that a habeas petitioner who claims prejudice based on counsel's alleged failure to present helpful evidence from a particular witness, must call that witness to testify before the habeas court or otherwise prove what the witness would or could have stated had he been questioned at trial, as the petitioner claims he should have been." (Internal quotation marks omitted.) *Jones* v. *Commissioner of Correction*, 212 Conn. App. 117, 131–32, 274 A.3d 237, cert. denied, 343 Conn. 933, 276 A.3d 975 (2022); see also *Benitez* v. *Commissioner of Correction*, 197 Conn. App. 344, 350–51, 231 A.3d 1285 (petitioner failed to prove prejudice because he "failed to call the complainant to testify at the habeas trial, or otherwise to establish what the complainant would or could have testified to on cross-examination, had he been questioned" in manner proposed by petitioner), cert. denied, 335 Conn. 924, 233 A.3d 1091 (2020); *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 555–56, 124 A.3d 1 (petitioner failed to prove prejudice because he failed to offer evidence as to how

witness would have testified if they had been cross-examined differently), cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

In rejecting the petitioner's claim in the present case, the court reasoned as follows. "McMahon's investigator obtained a statement from [the victim] in which [he] stated that [the petitioner] was not present during the shooting. [The victim] testified in accordance with that but was impeached with his prior [inconsistent] statements to the police. There is no deficient performance as to [the victim].

"[McMahon's] investigator also spoke to Santa and obtained a statement in which she stated that she saw [the petitioner] at the scene but, contrary to her prior statements, did not see him shoot [the victim]. On cross-examination, [McMahon] elicited that she went out to the porch and saw [the petitioner] *after* she heard one shot. This is consistent with her statement to his investigator that she saw [the petitioner] there but did not see the shooting.

"Marcelino testified that [the victim] told him that Mario and [the petitioner] had shot him and [McMahon] elicited on cross-examination that Marcelino did not see the shooting himself. However, Marcelino did see [the petitioner] at the scene. [The petitioner] points out numerous other areas of cross-examination that [McMahon] could have asked about. However, there is no one way to engage in cross-examination and [McMahon] exercised reasonably competent professional judgment in conducting his examination at this trial. Additionally, neither Santa, Marcelino, nor [the victim] were called to testify at the habeas trial and, thus, this court cannot determine how they would have responded to the areas of cross-examination [McMahon] could have differently inquired about.

"[McMahon] was ultimately successful in obtaining acquittals on three of the four counts. There were several witnesses who placed [the petitioner] at the scene of the crime—except, notably, the victim—and there was sufficient evidence from which the jury could conclude that [the petitioner] was physically present but did not shoot [the victim]. Even if [McMahon] could have impeached Santa with her statement to his investigator, it would have only served to reinforce her trial testimony that she did not see the shooting but did see [the petitioner] at the scene." (Emphasis in original.) Accordingly, the court concluded that the petitioner failed to prove his ineffective assistance of counsel claim predicated on McMahon's failure to adequately cross-examine the state's eyewitnesses.

On appeal, the petitioner argues that "[n]one of the time spent by trial counsel questioning the state's witnesses could reasonably be described as 'confrontation.' None of the witnesses' numerous falsehoods, inconsistencies, and version changes about who was present, who was holding firearms, and who fired was addressed. It was particularly prejudicial as the impeachment material did not just demonstrate lack of credibility—it went straight to the heart of [the petitioner's] alibi defense. . . . No conceivable strategy could explain trial counsel's failure to point out to the jury Marcelino's admission to the police that he had lied the last time he had spoken with them, his admitted motive and bias for lying previously, his claimed motive and bias for purportedly telling the truth that night, and Santa's complete reversal about having seen the shooting." He further argues that McMahon's failure to adequately cross-examine the witnesses prejudiced him because "the only evidence directly connecting the petitioner to the attack was the eyewitness testimony of Marcelino and Santa, both of whom were subject to

substantial impeachment evidence." (Emphasis omitted.) We are not persuaded.

As an initial matter, we note that, despite the petitioner's claim that McMahon performed deficiently in cross-examining the victim, he fails to present any meaningful argument in support of that claim. Regardless, because McMahon testified at the habeas trial that he did not want to impeach the victim's testimony for the obvious reason that the victim denied that the petitioner was present at the scene of the crime, any claim predicated on the failure to cross-examine the victim necessarily fails. Our conclusion that McMahon's strategic decision not to undermine favorable evidence was not objectively unreasonable requires no elaboration.

As to Marcelino, the petitioner highlights various inconsistencies between Halt's report recounting Marcelino's statements on the night of the shooting and Marcelino's written statement from that same night. He argues that those documents were "filled with significant material for confrontation on cross-examination." Specifically, he contends that Marcelino contradicted himself regarding: "which brothers [were] there"; "having seen Mario and [the petitioner] with guns"; "the sequence of the gunshots, what type of gun was used, and which building he entered [when he called 911]"; and the alleged motive for the shooting.[13]

[13] The petitioner notes that Marcelino: (1) admitted to the police that he had not been truthful in October, 2010, when he was questioned about the shooting of the petitioner's cousin Kevin; (2) initially told Halt that " 'they wanted to shoot me, not my cousin' " (referring to the victim) and then later, in his written statement, stated that the victim was shot as retaliation for Armando shooting Kevin; (3) initially claimed that Mario, the petitioner, and Yair demanded to see Armando but then, in his written statement, no longer claimed that Yair was with Mario and the petitioner; (4) claimed that the victim told him that Mario and the petitioner had shot him despite evidence establishing that the victim was unable to speak after being shot due to the damage to his face and jaw; and (5) initially claimed that he saw Mario with a gun but later denied that he saw anyone with a gun.

According to the petitioner, Marcelino "should have been effectively challenged by competent counsel on the reason, if any, for running upstairs to call 911 on a cell phone he had with him downstairs, then leaving his phone upstairs and coming back down. He should have been cross-examined on how he is suddenly able to answer the question 'what kind of gun was used' because [the victim] told him, when [the victim] was reportedly unable to speak. Another fair question is why he would make the peculiar telephone call to the police [in which he] stated that he witnessed the shooting [but failed to provide any more information]." (Internal quotation marks omitted.)

The petitioner's proposed line of questioning fails to demonstrate that McMahon performed deficiently. Despite the noted inconsistencies, Marcelino consistently identified the petitioner as being present at the scene of the shooting in both statements and at trial. Marcelino testified at the criminal trial that, although he did not see the shooting, he saw Mario *and the petitioner* approach the victim immediately before the shooting occurred. Considering Marcelino's consistency on this key point—that he saw the petitioner approach the victim immediately before the shooting—it would have been reasonable for McMahon to elect not to focus on the inconsistencies concerning ancillary details. This is particularly true given that the prosecutor already had used Marcelino's prior inconsistent statement to impeach Marcelino's testimony that he did not recall the victim telling him that he had been shot by the petitioner. Therefore, we agree with the habeas court that the petitioner failed to prove that McMahon performed deficiently in failing to impeach Marcelino as to every inconsistency in his statements and testimony. Furthermore, as noted by the habeas court, the petitioner cannot demonstrate that he was prejudiced by McMahon's failure to cross-examine Marcelino on the

specific issues because Marcelino did not testify at the habeas trial. See *Jones* v. *Commissioner of Correction*, supra, 212 Conn. App. 131–32.

Finally, regarding Santa, the petitioner argues that McMahon should have confronted Santa "with her completely opposite pretrial statement to [Kalinowski], provided mere weeks before the trial, admitting that she had been downstairs, not upstairs, and had *not* seen [the petitioner] shoot [the victim]." (Emphasis in original.) He claims that the court's finding that Santa testified at the criminal trial that she did not see the shooting is clearly erroneous and, therefore, that the court improperly dismissed the significance of impeaching Santa with her statement to Kalinowski. We disagree.

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Thomas* v. *Cleary*, 229 Conn. App. 15, 27–28, 326 A.3d 1109 (2024).

At the 2014 trial, on direct examination, Santa testified that she "heard a shooting" while she was in her aunt's house, which was across the street from where the Three Kings Day party was being held, which prompted her to go outside on a porch on the second story of the building to see what happened. She testified that, once outside on the porch, she saw "Mario, Yair, and [the petitioner]." When asked whether the petitioner was "doing anything with regard to [the victim]," she responded that she did not remember. The prosecutor then asked whether she saw the petitioner shoot the victim, and she said, "Yeah."

On cross-examination, Santa testified that she was inside the kitchen at her aunt's house when she heard a single gunshot, which prompted her to go outside on

the porch. She further testified that it took "[l]ike a minute" for her to get from the kitchen to the porch to see what was happening outside. Accordingly, although Santa testified that she saw the petitioner shoot the victim, she also testified that she heard only a single gunshot while she was inside her aunt's kitchen and, thus, did not see the actual shooting. The habeas court emphasized that portion of Santa's testimony, noting that she went outside "*after* she heard one shot." (Emphasis in original.) Thus, the court's finding is not clearly erroneous because there is evidence in the record to support it, and we are not left with a definite and firm conviction that a mistake has been committed.

We further conclude that the court properly dismissed the significance of Santa's prior allegedly inconsistent statement to Kalinowski. In an entry dated March 8, 2014, Kalinowski noted that, when she interviewed Santa, Santa stated that "[w]hat she recalls is that she was upstairs at her cousin's house when she heard gun shots. She said she ran [downstairs] and looked outside to see Mario and [the petitioner] at the scene. She told [Kalinowski that] she did not see the shooting take place, only that [the petitioner] and Mario both had guns and were fleeing the scene in Mario's car. . . . When [Kalinowski] asked her if maybe she mistook [the petitioner] for Mario because they are very similar in looks, she said 'No, they were both there.' " Kalinowski thus "did not feel a statement from [Santa] would be beneficial to the [petitioner]." Because Santa, like Marcelino, consistently maintained that she saw the petitioner on the night of the shooting in all of her statements, the court reasonably concluded that cross-examining her regarding the inconsistency as to where she was standing when she saw the petitioner on the night of the shooting "would have only served to reinforce her trial testimony that she did not see the shooting but did see [the petitioner] at the scene." Consequently, the petitioner's ineffective assistance claim

predicated on McMahon's failure to confront Santa with her prior inconsistent statement also fails.

3

Last, the petitioner claims that the court improperly concluded that McMahon's failure to move to preclude the presentation to the jury of the 2004 conviction did not prejudice the petitioner. The petitioner's claim necessarily fails because he has failed to challenge the court's conclusion that McMahon did not perform deficiently regarding the evidence of the petitioner's 2004 conviction.

In its memorandum of decision, the habeas court summarily rejected the petitioner's ineffective assistance claim predicated on McMahon's failure to avoid the introduction of the petitioner's 2004 conviction. The court reasoned that the petitioner "was charged with—and acquitted of—criminal possession of a firearm. One element of that offense is that the individual has a prior felony conviction. In order to avoid testimony on the subject, [McMahon] agreed to submit a stipulation to the jury that [the petitioner] . . . previously [was] convicted of an unnamed felony. The court fails to see how there could be any deficient performance. Nor is there any prejudice, since [the petitioner] was acquitted of the charge."

On appeal, the petitioner argues that "informing a [jury] of a [defendant's] prior conviction is highly prejudicial. Here, it was not just introduced, e.g., for credibility purposes, or to prove that he was a felon in possession. It was emphatically argued as evidence of guilt as the shooter. And though the jury rejected that count, it did convict on conspiracy, leading to the reasonable inference that [the petitioner] was viewed by the jury as a person of 'bad general character,' with a 'general readiness to do evil.' . . . Use of the prior conviction,

compounded by the lack of any defense or confrontation, was enough to leave the jury feeling they should convict him of 'something.' "

The petitioner, however, fails to address the court's conclusion that McMahon did not perform deficiently by stipulating to the existence of the prior unnamed felony conviction. See *Soyini* v. *Commissioner of Correction*, 222 Conn. App. 428, 441, 305 A.3d 662 (2023) ("*Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong" (internal quotation marks omitted)), cert. denied, 348 Conn. 940, 307 A.3d 274 (2024). Given that a prior felony conviction is a necessary element of a criminal possession of a firearm charge; see General Statutes § 53a-217 (a) (1) (A) ("[a] person is guilty of criminal possession of a firearm . . . when such person possesses a firearm . . . and . . . has been convicted of . . . a felony"); we agree with the habeas court that McMahon's decision to stipulate to the existence of an unnamed felony conviction to avoid having the state introduce evidence to establish that fact is not objectively unreasonable. See, e.g., *State* v. *Thompson*, 81 Conn. App. 264, 287, 839 A.2d 622 ("[a]lthough the stipulation may have been disadvantageous to the defendant, it was an element that necessarily had to be proven under § 53a-217"), cert. denied, 268 Conn. 915, 847 A.2d 312 (2004).

Furthermore, considering that the trial court instructed the jury that the stipulation had been admitted for the sole purpose of proving an essential element of the criminal possession of a firearm offense[14] and that the jury acquitted the petitioner of not only that charge but also of criminal attempt to commit murder and assault

[14] The court instructed the jury that the stipulation was "admitted [f]or a limited purpose, that purpose being to establish the second essential element of [the criminal possession of a firearm] offense. The stipulation may not be used for any other purpose."

in the first degree,[15] the evidence presented at the habeas trial does not support the inference that the jury viewed the petitioner as a bad person with a propensity to do evil. "In the absence of an indication to the contrary, we presume that the jury followed the court's instructions and considered [the] evidence solely for the purpose for which it was admitted." (Internal quotation marks omitted.) *State* v. *Delacruz-Gomez*, 350 Conn. 19, 34, 323 A.3d 308 (2024); see also *State* v. *Patterson*, 344 Conn. 281, 301, 278 A.3d 1044 (2022) ("limiting instructions serve to minimize any prejudicial effect that [such] evidence . . . otherwise may have had" (internal quotation marks omitted)). Accordingly, we also agree with the habeas court that the petitioner failed to establish that he was prejudiced by McMahon's alleged ineffectiveness regarding the stipulation as to the petitioner's prior conviction.

The judgments are affirmed.

In this opinion the other judges concurred.

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[15] In his direct appeal, this court rejected the petitioner's claim that the jury's verdict finding him guilty of conspiracy to commit murder was inconsistent with his acquittal on the substantive charges. See *State* v. *Balbuena*, supra, 168 Conn. App. 206. We reasoned that "[t]he crime of conspiracy to commit murder requires that the [petitioner] agree to commit murder, perform an overt act in furtherance of committing murder, and hold the requisite intent to commit murder. . . . A jury reasonably could have found that the [petitioner] agreed to and held the requisite specific intent to kill the victim based on his active participation in a group that collectively made threatening comments to the victim, brandished weapons, pursued the victim, and shot at the victim. Proof of the substantive crimes, on the other hand, required the jury to find, inter alia, that the [petitioner] himself had performed an action or omission constituting a substantial step toward causing the victim's death . . . [and] had caused injury to the victim . . . or had possessed a firearm. . . . None of these is an element of the crime of conspiracy to commit murder, and therefore, the jury's verdict was not inconsistent with its conclusion that the defendant was guilty of conspiracy to commit murder." (Citations omitted.) Id., 206–207.

STATE OF CONNECTICUT *v.* NICOLAS A. MARCIANO (AC 46753)

Alvord, Elgo and Cradle, Js.*

Syllabus

The state appealed, on the granting of permission, from the judgment of the trial court dismissing the information charging the defendant with operating a motor vehicle while under the influence of alcohol following the court's granting of the defendant's motion to suppress evidence obtained as a result of his unconstitutional seizure. The state claimed, inter alia, that no constitutional violation occurred because, at all relevant times, the arresting officer was acting in his community caretaking capacity during his encounter with the defendant. *Held*:

The trial court properly concluded that the community caretaking exception to the warrant requirement did not apply because the arresting officer was not acting within his community caretaking capacity when he restricted the defendant's liberty, as there was no evidence in the record that the officer was seeking to prevent the commission of a crime, protect an individual who was in danger of physical harm, resolve a conflict, or maintain a feeling of security in the community.

The trial court properly granted the defendant's motion to suppress because it properly concluded that the defendant had been seized within the meaning of the state and federal constitutions when the uniformed, visibly armed, arresting officer prevented him from driving away by illuminating his vehicle with takedown lights, approaching him, and nonverbally commanding that he roll down his window as, at that time, a reasonable person in the defendant's position would not have felt free to leave the scene.

Argued November 13, 2024—officially released March 18, 2025

Procedural History

Information charging the defendant with operating a motor vehicle while under the influence of alcohol, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, where the court, *Klatt*, *J.*, granted the defendant's motion to suppress; thereafter, the court, *Klatt*, *J.*, on the state's motion, rendered judgment dismissing the information,

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

and the state, on the granting of permission, appealed to this court. *Affirmed.*

Robert J. Scheinblum, special assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Jonathan Shaw*, deputy assistant state's attorney, for the appellant (state).

Nicole Van Lear, deputy assistant public defender, for the appellee (defendant).

Opinion

CRADLE, J. The state of Connecticut appeals from the judgment of the trial court dismissing an information charging the defendant, Nicolas A. Marciano, with operating a motor vehicle while under the influence of alcohol in violation of General Statutes § 14-227a, following its granting of the defendant's motion to suppress evidence obtained as a result of his unconstitutional seizure.[1] On appeal, the state claims that no constitutional violation occurred because, at all relevant times, the arresting officer was acting in his community caretaking capacity. Alternatively, the state argues that, even if the officer was not acting in his community caretaking capacity, the defendant was not unlawfully seized because the officer's conduct did not constitute a show of authority sufficient to cause a reasonable person in the defendant's position to believe that he was not free to leave. We affirm the judgment of the trial court.

The record reflects the following facts found by the trial court after an evidentiary hearing on the defendant's motion to suppress, as supplemented by the undisputed testimony of the arresting officer and the

[1] Pursuant to General Statutes § 54-96, the state requested, and the trial court granted, permission to appeal from the judgment of dismissal.

video recording from his body camera.[2] On May 9, 2022, Connecticut State Troopers Brandon Godwin and Andrew Sturmer were on routine patrol in a marked state police cruiser in the vicinity of Route 44 in Mansfield. At approximately 1:30 a.m., the troopers were traveling eastbound on Route 44, near the intersection with Route 195. There is a Cumberland Farms gas station and convenience store located on one corner of the intersection. There are two entrances to the Cumberland Farms parking lot, neither of which was obstructed in any way; there were no signs or gates prohibiting entry to or parking in the lot after business hours. As the troopers approached the intersection, Godwin observed a lone vehicle parked in an unlit area of the Cumberland Farms parking lot, which he found "abnormal" because the Cumberland Farms gas station and convenience store were closed at the time. The vehicle was not parked near the store or the fuel pumps; rather, it was parked along the side of the lot, parallel to the curb. Godwin entered the parking lot "just . . . to make sure everything was all right."

When Godwin entered the parking lot, he parked his cruiser approximately forty to fifty feet from the parked vehicle, facing the driver's side, basically in a "T" position with the vehicle, and immediately illuminated the vehicle with his cruiser's "takedown lights." He observed "an individual inside the car, in the driver's seat, with his head looking down toward the steering wheel." Godwin also observed that there was "some kind of damage to the driver's side rear fender" of the vehicle. Although the cruiser's lights spotlighted the vehicle, the cruiser did not block or otherwise hinder the vehicle's ability to move. Godwin did not activate the overhead flashing red and blue lights or the sirens of his cruiser.

[2] The trial court noted, and the parties do not dispute, that the video recording from the body camera is the best evidence of the incident at issue. The facts in this case are essentially undisputed.

When Godwin exited his cruiser, he observed the defendant sit upright in the driver's seat, start his vehicle and illuminate its headlights.[3] As Godwin continued to approach the defendant's vehicle, he began waving his flashlight toward the defendant in a circular motion, signaling the defendant to roll down his window. When Godwin arrived at the vehicle, the defendant opened the driver's side door a few inches and told Godwin that his window would not roll down. Godwin pulled the door open completely and asked the defendant what he was doing there. Godwin smelled the odor of alcohol emanating from the defendant's vehicle and believed that the defendant's speech was slurred. Godwin checked the defendant's eyes and then asked the defendant to exit his vehicle so that he could perform certain tests. The trial court concluded that it was at this point that Godwin began a criminal investigation, suspecting that the defendant was operating under the influence.[4] As a result of the investigation, the defendant was

[3] Although the parties do not dispute the trial court's factual findings, we note that certain of those findings, specifically as to the sequence of certain events, are imprecise. Specifically, although the court found that the defendant turned on his vehicle in response to Godwin's signal to him to roll down his window, Godwin testified, and the video recording from his body camera confirms, that the defendant started his vehicle as Godwin exited his cruiser. The parties do not dispute this. Likewise, the court noted that Godwin observed damage to the defendant's vehicle when he reached the defendant's vehicle. Godwin testified that he observed a "black . . . discoloration" near the handle of the driver's side rear door when he illuminated his cruiser's takedown lights. When he reached the defendant's vehicle, he realized that the discoloration "appeared to be melted rubber" from the driver's side rear tire. Despite that damage, Godwin testified that the vehicle appeared to be operable.

[4] The court found: "At this time, the trooper also observed that the vehicle had damage to the rear driver's side tire with the tread gone and rubber from the tire melted onto the fender. The defendant indicated to the troopers that he did not own the vehicle and he was waiting for a friend to pick it up. The evidence indicated that he had been parked, with the vehicle off, for some period of time. The defendant had been on his cell phone at the time of the [Godwin's] approach and had the phone in his hand. . . . While [Godwin] approached on his own, the second trooper was at the vehicle within a minute."

arrested and charged with operating a motor vehicle while under the influence in violation of § 14-227a.

On February 23, 2023, the defendant filed a motion to suppress "all evidence derived from law enforcement's encounter with [him] on May 9, 2022," on the ground that "Godwin lacked a legal basis to approach [the defendant], and the evidence against [the defendant] was derived from the illegal approach." On April 21, 2023, the state filed an objection to the defendant's motion to suppress. The state argued that Godwin did not seize the defendant until he smelled the odor of alcohol emanating from the defendant's vehicle and heard his slurred speech, at which time he "developed probable cause to detain him."[5]

On April 21, 2023, the court held an evidentiary hearing on the defendant's motion to suppress and the state's objection to that motion. The state presented the testimony of Godwin and introduced into evidence the video recording from Godwin's body camera. The

[5] In its memorandum of law objecting to the defendant's motion to suppress, the state argued: "The basis of the defendant's motion [to suppress], while not explicitly stated, seems to be that by simply driving his police vehicle into the gas station and parking, [Godwin] had seized the defendant. However, [Godwin] did not seize the defendant until later in their encounter, after developing probable cause that the defendant was operating his vehicle under the influence. . . . The defendant was not seized when [Godwin] entered the gas station, parked his vehicle, and approached the defendant's vehicle." (Citation omitted.) The state asserted that there was no use of physical force and there was not a "sufficient show of authority such that a reasonable person would not have felt free to leave." In support of this assertion, the state argued that "Godwin observed a vehicle parked at a closed gas station at 1:30 in the morning. He parked a significant distance away from the vehicle, his overhead flashing lights and sirens were not on, and he did not restrict the vehicle's ability to move. He approached the vehicle alone, slowly, did not have a firearm drawn, did not provide any verbal commands and spoke calmly. It was not until he detected the odor of alcohol and heard the defendant speak in a slurred manner that he developed probable cause to detain him." On the basis of those facts, the state asserted that the defendant was not seized by Godwin and that Godwin did not require a " 'lawful basis' " to approach the defendant.

defendant did not present any witnesses but introduced into evidence two portions of the video recording from Godwin's body camera, an overhead photograph of the Cumberland Farms and two photographs from the night in question.

On May 9, 2023, the defendant filed a posthearing memorandum of law in support of his motion to suppress, wherein he argued: "[The defendant] was seized, at the latest, when Godwin waved his lit flashlight in [the defendant's] direction as Godwin continued to walk toward [the defendant]. In the seconds before, Godwin drove into the Cumberland Farms parking lot and turned on his 'takedown' light[s] as he stopped his patrol car. The bright spotlight was pointed directly at [the defendant]—the only person in the parking lot. . . . Although a reasonable person may have believed he was not free to leave once the takedown light[s] [were] trained on him, [the defendant] may have believed otherwise because he started the engine and turned on his car's lights. . . . He never left, however, because Godwin waved his lit flashlight in [the defendant's] direction at least ten times immediately after [the defendant] started the engine and turned on the car's lights. . . . Godwin also continued to walk toward [the defendant] as he waved the flashlight at him. Godwin no doubt understood [the defendant] starting his engine and turning on the car lights as a manifestation of [the defendant's] intention to leave the parking lot. Godwin therefore waved his flashlight as soon as [the defendant] started the engine in a way that communicated to [the defendant] that he was not free to leave. . . . [The defendant] never moved the car once Godwin started waving his flashlight as he continued walking in [the defendant's] direction because a reasonable person in [the defendant's] position would not have felt free to leave." (Citations omitted; emphasis omitted.)

On May 22, 2023, the state filed its posthearing memorandum of law in support of its objection to the defendant's motion to suppress. In support of its contention that Godwin's stop of the defendant was not unconstitutional, the state alleged: "Godwin observed a vehicle parked in a closed gas station at 1:30 in the morning. Utilizing his role as a community caretaker, [he] entered the gas station parking lot. Upon entering, he observed an individual in the driver's seat who appeared to be hunched over or asleep, and he wanted to inquire if he needed assistance. [Godwin] parked a significant distance away from the defendant, did not utilize his overhead lights, and his siren was not on. He approached the defendant's vehicle alone, in a slow and calm manner, did not have his firearm drawn, and did not give any commands to the defendant. As [Godwin] exited his vehicle, he heard and observed the [defendant] start his vehicle. [Godwin] did not return to his vehicle and try to stop the defendant, he did not try to block him in or prevent him from driving, and he did not chase after him or verbally tell him to stop, evidencing the fact that the defendant was not being detained at that time. During his approach of the vehicle, [Godwin] noticed that the vehicle had significant, recent damage and that the rear driver side tire had nearly no tread.[6] . . . When the defendant opened his car door, due to his window not working, [Godwin] immediately detected the odor of alcohol emanating from the vehicle. Upon speaking with the defendant, [Godwin] noted that his speech was slurred. Due to the overwhelming odor of alcohol, the defendant's slurred speech, and the damage to the [defendant's] vehicle, [Godwin] had reason to

[6] As noted in footnote 3 of this opinion, Godwin testified that he observed discoloration near the driver's side rear tire of the defendant's vehicle when he illuminated his takedown lights. Godwin testified that, when he reached the defendant's vehicle, he realized that the discoloration "appeared to be melted rubber" from the driver's side rear tire.

believe that the defendant was operating his motor vehicle under the influence of alcohol and asked him to step out of the vehicle for further examination. It was at this point that [Godwin] seized the defendant." (Footnote added.)

On June 6, 2023, the defendant filed a reply to the state's objection to his motion to suppress wherein he reiterated his argument that a reasonable person in his position would not have felt free to leave the parking lot under the circumstances and that his "seizure was not justified under the community caretaking doctrine." The defendant asserted that "Godwin lacked the empirical facts necessary to interfere with [the defendant's] freedom of movement under the community caretaking doctrine" because "the location and manner in which [the defendant's] car was parked did not give rise to a belief that he was in distress or in need of aid," there had been no reports of any concerns related to the defendant's vehicle, and, "upon Godwin's arrival, there was no indication that [the defendant] was in any distress or need of aid." The defendant also asserted that, "even if [the defendant's] mere presence in a safe parking lot with open ingress and egress that serviced a convenience store that was brightly lit initially justified Godwin's decision to check on his well-being, including due to the observation of [the defendant's] lowered head, any concerns Godwin may have felt for [the defendant's] health were dispelled once [the defendant] lifted his head, started the car's engine and turned on the lights and/or pressed the brake pedal upon Godwin's approach . . . ." (Footnote omitted.)

On June 21, 2023, the court issued a memorandum of decision wherein it granted the defendant's motion to suppress. The court agreed with the defendant's argument that he was seized, at the latest, when Godwin waved his flashlight at him and ordered him to roll down his window. The court reasoned: "The defendant

was in a parked vehicle, alone in a dark parking lot in the early morning hours. He was in a completely isolated, rural location, [with] no other pedestrians or vehicles in the near vicinity [and] no other businesses open at that time. He was on his phone, presumably waiting for a friend to pick up the vehicle.

"[Godwin's] approach, while not blocking the defendant's path, also clearly indicated the officer's intent to speak with him and [that the defendant should] not leave the area. The video demonstrates that the 'takedown lights' spotlighted the defendant and the vehicle in an intimidating fashion. The defendant was effectively pinned in place by the lights. There was no question that the lights were coming from a clearly marked police cruiser. Within seconds, an armed police officer was approaching the defendant, signaling with his flashlight to roll down the window of the vehicle. These actions clearly communicate to an individual: 'Do not leave because I want to speak with you.' "

The court found that, "in consideration of the totality of the circumstances, a reasonable person in the defendant's position, with the location, with the lights used, the trooper's approach, and the motioning with the flashlight, would not believe he would be free to leave." The court also found that, at the time of the seizure, Godwin lacked a reasonable and articulable suspicion of criminal activity.

The court rejected the state's argument that Godwin approached the defendant's vehicle in his role as a community caretaker and ruled that the community caretaking exception to the warrant requirement did not apply in this case. The court explained: "The sole evidence offered by the state was [Godwin's] testimony, indicating that, while on patrol, he observed a lone car in the parking lot of a closed business, which he thought was 'unusual' and 'abnormal.' There was nothing about

how the vehicle was parked to indicate worry or concern. There were no complaints regarding that vehicle, no reports of criminal activity or accidents. There was nothing readily observable about the vehicle itself, i.e., no flashers, hood extended, etc., that would render a belief that the operator needed assistance. The video evidence revealed the defendant, who was seated upright, look toward the cruiser once the 'takedown lights' illuminated him.

"Not every lone vehicle parked along the side of the road or in an empty lot, even in a rural location, is or should be considered 'abnormal.' If the concern was a need for medical assistance, that concern should have dissipated once the defendant looked and responded to the officer's presence. While the trooper testified that he had observed damage in the rear driver's side of the vehicle, this would not have been visible to the officer at the time the vehicle was first observed and only after the trooper began his approach. Further, the trooper testified that the vehicle . . . still appeared operational."

On the basis of the foregoing, the court concluded that the evidence obtained that night was seized in violation of the fourth and fourteenth amendments to the United States constitution and article first, § 7, of the Connecticut constitution and ordered that it be suppressed.

The state thereafter asked the court to dismiss the charge against the defendant and sought permission to appeal the court's granting of the motion to suppress, which the court granted. This appeal followed.

The standard of review for a motion to suppress is well settled. "A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]hen a

question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, [however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Pompei*, 338 Conn. 749, 756, 259 A.3d 644 (2021).

Here, the state does not challenge the trial court's factual findings but, rather, contends that the court erred in concluding that Godwin was not acting within his community caretaking capacity and that the defendant was seized when Godwin signaled the defendant with his flashlight to roll his window down. We address each claim in turn.

I

The state first claims that the court erred in granting the defendant's motion to suppress because Godwin was acting in his community caretaking capacity at all times during his encounter with the defendant. We disagree.

Consistent with our standard of review pertaining to a court's ruling on a motion to suppress, "in reviewing the applicability of the community caretaking [doctrine], the trial court's subordinate factual findings will not be disturbed unless clearly erroneous and the trial court's legal conclusion regarding the applicability of the [community caretaking] doctrine in light of these facts will be reviewed de novo." (Internal quotation marks omitted.) Id.

"The fourth amendment to the United States constitution prohibits unreasonable searches and seizures by government agents. Subject to a few well defined exceptions, a warrantless search and seizure is per se unreasonable. . . . The state bears the burden of proving that an exception to the warrant requirement applies when a warrantless search [and seizure have] been conducted." (Footnote omitted; internal quotation marks omitted.) Id., 757.

The exception to the fourth amendment's warrant requirement that the state argues applies to the present case is known as the community caretaking exception. The United States Supreme Court first described the community caretaking functions in *Cady* v. *Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). There, the Supreme Court explained that "[l]ocal police officers, unlike federal officers, frequently . . . engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Id., 441.[7] It has since been explained that "[s]afeguarding individuals and their property from harm is the essence of the

[7] "The defendant in *Cady* was convicted of murder after incriminating evidence was found during a warrantless search of his motor vehicle following an automobile accident. . . . The police officers searched the defendant's motor vehicle because they knew that he was an off duty Chicago police officer who was required by regulation to carry his service revolver at all times. . . . The court in *Cady* rejected the defendant's contention that the search was illegal, concluding that the search was standard procedure in [that police] department, to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. . . . The police had not violated the defendant's fourth amendment rights when they searched the trunk of his parked vehicle, the court held, because they reasonably believed that it contained a loaded revolver that could endanger the public if left unsecured." (Citations omitted; internal quotation marks omitted.) *State* v. *Pompei*, supra, 338 Conn. 758–59. Like *Cady*, the majority of cases that discuss the community caretaking function of police officers involve inventory searches of motor vehicles.

community caretaking function of the police." (Internal quotation marks omitted.) *United States* v. *Best*, 415 F. Supp. 2d 50, 56 (D. Conn. 2006). It "involves routine, nonemergency duties undertaken to protect the public . . . ." *State* v. *Pompei*, supra, 338 Conn. 758 n.5.

Our Supreme Court has observed that "it is not always a simple matter to delineate precisely pursuant to which function [the] police are acting in carrying out a particular search or seizure. In fact . . . [p]olice often operate in the gray area between their community caretaking function and their function as criminal investigators. Often there is no bright line separating the one from the other . . . . In many instances, however, it is possible to discern whether the police are acting in their crime control or investigative functions, or instead are acting pursuant to their community caretaking function." (Internal quotation marks omitted.) *State* v. *Curet*, 346 Conn. 306, 324, 289 A.3d 176 (2023). "[T]he police have complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses; by design or default, the police are also expected to reduce the opportunities for the commission of some crimes through preventive patrol and other measures, aid individuals who are in danger of physical harm, assist those who cannot care for themselves, resolve conflict, create and maintain a feeling of security in the community, and provide other services on an emergency basis. . . . Constitutional guarantees of privacy and sanctions against their transgression do not exist in a vacuum but must yield to paramount concerns for human life and the legitimate need of society to protect and preserve life . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 537, 88 A.3d 491 (2014).

Our Supreme Court has held that a police officer acting in a community caretaking capacity may make "a reasonable intrusion not prohibited by the fourth

amendment." *State* v. *Tully*, 166 Conn. 126, 133, 348 A.2d 603 (1974). "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." (Internal quotation marks omitted.) Id., 144. "The police must have a valid reason grounded in empirical facts rather than subjective feelings to believe that a limited intrusion into liberty or property interests is justified . . . . It is an objective and not a subjective test . . . that looks to the totality of the circumstances." (Citations omitted; internal quotation marks omitted.) *State* v. *Pompei*, supra, 338 Conn. 757–58.

Here, the state has steadfastly maintained, before the trial court and now this court, that the defendant was not seized until Godwin smelled the odor of alcohol, heard the defendant's slurred speech, and asked the defendant to step out of his vehicle so he could commence an investigation to determine whether the defendant was operating while under the influence. The state acknowledges, however, that there was "some restriction on . . . [the defendant's] liberty" when Godwin turned on his takedown lights, approached the defendant and signaled to him to roll down his window. The state argues that this restriction of the defendant's liberty was justified because Godwin was acting in his community caretaking capacity. The state argues that, "[c]ontrary to the trial court's conclusion, from the time that the troopers were on routine patrol and first saw the defendant's car until the defendant opened the driver's door and the troopers smelled alcohol and heard his slurred speech, the troopers' activities were 'totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute.' " The lack of empirical facts supporting a reasonable belief that the exercise of their community caretaking function was the basis of their conduct belies this argument.

Godwin testified that he first noticed the defendant's vehicle in the Cumberland Farms parking lot when he was driving through the intersection on routine patrol. He further testified that, at that time, he did not notice if the vehicle was occupied. In fact, the defendant's vehicle was off and parked on private property. It was parked parallel to the curb and was not askew. There was nothing about the manner in which it was parked, or its appearance, to indicate that it was disabled when Godwin entered the parking lot. There were no gates or other barriers preventing the public from accessing or parking in the lot when the business was closed, and there were no signs prohibiting entry or trespassing. There had been no reports that the vehicle had been involved in any type of incident or had been stolen. There had been no report as to how the vehicle got there or how long it had been there. There was no sign of distress or threat to life or property. Other than a parked car on the private property of a closed business, there was simply no basis for Godwin's stated purpose of entering the parking lot—to "make sure everything was all right."[8]

Once Godwin pulled into the parking lot, he noticed the defendant in the driver's seat of the vehicle, with his head looking down toward the steering wheel, and what appeared to be damage to the vehicle near the rear driver's side tire. Godwin testified that, at that point, he thought there was a possible emergency, in that he believed the defendant could be in distress. Godwin testified that he heard the engine of the defen-

[8] On cross-examination at the suppression hearing, Godwin was asked whether there was any sign of an individual in the vehicle being in distress. Godwin began to explain: "No, but, you know, in reference to, you know, what's been going on in Mansfield, and, you know, the past couple years there's been . . . ." His explanation was interrupted by defense counsel, who objected to the testimony as beyond the scope of his question and asked that the testimony be stricken. The court sustained the objection but did not strike the testimony.

dant's vehicle go on and observed the brake lights illuminate when he was exiting his cruiser, and the defendant's head was not down anymore. At that point, when the defendant raised his head and started his vehicle, the stated basis for Godwin's exercise of his community caretaking function—to check on the defendant's well-being—ceased to exist. Godwin, however, was undeterred by the defendant's movement. Although the defendant did not, at any point, show any signs of distress or in any way indicate that he needed assistance, Godwin nevertheless continued to approach the defendant's vehicle and waved his flashlight at the defendant several times, essentially ordering him to stay where he was located and to roll down his window. Because it was clear that the defendant was not in distress once he started the car and lifted his head, Godwin had no reasonable basis to restrict the defendant's liberty.[9]

In support of the state's argument that Godwin acted in his community caretaking capacity when he restricted the defendant's liberty, the state relies on our Supreme Court's decision in *State* v. *Pompei*, supra, 338 Conn. 749.[10] In *Pompei*, our Supreme Court affirmed the denial

[9] Although Godwin asked the defendant if he was okay, he first asked him what he was doing there.

[10] The state also relies on *State* v. *Drummond*, 305 N.J. Super. 84, 701 A.2d 958 (App. Div. 1997), in which the Appellate Division of the Superior Court of New Jersey held that the arresting officers were justified in making a community caretaking inquiry when they observed a vehicle parked with its lights off next to a closed car wash facility shortly before midnight because those experienced officers deemed it "atypical for the location." Id., 88. Not only are we not bound by New Jersey case law, but the reasoning of that case fails to account for the principle, stated therein, that "a reasonably objective police officer" acting in his community caretaking capacity is justified in "making an inquiry on property and life . . . ." (Internal quotation marks omitted.) Id. Other than stating that the circumstance was "atypical," the officers offered no other facts in support of their initial approach of the defendant. Id. As noted herein, Connecticut case law does not support a restraint on one's liberty in furtherance of community caretaking in the absence of empirical facts that support an objective belief that life or property are at risk.

of the defendant's motion to suppress, explaining that "[the arresting officer] was not acting in a criminal investigatory capacity when he parked his patrol car behind the defendant's motor vehicle but, rather, was responding to a dispatch from a concerned citizen who had reported an unconscious male in a Ford Focus in the Cumberland Farms parking lot at 1:56 a.m. [The officer] did not activate the lights on his patrol car and parked behind the defendant's vehicle because he wanted 'to keep it from being able to roll backwards or backup until [he] could ascertain the situation at hand.' [The officer] exited his patrol car and observed the unconscious or sleeping defendant in the driver's seat with the engine running. [The officer] knocked on the driver's side window to rouse the defendant and to ascertain whether he required medical attention. Indeed, consistent with this purpose, the first question [the officer] asked the defendant was whether he was okay." Id., 760. The court held: "In light of the limited 'purpose and scope of the intrusion,' as well as the complete dearth of evidence indicating that 'this was a general exploratory' or 'pretext[ual]' stop . . . we conclude that the defendant's encounter with [the officer] falls squarely within the community caretaking doctrine." (Citation omitted.) Id., 760–61.

The present case is factually distinguishable from *Pompei* in important ways. First, the officer in *Pompei* was responding to a report from a citizen that there was an unconscious male in a vehicle parked in the Cumberland Farms parking lot at 1:56 a.m. Id. The state asserts that this is a "distinction without a difference . . . because in both instances the police had no reason to suspect any criminal wrongdoing when they encountered the motorist [and] approached his car . . . ." We disagree. The report from a citizen to the police that there was an unconscious male in a running motor vehicle provided empirical facts upon which the officers

in *Pompei* reasonably relied in believing that the driver of the vehicle may have needed assistance. See *State* v. *Pompei*, supra, 338 Conn. 760. Here, Godwin's initial decision to enter the parking lot was based solely upon his belief that it was abnormal for a car to be parked in the lot of a closed business late at night. He had no knowledge at that time that the vehicle was even occupied. That decision, therefore, was more akin to investigating a suspicious vehicle than to safeguarding life or property. Additionally, in *Pompei*, the defendant's vehicle was running; id.; whereas the defendant's vehicle in the present case was not. An unconscious driver of a running vehicle can be, for obvious reasons, more concerning than a driver sitting in a vehicle that is not running. Lastly, even if we were to agree that Godwin was acting in his community caretaking capacity on the basis of his limited explanation that he believed that it was abnormal for a car simply to be parked in the parking lot of a closed business, that he was concerned for the defendant's well-being because the defendant's head was facing down toward the steering wheel and there appeared to be damage to the vehicle, that concern would have been dispelled when the defendant lifted his head and then turned on his car and illuminated the headlights of his own vehicle. In *Pompei*, the defendant was unconscious when the officer knocked on his window. Id. When the defendant here lifted his head and started his vehicle, there was no basis, rooted in community caretaking, for Godwin to restrict the defendant's liberty, as the state concedes that he did, by continuing to approach him and commanding that he roll down his window.

The present case is also distinguishable from *State* v. *Foote*, 85 Conn. App. 356, 857 A.2d 406 (2004), cert. denied, 273 Conn. 937, 875 A.2d 43 (2005), and cert. denied, 273 Conn. 937, 875 A.2d 44 (2005), also cited by the state, in which this court held that an officer

who observed a disabled vehicle on the shoulder of a highway with its hazard lights on and people standing outside of it initially "was not engaged in an investigatory stop of criminal activity, but rather was acting in accordance with his community caretaking function." Id., 358, 361–62. Unlike the case at hand, it was clear that the vehicle in *Foote* was disabled and therefore needed assistance. See id., 358. It also was on a public roadway, presenting a hazard to the public in general and to the vehicle's occupants. See id.

In the absence of any empirical facts to support a reasonable belief that the defendant in the present case was in distress, which was Godwin's stated basis for approaching him, the state has failed to demonstrate that Godwin's encounter with him was not an impermissible general exploratory stop. As stated herein, the presence of such facts is necessary to ensure that the community caretaking doctrine is not abused and relied upon as pretext to justify an unconstitutional restriction of one's liberty. We emphasize that our determination of whether Godwin was exercising his community caretaking function is a fact intensive analysis. On the basis of the record before us, we are persuaded that this is not a case in which Godwin was seeking to prevent the commission of a crime, protect an individual who was in danger of physical harm, resolve a conflict or maintain a feeling of security in the community. There were no empirical facts demonstrating the existence of a threat to anyone's life or property or to the public at large. Accordingly, we agree with the trial court's conclusion that Godwin was not acting within his community caretaking capacity when he restricted the defendant's liberty.

II

Alternatively, the state claims that, even if the trial court correctly determined that Godwin was not acting

within his community caretaking capacity when he restricted the defendant's liberty, the court erred in concluding that the defendant was unconstitutionally seized when Godwin illuminated his vehicle with takedown lights, approached his vehicle and signaled to him to roll down his window.[11] Specifically, the state argues that the defendant was not seized at that point because Godwin's conduct did not constitute a show of authority sufficient to cause a reasonable person in the defendant's position to believe that he was not free to leave. We disagree.[12]

We begin by setting forth the legal test used to determine when a person is seized for purposes of the federal and state constitutions.[13] "[A] person is seized when, by means of physical force or a show of authority, his freedom of movement is restrained. . . . The key consideration is whether, in view of all the circumstances surrounding the incident, a reasonable person

[11] As noted herein, the state concedes that the defendant's liberty was restricted to "some" extent at that point. The state argues, however, that the defendant was not seized until Godwin smelled the odor of alcohol emanating from the defendant's vehicle, causing him to commence a criminal investigation.

[12] The state concedes that Godwin did not have a reasonable and articulable suspicion to seize the defendant until he smelled the odor of alcohol emanating from his vehicle and heard his slurred speech.

[13] The fourth amendment to the United States constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

Article first, § 7, of the Connecticut constitution provides in relevant part: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures . . . ."

Article first, § 9, of the Connecticut constitution provides: "No person shall be arrested, detained or punished, except in cases clearly warranted by law."

Although our Supreme Court has determined that, under certain circumstances, the relevant provisions of the state constitution provide broader protection from unreasonable search and seizure than does the fourth amendment; see, e.g., *State* v. *Oquendo*, 223 Conn. 635, 649–50, 613 A.2d 1300 (1992); our analysis and resolution of the present appeal would be the same under either constitution.

would have believed that he was not free to leave. . . . The inquiry is objective, focusing on a reasonable person's probable reaction to the [officers'] conduct. . . . In situations in which the police have not applied any physical force, we must conduct a careful [fact intensive] examination of the entirety of the circumstances in order to determine whether the police engaged in a coercive display of authority [such that a reasonable person in the defendant's position would not have believed he was free to leave] . . . .

"Factors to be considered in determining whether police conduct projects coercion include, but are not limited to: the number of officers and vehicles involved; whether the officers are uniformed; whether the officers are visibly armed or have their weapons drawn; whether the vehicles involved are marked police cruisers, whether the vehicles' sirens and emergency lights are activated, and whether the vehicles' headlamps or spotlights illuminate the defendant; whether the defendant is alone or otherwise appears to be the target of police attention; the nature of the location, including whether it is public or private property; whether the defendant is surrounded or fully or partially blocked in by the police; the character of any verbal communications or commands issued by the police officers; whether the officers advise the detainee of his right to terminate the encounter; the nature of any physical contact; whether the officers pursue after an initial attempt by the defendant to leave; whether the officers take and retain possession of the defendant's papers or property; and any other circumstance or conduct that bespeaks aggressiveness or a show of force on the part of the police, or suggests that the defendant is under suspicion or otherwise not free to leave. . . . Although it is true that not all personal intercourse between [the police] and citizens involves seizures of persons . . . and that law enforcement officers must

be free to engage in healthy, mutually beneficial intercourse with the public . . . it is equally true that use of coercion beyond that inherent in any police-citizen encounter transforms these sorts of informal, voluntary interactions into seizures." (Citations omitted; internal quotation marks omitted.) *State* v. *Edmonds*, 323 Conn. 34, 50–51, 145 A.3d 861 (2016).

"It is well established that we must undertake a more probing factual review of allegedly improper seizures, so that we may come to an independent legal determination of whether a reasonable person in the defendant's position would have believed that he was not free to leave. . . . A proper analysis of this question is necessarily fact intensive, requiring a careful examination of the entirety of the circumstances in order to determine whether the police engaged in a coercive display of authority . . . . Although we must, of course, defer to the trial court's factual findings, our usual deference . . . is qualified by the necessity for a scrupulous examination of the record to ascertain whether [each] finding is supported by substantial evidence . . . . Furthermore, in reviewing the record, we are bound to consider not only the trial court's factual findings, but also the full testimony of the arresting officers; in particular, we must take account of any undisputed evidence that does not support the trial court's ruling . . . but that the trial court did not expressly discredit." (Citations omitted; internal quotation marks omitted.) Id., 38–39.

Here, the defendant was in the sole car parked on private property, "where police would not be expected to routinely patrol"; id., 58; when Godwin entered the parking lot, parked his cruiser and spotlighted him with its takedown lights,[14] making it clear that he was the

[14] The state also argues that the court erred "in concluding that the troopers' use of their cruiser's spotlights, in conjunction with [Godwin's] use of a flashlight to signal to the defendant to roll down his window, constituted a coercive display of authority." We disagree. In light of the surrounding circumstances, we consider the use of the takedown lights a factor further

target of police attention. Although Godwin did not have his weapon drawn when he emerged from his cruiser and approached the defendant waving his flashlight, he was uniformed and visibly armed. The defendant started his vehicle and illuminated its headlights, presumably to leave. At that point, Godwin, by his actions of continuing to approach the defendant and commanding him with his flashlight to roll down his window, stopped the defendant from leaving. In other words, Godwin's response to the defendant starting his vehicle and illuminating its lights—to continue to approach the defendant and emphatically signaling him to roll down his window—would have caused a reasonable person to believe that the only available response was to stop and engage with Godwin. There could have been no other reasonable interpretation of Godwin's nonverbal command.

"It is well settled that a reasonable citizen would not feel free to disregard a verbal command to stop issued by an armed, uniformed police officer. See *State* v. *Benton*, [304 Conn. 838, 844 n.4, 43 A.3d 619 (2012)] (state conceded that police officer's command to stop constitutes seizure for purposes of state constitution); *State* v. *Oquendo*, [223 Conn. 635, 647–48 n.8, 613 A.2d 1300 (1992)] (similar); *State* v. *Williamson*, 10 Conn. App. 532, 540, 524 A.2d 655 (order to halt, standing alone, constituted seizure), cert. denied, 204 Conn. 801, 525 A.2d 965 (1987); see also *United States* v. *Stover*, 808 F.3d 991, 995 (4th Cir. 2015) (command to halt is example of police conduct that conveys to reasonable person that he is not free to leave) [cert. denied, 580 U.S. 901, 137 S. Ct. 241, 196 L. Ed. 2d 184 (2016)]; *In re Martin H.*, Docket No. B151148, 2002 WL 1732650, *3 (Cal. App. July 25, 2002) (when an officer commands

supporting the conclusion that the defendant had a reasonable belief that he was not free to leave. See *State* v. *Edmonds*, supra, 323 Conn. 58–59.

a citizen to stop, this constitutes a detention because the citizen is no longer free to leave . . .); *Blake* v. *State*, 939 So. 2d 192, 195 (Fla. App. 2006) ([i]f . . . the officer phrases his or her inquiries as commands, this action would indicate that the individual was not free to leave); M. Raymond, 'The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure,' 54 Buff. L. Rev. 1483, 1493 (2007) ([P]olice commands or orders create seizures. The quintessential command is the order to stop . . . ."). (Internal quotation marks omitted.) *State* v. *Edmonds*, supra, 323 Conn. 59–60. Similarly, the circumstances of the present case support the trial court's conclusion that Godwin's continued approach, after the defendant started his vehicle, coupled with the motion of the flashlight toward the defendant to roll down his window, constituted a command to stop. Accordingly, having considered all of the relevant circumstances and all of the undisputed evidence in the record, we are compelled to conclude that a reasonable person in the defendant's position would not have felt free to leave the scene and that the defendant was seized no later than when Godwin successfully commanded him to stop.

In sum, we agree with the trial court's conclusions that Godwin was not acting in his community caretaking capacity when he stopped the defendant and that the defendant was seized within the meaning of the state and federal constitutions when Godwin prevented him from driving away by approaching him and commanding that he roll down his window. Accordingly, we conclude that the court properly granted the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

VIRGINIA BROWN *v.* ZONING BOARD OF APPEALS OF THE TOWN OF AVON
(AC 46969)

Alvord, Cradle and Prescott, Js.*

Syllabus

The plaintiff appealed from the judgment of the trial court dismissing her appeal from the decision of the defendant, which upheld the decision of the defendant's zoning enforcement officer to approve an application for a permit by the plaintiff's neighbors to build a retaining wall along the plaintiff's shared property line. The plaintiff claimed that the court erred in determining that the proposed retaining wall was not a structure within the meaning of applicable zoning regulations. *Held*:

Because the permit approved by the defendant had expired and the plaintiff failed to demonstrate that her claim was reviewable under the capable of repetition, yet evading review exception to the mootness doctrine, this court dismissed the plaintiff's appeal as moot and vacated the judgment of the trial court and the decision of the defendant.

Argued January 6—officially released March 18, 2025

Procedural History

Appeal from the decision of the defendant affirming the decision of its zoning enforcement officer approving an application for a building permit to build a retaining wall, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Schuman*, *J.*; judgment dismissing the appeal, from which the plaintiff, on the granting of certification, appealed to this court. *Appeal dismissed*; *judgment vacated.*

Virginia Brown, self-represented, the appellant (plaintiff).

Kari L. Olson, with whom was *Joseph D. Szerejko*, for the appellee (defendant).

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

Opinion

CRADLE, J. The plaintiff, Virginia Brown, appeals from the judgment of the trial court dismissing her appeal from the decision of the defendant, the Zoning Board of Appeals of the Town of Avon, which upheld the decision of the zoning enforcement officer to approve an application for a building permit filed by the plaintiff's adjoining property owners to build a retaining wall along the shared property line for the purpose of expanding their driveway. The plaintiff challenges on appeal the court's determination that the defendant properly held that the proposed retaining wall was not a "structure" within the meaning of the applicable zoning regulations and therefore did not need to comply with setback requirements. Because the permit approved by the defendant has expired, we dismiss the plaintiff's appeal as moot and vacate the judgment of the trial court and the decision of the defendant.

The following undisputed facts and procedural history are relevant to our consideration of this appeal. The plaintiff owns a residential property in Avon adjacent to property owned by Thomas Gresh, Nicole Gresh, and Joseph Farraye (applicants or neighbors). On September 30, 2021, the applicants applied for a permit to construct a retaining wall, six feet high, 180 feet long, along the shared property line. The proposed retaining wall would be composed of large concrete blocks measuring three feet high and five feet long, each weighing more than 4400 pounds, set on the ground on a base of "crushed stone compacted." The purpose of the retaining wall was to build up the grade of the portion of the applicants' property adjacent to the border with the plaintiff's property so that they could expand the width of their driveway from fifteen feet to approximately forty feet. The wall as constructed would lie within approximately one foot of that border line.

On October 27, 2021, Hiram Peck, the town's zoning enforcement officer, issued a certificate of zoning compliance and the building official issued a building permit. On March 4, 2022, the plaintiff first learned that the certificate of zoning compliance and building permit had been issued, after the applicants "clearcut a dozen or so mature trees" along the shared property line.

On March 8, 2022, the plaintiff sent an email to Peck inquiring why the permit issued in the absence of a variance which, she alleged, was required because the proposed retaining wall was a "structure" under the town's zoning regulations and, therefore, subject to the setback requirements. On March 14, 2022, Peck responded, inter alia, that the proposal had been "reviewed for compliance with all applicable building codes, engineering standards and zoning standards" and it was determined that the proposed retaining wall complied with the regulations in that walls and fences historically have not been considered structures and therefore a variance was not required. On March 15, 2022, Peck told the plaintiff, inter alia, that the proposed retaining wall "was approved on October 27, 2021, by the authorized wetlands agent who is properly credentialed for such a determination."

On March 25, 2022, the plaintiff appealed both to the defendant and to the Inland Wetlands Commission (IWC).[1] As to her appeal to the defendant, the plaintiff challenged the issuance of the zoning permit on the ground that "the proposed concrete block retaining wall qualifies as a 'structure' and is within the twenty-five foot front side yard setback area required for the RU-2A zone." As to her appeal to the IWC, the plaintiff

[1] Specifically, the plaintiff filed an appeal of the issuance of the zoning permit with the defendant, an appeal of the issuance of the building permit with the building code board of appeals, and an appeal of the inland wetlands staff decision with the IWC.

challenged "the administrative approval of the proposed driveway expansion and concrete block retaining wall, notwithstanding that the proposed construction constitutes 'regulated activity' well within the upland review area and will invariably impact the wetlands located on the property, which requires approval by the [IWC]."

On April 28, 2022, the defendant held a public hearing on the plaintiff's appeal challenging the issuance of the zoning permit to address "the zoning enforcement officer's interpretation and determination of the Avon Zoning Regulations regarding the definition of structure as it pertains to a fence/wall." After the hearing, the defendant denied the plaintiff's appeal. On May 23, 2022, the plaintiff appealed to the trial court.

While that appeal was pending, the IWC held a public hearing, on June 13, 2022, on the plaintiff's appeal from the administrative decision to approve the plans for the proposed retaining wall. The IWC upheld the plaintiff's appeal and ordered that a full application for the construction of the proposed retaining wall be submitted to the IWC.

On June 5, 2023, the trial court, *Schuman*, *J.*, dismissed the plaintiff's appeal of the issuance of the zoning permit. In its memorandum of decision, the court noted: "A 'structure' under the [Avon Zoning] [R]egulations [(regulations)] is 'anything constructed or erected which requires location on the ground or attachment to something having location on the ground but excluding pavement.' Section IV.A.2.f of the regulations provides that 'structures customarily incidental to a single-family dwelling shall be located at least ten feet from side or rear lot lines in the rear yard, or if not in the rear yard, conforming to front and side yards in the applicable zone . . . .' A chart in section IV.A.6 of the regulations contains the side yard regulations applicable for each

zone. Under the chart, the minimum side yard set back distance for zone RU-2A is twenty-five feet for any lot in existence as of June 27, 2006, which, the parties do not dispute, would include the [neighbors'] lot." The court determined that, according to the plain language of the regulation, the wall satisfies the definition of a structure, as it is something that is erected and will be placed on the ground on a base of crushed stone. The court determined, however, that several provisions of the regulations identify the terms "structure," "wall," and "fence" as distinct terms while used in the same sentence. The court also determined that the plaintiff's interpretation of the term "structure" to include the neighbors' proposed retaining wall would logically lead to the inclusion of all other walls and fences in Avon, which interpretation would impose on owners of hundreds of fences in the town the burden of having a nonconforming use, which is "unreasonable and not one that the court could assume that the drafters of the regulations intended." In light of that potential result, the court found that "[t]he more reasonable and rational conclusion is that the retaining wall here, along with the other residential walls and fences, are not 'structures' " under the regulations. This certified appeal followed.

On November 15, 2023, the neighbors filed a revised application for a building permit which "includes the same structural retaining wall but avoids the wetlands area on the subject property." As of September 10, 2024, "the permit ha[d] not been issued."

Before considering the plaintiff's challenge to the court's conclusion that the retaining wall at issue is not a structure that is subject to setback requirements, we must address the defendant's argument that the plaintiff's appeal is moot.

"[A] case is considered moot if [the] court cannot grant the [litigant] any practical relief through its disposition of the merits . . . . [T]he . . . doctrine is designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions [that] may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . . . [A]n actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *United Illuminating Co.* v. *Public Utilities Regulatory Authority*, 350 Conn. 660, 668–69, 325 A.3d 900 (2024).

The parties agree that the permit issued on October 27, 2021, has expired.[2] The plaintiff nevertheless contends that this appeal from the defendant's decision upholding the issuance of that permit is not moot because the neighbors filed a revised application on November 15, 2023. As stated herein, the record reflects, and the parties do not dispute, that that application had not been acted upon as of September 10, 2024. Because no action was taken on that application within thirty days of its filing, that application is void. Accordingly, there is no longer an ongoing controversy between the parties and the plaintiff's appeal is moot.[3]

[2] Section 105.5 of the State Building Code provides in relevant part: "Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. . . ."

[3] At oral argument before this court, the defendant agreed that, because the November 15, 2023 application had not been acted upon, it is "void as a matter of law" and, consequently, the town can no longer grant it. The defendant further indicated that, if the neighbors wished to pursue their proposed driveway expansion, they would need to file a new application.

The plaintiff argues that this matter is reviewable, regardless of mootness, under the capable of repetition, yet evading review exception to the mootness doctrine. "The mootness doctrine does not preclude a court from addressing an issue that is capable of repetition, yet evading review. . . . [F]or an otherwise moot question to qualify for review under the capable of repetition, yet evading review exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance. Unless all three requirements are met, the appeal must be dismissed as moot." (Internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 13, 287 A.3d 557 (2023).

"Focusing on the second prong of the exception, the analysis entails two separate inquiries: (1) whether the question presented will recur at all; and (2) whether the interests of the people likely to be affected by the question presented are adequately represented in the current litigation. A requirement of the likelihood that a question will recur is an integral component of the capable of repetition, yet evading review doctrine. In the absence of the possibility of such repetition, there would be no justification for reaching the issue, as a decision would neither provide relief in the present case nor prospectively resolve cases anticipated in the future. . . . The second prong does not provide an

exception to the mootness doctrine when it is merely *possible* that a question could recur, but rather there must be a *reasonable likelihood* that the question presented in the pending case will arise again in the future . . . .'' (Emphasis in original; internal quotation marks omitted.) *R. G.-R.* v. *S. R.*, 226 Conn. App. 547, 559, A.3d , cert. denied, 349 Conn. 923, 321 A.3d 1131 (2024).

The plaintiff's argument as to the second prong of the exception is limited to asserting that ''it is almost certain [that] this exact question will arise again in the future as there is a near identical building permit pending which, if this issue is not resolved now, will almost certainly be granted leading to further identical litigation between the plaintiff and the defendant.'' As discussed herein, however, that application was not acted upon within thirty days from the date of its filing and is, therefore, void. The plaintiff thus has failed to satisfy the second prong of the capable of repetition, yet evading review exception, and, consequently, she has failed to demonstrate that her claim is reviewable under that exception.[4]

Having determined that the plaintiff's appeal is moot, we next consider whether the trial court's judgment and the defendant's decision determining that the retaining wall at issue did not constitute a structure that was subject to setback requirements should be vacated. The following principles govern our analysis.

''[W]hen an appeal is dismissed as moot, the party who is unable to obtain judicial review should not be barred from relitigating the factual and legal issues decided in rendering that judgment. . . . Vacatur is

[4] Because the plaintiff does not satisfy the second prong of the ''capable of repetition, yet evading review'' exception, we need not address the first and third prongs.

commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences. . . . In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment . . . . The same is true when mootness results from unilateral action of the party who prevailed below." (Citation omitted; internal quotation marks omitted.) *United Illuminating Co.* v. *Public Utilities Regulatory Authority*, supra, 350 Conn. 675. We likewise have "the equitable authority to direct vacatur of a mooted agency decision." Id., 677.

Here, it was the action of the applicants, who failed to meet the temporal requirements pertaining to the October 27, 2021 permit that rendered the plaintiff's appeal moot, and the defendant, who then invited us to hold that it is moot. The plaintiff has pursued every available avenue both to reverse the defendant's decision and to overturn the legal precedent that it established. Directing the vacatur of that decision, and the decision of the trial court upholding it, wholly eliminates any lingering concerns regarding the applicability of that precedent in the future.

The appeal is dismissed and the judgment of the trial court and the decision of the defendant are vacated.

In this opinion the other judges concurred.

WILLIAM DALY *v.* DEPARTMENT OF CHILDREN AND FAMILIES
(AC 47155)

Suarez, Westbrook and Keller, Js.

Syllabus

The plaintiff, a former high school substitute teacher, appealed from the judgment of the trial court dismissing his appeal from the decision of a hearing officer for the defendant Department of Children and Families, who upheld the department's decision to substantiate allegations of sexual abuse of A, a high school student, and to place the plaintiff's name on its child abuse and neglect central registry. While working as a substitute teacher at A's high school, the plaintiff had engaged A through social media, met with her at a shopping plaza and a park, and kissed her. The plaintiff claimed, inter alia, that the trial court improperly concluded that there was substantial evidence in the record to support the hearing officer's finding that he had sexually abused A. *Held*:

The trial court properly concluded that the findings and conclusion of the hearing officer upholding the substantiation of the allegations of sexual abuse with respect to A were supported by substantial evidence.

The trial court properly determined that the hearing officer did not act unreasonably, arbitrarily, illegally or in abuse of her discretion in upholding the department's decision to place the plaintiff's name on its central registry, as the hearing officer found that all three criteria in the department's policy manual for placement of the plaintiff's name on the central registry, intent, severity, and chronicity, were supported by substantial evidence.

Argued November 13, 2024—officially released March 18, 2025

Procedural History

Administrative appeal from the decision of a hearing officer of the defendant upholding the decision of the defendant to substantiate allegations of sexual abuse and to place the plaintiff's name on the Central Registry of Persons Responsible for Child Abuse and Neglect, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Hon. Henry S. Cohn*, judge trial referee; judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Christopher DeMarco, for the appellant (plaintiff).

Matthew J. Parenti, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa J. Khan*, assistant attorney general, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, William Daly, appeals from the judgment of the trial court dismissing his appeal from the decision of a hearing officer of the defendant, the Department of Children and Families (department), who upheld the department's decision to substantiate allegations of sexual abuse against a child and to place the plaintiff's name on the Central Registry of Persons Responsible for Child Abuse and Neglect (central registry).[1] See General Statutes § 17a-101k (c) (1).[2] On appeal, the plaintiff claims that the court improperly concluded that there was substantial evidence in the

[1] Section 17a-101k-1 (14) of the Regulations of Connecticut State Agencies provides: " 'Central registry' or 'registry' means the confidential data file maintained as part of the department's computerized database, of persons who have been substantiated as individuals responsible for an act or acts of child abuse or neglect and for whom the commissioner [of the department] has made a determination, based upon a standard of reasonable cause, that the individual poses a risk to the health, safety or well-being of children . . . ." See also General Statutes § 17a-101k (a); *Matthew M.* v. *Dept. of Children & Families*, 143 Conn. App. 813, 818 n.2, 71 A.3d 603 (2013). Our Supreme Court has observed that "the stated legislative purpose of the central registry is to prevent or discover abuse of children." (Internal quotation marks omitted.) *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 426 n.19, 94 A.3d 588 (2014); see also *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 573, 964 A.2d 1213 (2009); *Natasha B.* v. *Dept. of Children & Families*, 189 Conn. App. 398, 406, 207 A.3d 1101 (2019).

[2] General Statutes § 17a-101k (c) (1) provides in relevant part: "Following a request for appeal, the commissioner [of the department] or the commissioner's designee shall conduct an internal review of the recommended finding to be completed no later than thirty days after the request for appeal is received by the department. The commissioner or the commissioner's designee shall review all relevant information relating to the recommended finding, to determine whether the recommended finding is factually or legally deficient and ought to be reversed . . . ."

record to support the hearing officer's findings that (1) he had sexually abused a child and (2) his name should be placed on the central registry by the department.[3] We affirm the judgment of the trial court dismissing the plaintiff's administrative appeal.

The following facts, as found by the hearing officer,[4] and procedural history are relevant to this appeal. In March, 2022, the twenty-one year old plaintiff was employed as a substitute teacher and an assistant to the track coach at a public high school. The plaintiff previously worked as a substitute teacher at a public middle school. The principal of the middle school became aware that a female student in that middle school had interacted with the plaintiff on social media. The middle school principal advised the plaintiff "to make his social media private" and cautioned him against this type of contact with students enrolled in the middle school. The plaintiff denied knowing that the person who had contacted him attended the middle school where he worked.[5]

[3] In his statement of issues, the plaintiff also claims that the trial court "erred in dismissing [his] appeal." We need not address this claim separately, as it is based on the plaintiff's prevailing on either of his other claims.

[4] We note that the hearing officer relied on the department's Policy Manual (policy manual) in issuing her written decision. Our Supreme Court has stated: "Connecticut courts, including this court, have previously approved of using the policy manual as a reference in the absence of guidance in the relevant statutory provisions or regulations." *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 420, 94 A.3d 588 (2014). The policy manual is available to the public on the department's website at https://portal.ct.gov/dcf/policy/legal/v12 (last visited March 7, 2025). See, e.g., id., 421 n.15. The criteria for recommendation for placement on the central registry is set forth in § 22-4, formerly § 34-2-8, of the policy manual. See *Natasha B.* v. *Dept. of Children & Families*, 189 Conn. App. 398, 405 n.9, 207 A.3d 1101 (2019) ("Effective January 2, 2019, the department has updated its policy manual. The current version of the policy [for placement on the central registry] may now be found in § 22-4."); see also Dept. of Children and Families, Policy Manual § 22-4.

[5] In her investigation protocol, the department's social worker stated that the middle school principal reported the following: "I had one time that I understood [the plaintiff] responded to a girl who followed him on Instagram. [The plaintiff] said hi to the student and followed the student back. When

On March 25, 2022, the department received a report of suspected abuse or neglect from a caller who had received an email from a student reporting that some student athletes at the high school were concerned that the plaintiff "was exchanging social media messages with female students." Five days later, the department received a second report about the plaintiff, this time from the police, regarding concerns of an inappropriate relationship between the plaintiff and another high school student, A.[6]

The plaintiff had met A at the high school in the course of his employment. He inquired if she was a member of the senior class, but did not ask specifically for her age.[7] They discussed their mutual interest in running. The two communicated on social media, where the plaintiff told A that she "was pretty" and asked if he could use her picture as the lock screen and wallpaper for his cell phone. In subsequent social media messages, the plaintiff told A that she was "super sweet and very pretty [and that] on a serious note, you're literally the prettiest girl I've ever seen in the whole entire world [with an emoji with heart eyes]." Additionally, there was evidence before the hearing officer that

I asked him, [the plaintiff] denied knowing it was a student. [The plaintiff] said he responded hi hoping to have the person tell him who it was. I told [the plaintiff] that he can't have contact on social media with students. I told him it needed to be private if he was going to substitute in the building."

[6] In view of this court's policy of protecting the privacy interests of juveniles, we refer to the children who were the subjects of the department's investigation in this matter by initials. See *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 396 n.1, 94 A.3d 588 (2014).

On February 28, 2023, the plaintiff, pursuant to Practice Book § 11-20A (h), filed an ex parte motion for permission to use a pseudonym in this administrative appeal. The trial court denied this motion on April 18, 2023.

[7] General Statutes § 17a-93 provides in relevant part: "(1) 'Child' means any person under eighteen years of age, except as otherwise specified, or any person under twenty-one years of age who is in full-time attendance in a secondary school, a technical school, a college or a state accredited job training program . . . ."

A informed the department social worker that she was seventeen years old at the time of her interactions with the plaintiff.

the plaintiff complimented A's attire. A also stated that the plaintiff would not stop staring at her when he began working as a substitute teacher in her class while also looking at other girls in the class; indicated that she reminded him of a character on a television show; inquired about her sibling, who was a student in the middle school with whom he "played ball . . . at recess"; obtained her home address; and shared information about his interests and "his vacation life . . . ."

The plaintiff and A agreed to meet at a local shopping plaza where the plaintiff was accompanied by his parents. A and two others drove to the plaintiff's location, where he introduced A to his parents. A surmised that the plaintiff had spoken to his parents about her, as they inquired about her interest in nursing.

Two days later, the plaintiff and A met at a park, where he attempted to teach her how to skateboard. During this activity, the plaintiff held onto A's hips to assist her, and he helped her to get up after she fell. Afterward, they sat on swings at the park and talked, until a police officer informed them that the park was closing. The plaintiff walked A to her car, where he kissed her.

The high school principal subsequently became aware of concerns regarding the relationship between the plaintiff and A. Specifically, the high school principal learned that the plaintiff and A had communicated with each other on social media and had met at the park where they kissed. The plaintiff and A both confirmed these events to the principal, who then contacted the police.

The department commenced an investigation into the plaintiff's conduct with students. A informed an investigator that she felt as if the plaintiff was contacting her "obsessively" and that she felt pressured to kiss him at the park. A reported that she blocked the plaintiff

on social media after that incident and that she felt awkward upon seeing him in school. Although the plaintiff never sent A any sexual content or mentioned sex to her, she believed his intentions toward her were "obvious . . . ."

After A ended her online communications with the plaintiff on social media, he commented "cute" on the social media site of another female student. This student, D, replied that she thought the commentator was the plaintiff, her substitute teacher, which he confirmed. D then informed the plaintiff that she was fourteen years old. There was evidence that three middle school students learned of this online interaction and expressed their concerns to the middle school principal. Additionally, these students informed the middle school principal that they had heard from friends at the high school that the plaintiff had kissed A. "The [middle school] principal was familiar with the [plaintiff] and immediately called the high school principal to make sure that the [plaintiff] was removed from the building" and was informed that the plaintiff's employment had been terminated.

Following the completion of its investigation, the department substantiated the allegations of sexual abuse/exploitation[8] by the plaintiff against A and placed his name on the central registry. See General Statutes §§ 17a-101g and 17a-101k. The plaintiff subsequently

[8] Section 22-3 of the department's policy manual (policy manual) that was effective as of February 1, 2021, provides in relevant part: "Sexual abuse/Exploitation is any incident involving a child(ren)'s non-accidental exposure to sexual behavior. *Evidence of sexual abuse includes, but is not limited to the following . . . other verbal, written or physical behavior not overtly sexual but likely designed to 'groom' a child for future sexual abuse.*" (Emphasis added.) Dept. of Children and Families, Policy Manual § 22-3, p. 2.

The current version of § 22-3, effective as of April 12, 2023, contains identical language. Unless otherwise noted, all references in this opinion to § 22-3 of the policy manual refer to the version effective as of February 1, 2021.

requested an administrative hearing to appeal these determinations.[9] In accordance with this request, an administrative hearing was held on January 9, 2023.

On January 19, 2023, the hearing officer issued her written decision upholding the department's decision to substantiate the allegations of sexual abuse against the plaintiff and to place his name on the central registry. At the start of her analysis, the hearing officer determined that the department established that the plaintiff, as a substitute teacher who met A while she was a student in his class, was a person given access to A by a person responsible for her and entrusted with A's care for the purposes of education in accordance with General Statutes § 17a-93 (15).[10] She further concluded that the plaintiff's "considerable effort to engage" A constituted grooming,[11] that is "verbal, written and physical behavior not overtly sexual, but likely

[9] Section 17a-101k-6 (a) of the Regulations of Connecticut State Agencies provides in relevant part: "Any person . . . who has been substantiated as an individual responsible for child abuse or neglect [and] against whom a registry finding is made . . . may request an administrative hearing to contest the department's decisions." See also General Statutes § 17a-101k (c) and (d); Dept. of Children and Families, Policy Manual § 6-5, pp. 11—12.

[10] General Statutes § 17a-93 (15) provides: " 'Person entrusted with the care of a child or youth' means a person given access to a child or youth by a person responsible for the health, welfare or care of a child or youth for the purpose of providing education, child care, counseling, spiritual guidance, coaching, training, instruction, tutoring or mentoring of such child or youth." See also Regs., Conn. State Agencies § 17a-101k-1 (6); Dept. of Children and Families, Policy Manual § 22-3, p. 1; see generally *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 415, 94 A.3d 588 (2014).

[11] In a recent decision, the United States District Court for the District of New Mexico explained grooming as follows. "The two major commonalities in the definitions reviewed as well as the empirical studies of grooming are (a) some sort of inappropriate behavior on the part of the prospective abuser (whether it is a bribe, boundary violation, invasion of privacy, misstatement of morality, mischaracterizing an interaction as a 'game,' isolation, emotional manipulation, etc.) and (b) the function of this inappropriate behavior is to increase the likelihood that the adult can sexually abuse the child (by, for example, gaining access to them, gaining their trust, silencing them, isolating them, desensitizing them to nudity or sex, etc.). Each component of the definition may have different topographies in individual cases (e.g., some-

designed to lead to sexual behavior between an adult teacher and a minor student. If the [plaintiff's] intent was not obvious during their preliminary conversations, it became crystal clear when he kissed her at the park. . . . The [plaintiff] deliberately sought out a romantic relationship with a student and kissed her. This conduct meets the [d]epartment's operational definitions of sexual abuse grooming . . . and supports the [d]epartment's decision to substantiate the [plaintiff] for sexual abuse."

Next, the hearing officer addressed whether the plaintiff posed a risk to children and whether his name should

times the inappropriate behavior is removing a door to the child's bedroom, or sometimes it may be buying the child a bikini), but the function of the behavior is to increase the likelihood of future abusive contact. [N.] Bennett & [W.] O'Donohue, 'The Construct of Grooming in Child Sexual Abuse: Conceptual and Measurement Issues,' 23 J. Child Sexual Abuse 957, 968 (2014).

"Sexual grooming is the deceptive process used by sexual abusers to facilitate sexual contact with a minor while simultaneously avoiding detection. Prior to the commission of the sexual abuse, the would-be sexual abuser may select a victim, gain access to and isolate the minor, develop trust with the minor and often their guardians, community, and youth-serving institutions, and desensitize the minor to sexual content and physical contact. . . . [G. Winters et al.], 'Toward a Universal Definition of Child Sexual Grooming,' 43 Deviant Behavior 926, 933 (2022)." *United States* v. *Bindues*, 741 F. Supp. 3d 967, 1008–1009 (D. N.M. 2024), appeal filed (10th Cir. August 15, 2024) (No. 24-2117).

Furthermore, we note that the United States Court of Appeals for the Sixth Circuit has stated that "courts have used the term [grooming] to describe a variety of behaviors that appear calculated to prepare a child for a future sexual encounter. See *United States* v. *Gonyer*, 761 F.3d 157, 167 (1st Cir. 2014) (taking minor on a trip, buying him gifts, and permitting him to smoke cigarettes); *United States* v. *Lee*, 603 F.3d 904, 915 (11th Cir. 2010) (sending graphic photographs and promising gifts) . . . ." (Citation omitted.) *United States* v. *Fox*, 600 Fed. Appx. 414, 419–20 (6th Cir. 2015); see also *United States* v. *Brand*, 467 F. 3d 179, 203 (2d Cir. 2006) (sharing pictures, flirting, and attempting to gain affection constitute classic grooming behavior in preparation for future sexual encounter), cert. denied, 550 U.S. 926, 127 S. Ct. 2150, 167 L. Ed. 2d 878 (2007); see generally *United States* v. *Halamek*, 5 F.4th 1081, 1088 (9th Cir. 2021) (expert testimony on grooming demonstrated how seemingly innocent conduct could be part of seduction technique).

be placed on the central registry. "In making this determination, the [d]epartment must consider the intent of the perpetrator, the severity of the conduct, chronicity or pattern of behavior and the presence of substance abuse or domestic violence." With respect to the issue of intent, the hearing officer stated that the plaintiff, an adult with no apparent cognitive limitations, knew or reasonably was expected to know, that a relationship with A was prohibited and that such a relationship was likely to have a detrimental impact on her. "Even without specific training, the [plaintiff] had been cautioned about his social media activities and the boundaries between teachers and students." With respect to the severity of the plaintiff's actions, the hearing officer disagreed with the assessment of the department's social worker who testified that A had not suffered any significant impact or that the plaintiff's conduct displayed a serious disregard for A's well-being. Instead, the hearing officer concluded that sexual abuse perpetrated by a person entrusted with the care of a child demonstrated a serious disregard for the child's physical and emotional well-being. Finally, as to chronicity, the hearing officer stated: "The record reveals that the [plaintiff] engaged in inappropriate comments with more than one student, and continued to do so even after he was admonished against the practice by a school principal. The record reveals a young man who was singularly focused on finding a girlfriend, and he used the female students at his place of employment as his dating pool."

Ultimately, the hearing officer concluded that the department satisfied its burden of proof[12] and that the

[12] See General Statutes § 17a-101k (d) (2) ("[t]he burden of proof shall be on the commissioner [of the department] to prove that the finding is supported by a fair preponderance of the evidence submitted at the hearing"); see also *Natasha B.* v. *Dept. of Children & Families*, 189 Conn. App. 398, 408–409, 207 A.3d 1101 (2019).

plaintiff's name properly was placed on the central registry. Specifically, the hearing officer stated: "The facts of this case clearly meet the criteria for placement on the [c]entral [r]egistry. The [plaintiff] engaged in grooming behavior with a student in his class and kissed her. As a person with sufficient education to be employed as a substitute teacher, and with the warnings of his prior principal, the [plaintiff] knew, or should have known, that pursing a relationship with a student was not only impermissible, but also demonstrated a serious disregard for the student's welfare. [A] should have been able to trust that all of her teachers employed at her school would keep her safe and free from the pressures and expectations of an intimate relationship. Finally, the [plaintiff's] conduct was not an isolated incident, but rather a pattern of behavior that the [plaintiff] followed in an attempt to find a relationship. The behavior by the [plaintiff] is exactly the type of the conduct that the [d]epartment's [r]egistry was created to prevent. The [plaintiff's] failure to recognize how his behavior might be perceived by a seventeen year old girl, or that the consequences of his conduct might cause chaos, rumor and suspicion amongst the other students, reinforces the conclusion that the [plaintiff] poses a risk to children such that his name should be maintained on the [c]entral [r]egistry . . . ."

On February 28, 2023, the plaintiff filed an administrative appeal pursuant to General Statutes § 4-183,[13] challenging the hearing officer's decision to uphold the substantiation of sexual abuse and the placement of his name on the central registry.[14] On April 24, 2023, the

[13] General Statutes § 4-183 (a) provides in relevant part: "A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision may appeal to the Superior Court as provided in this section. . . . "

[14] Section 17a-101k-11 (b) of the Regulations of Connecticut State Agencies provides in relevant part: "Any individual found to be responsible for abuse or neglect who is aggrieved by the final decision of the hearing officer may appeal the final decision to the superior court in accordance with section

plaintiff amended his appeal to the trial court. The court, *Hon. Henry S. Cohn*, judge trial referee, heard argument from the parties on October 11, 2023. On October 26, 2023, the court issued a memorandum of decision dismissing the plaintiff's appeal. The trial court determined that the hearing officer's conclusions substantiating the determination of sexual abuse for purpose of the central registry and the decision to place the plaintiff's name on the central registry were supported by substantial evidence. The plaintiff thereafter appealed to this court. Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the court improperly concluded that the findings of the hearing officer substantiating the allegation of sexual abuse and placing his name on the central registry were supported by substantial evidence in the record and, as a result, the court improperly dismissed his administrative appeal. We conclude that the court properly dismissed the plaintiff's appeal.

We begin by setting forth the standard of review and legal principles relevant to the resolution of this appeal. "[J]udicial review of an administrative agency's action is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., and the scope of that review is limited. . . . When reviewing the trial court's decision, we seek to determine whether it comports with the [UAPA]. . . . [R]eview of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . *Neither this court nor the trial court may retry the case or substitute its own*

4-183 of the Connecticut General Statutes. . . ." See also General Statutes § 17a-101k (e); *Hogan* v. *Dept. of Children & Families*, 290 Conn. 545, 556, 964 A.2d 1213 (2009).

judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Conclusions of law reached by the administrative agency must stand if . . . they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . *The court's ultimate duty is only to decide whether, in light of the evidence, the* [*agency*] *has acted unreasonably, arbitrarily, illegally, or in abuse of* [*its*] *discretion.*" (Emphasis added; internal quotation marks omitted). *Natasha B.* v. *Dept. of Children & Families*, 189 Conn. App. 398, 403–404, 207 A.3d 1101 (2019); see also *Frank* v. *Dept. of Children & Families*, 312 Conn. 393, 402–403, 94 A.3d 588 (2014); *Commission on Human Rights & Opportunities* v. *Dance Right, LLC*, 230 Conn. App. 53, 72, 329 A.3d 1008 (2025); *F.M.* v. *Commissioner of Children & Families*, 143 Conn. App. 454, 474–75, 72 A.3d 1095 (2013).

"The substantial evidence rule imposes an important limitation on the power of the courts to overturn a decision of an administrative agency . . . . It is fundamental that a plaintiff has the burden of proving that the [C]ommissioner [of Children and Families], on the facts before [her], acted contrary to law and in abuse of [her] discretion . . . . The law is also well established that if the decision of the commissioner is reasonably supported by the evidence it must be sustained. . . . Furthermore, § 4-183 (j) provides in relevant part that [t]he court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact . . . . The reviewing court must take into account contradictory evidence in the record . . . *but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . .*" (Citations omitted; emphasis added;

internal quotation marks omitted.) *L. D.* v. *Commissioner of Children & Families*, 217 Conn. App. 150, 164, 287 A.3d 617 (2022); see also *Frank* v. *Dept. of Children & Families*, supra, 312 Conn. 403; *1st Alliance Lending, LLC* v. *Dept. of Banking*, 229 Conn. App. 664, 684, 328 A.3d 681 (2024); see generally *Cohen* v. *Dept. of Energy & Environmental Protection*, 215 Conn. App. 767, 791–92, 285 A.3d 760 (substantial evidence standard is highly deferential and permits less judicial scrutiny than clearly erroneous or weight of evidence standards of review), cert. denied, 345 Conn. 968, 285 A.3d 1126 (2022), and cert. denied, 345 Conn. 969, 285 A.3d 737 (2022).

Next, we set forth the relevant statutory language. "The [central] registry scheme is codified in two sections that work in tandem: General Statutes §§ 17a-101g and 17a-101k. Section 17a-101g sets forth the [department's] responsibilities upon receiving a report of abuse or neglect of a child: classification; evaluation; investigation; and determination of whether abuse or neglect has occurred. General Statutes § 17a-101g (a) and (b). The statute directs that: [i]f the [C]ommissioner of [Children and Families (commissioner)] determines that abuse or neglect has occurred, the commissioner shall also determine whether: (1) [t]here is an identifiable person responsible for such abuse or neglect; and (2) such identifiable person poses a risk to the health, safety, or well-being of children and should be recommended by the commissioner for placement on the [central registry] established pursuant to section 17a-101k. General Statutes § 17a-101g (b). The [department] is directed under § 17a-101k (i) to adopt regulations to implement the provision of that statute. . . . In accordance with § 17a-101k (i), the department promulgated regulations to implement the central registry." (Citation omitted; internal quotation marks omitted.) *Natasha B.* v. *Dept. of Children & Families*, supra, 189 Conn. App.

404; see also *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 568–70.

Additionally, we turn to the relevant regulations and the department's policy manual. Section 17a-101k-1 (4) of the Regulations of Connecticut State Agencies incorporates "sexual abuse" into the definition of child abuse for purposes of inclusion on the central registry.[15] See also Dept. of Children and Families, Policy Manual § 22-3, p. 2. The policy manual provides: "Evidence of sexual abuse includes . . . verbal, written or physical behavior not overtly sexual but likely designed to 'groom' a child for future sexual abuse." Id.

In the present case, the hearing officer found that the plaintiff met A while employed as a substitute teacher in the high school she attended. After discussing their mutual interest in running, the plaintiff initiated communications with A on social media.[16] The plaintiff repeatedly commented that A was "pretty" and asked to use her photograph as a background and lock screen on his cell phone. He described A as "super sweet" and sent her an "emoji with heart eyes." The two agreed to meet at a local plaza, where the plaintiff introduced A to his parents, who had been made aware of A and her interests. The plaintiff and A subsequently met at a park where he attempted to teach her how to skateboard. During this interaction, the plaintiff physically touched A by placing his hand on her hips to steady her on the skateboard and helped up her when she fell. After sitting together on a swing set, the plaintiff walked A to her car and then kissed her on the lips.

[15] Specifically, § 17a-101k-1 (4) of the Regulations of Connecticut State Agencies provides in relevant part: " 'Reports of child abuse or neglect' or 'referrals' means complaints received by the department alleging that a person under the age of eighteen . . . is in a condition that is the result of maltreatment such as . . . sexual abuse . . . ."

[16] There was evidence in the record that the plaintiff sought out A on social media.

The hearing officer concluded that, "[d]espite the differences in their circumstances and standing," the plaintiff "*made considerable efforts to engage* [*A*] . . . *Had the* [*plaintiff*] *been a boy in* [*A's*] *class*, *it could be said that he was wooing her*. But he was not a boy in her class, he was a teacher, and this was grooming behavior." (Emphasis added.) A described the plaintiff as "manipulative, and said that she knew what his intent was, even if he never discussed sex or implied anything sexual." Ultimately, the hearing officer concluded that the plaintiff "deliberately sought out a romantic relationship with a student and kissed her. This conduct meets the [d]epartment's operational [definition] of sexual abuse grooming . . . ." In dismissing the plaintiff's appeal, the trial court concluded that the determination by the hearing officer that the plaintiff had sexually abused A for purposes of the central registry was supported by substantial evidence. Specifically, the court stated: "The court . . . agrees with the hearing officer's application of the uncontested facts in the protocol to the conclusion regarding substantiation. As the hearing officer properly concluded, the plaintiff was not merely a fellow student. He was a teacher at the school. He took steps that were unwelcomed by the child to seek her to become involved in sexual behavior."

The plaintiff does not challenge the factual findings made by the hearing officer. Instead, he emphasizes the hearing officer's finding that the kiss between the plaintiff and A was " 'not overtly sexual.' " He further contends that the "record is completely devoid of any sexual references made by the plaintiff. In fact, [A] commented that the plaintiff never mentioned anything sexual in nature." Finally, the plaintiff asserts that there was no evidence that he exerted control or attempted to gain control over A, and, therefore, the hearing officer improperly concluded that he had sexually abused A

for purposes of including his name on the central registry. For these reasons, he contends that the hearing officer improperly determined that he had abused A. We disagree with the plaintiff's contentions.

First, we emphasize that, contrary to the argument of the plaintiff, the department's definition of grooming does not include an element of control. Rather, our careful review of the plaintiff's brief to this court leads us to conclude that he has imported that element of control from the department's definition of fondling, which is a separate and distinct means of sexual abuse. Section 22-3 of the policy manual provides in relevant part: "Evidence of sexual abuse includes, but is not limited to the following . . . fondling, including kissing, for the purpose of sexual gratification of the offender, or the purposes of shaming, humiliating, shocking or exerting control over the victim . . . ." Policy Manual, supra, § 22-3, p. 2.

We acknowledge that the hearing officer made an isolated reference to "fondling" as a basis to support the substantiation of sexual abuse. Nevertheless, a review of her decision in toto reveals that the primary reason to substantiate the plaintiff for sexual abuse was for grooming.[17] We emphasize that the department's definition of grooming does not contain a requirement that the perpetrator act with a purpose of sexual gratification or to exert control, or an attempt to do so. Further, contrary to the argument of the plaintiff, the finding that the kiss between the plaintiff and A was not " 'overtly sexual' " does not preclude a conclusion that his conduct constituted grooming. As such, the plaintiff's conduct toward A, including his numerous social

[17] See generally *Lazar* v. *Ganim*, 334 Conn. 73, 97–98, 220 A.3d 18 (2019) (although court made isolated reference to "the result of the primary would have been different" standard, it was clear from reading of decision in its entirety that it understood and applied proper "might have been different" standard).

media interactions, his compliments on her clothing and physical appearance, his plan to use her photograph as his background on his cell phone, his physical contact with her while teaching her skateboarding, his meeting with her outside of school on several occasions, and his initiating a kiss, constitutes substantial evidence in the record to support the hearing officer's determination that sexual abuse via grooming occurred.

The record amply supports the determination by the hearing officer that the plaintiff sexually abused A. See *Frank* v. *Dept. of Children & Families*, supra, 312 Conn. 402. We are mindful of our limited review pursuant to § 4-183, that we may not retry the matter or substitute our judgment for that of the hearing officer on the weight of the evidence or questions of fact, and that our ultimate duty is to determine whether the hearing officer, in issuing her order, acted unreasonably, arbitrarily, illegally or in an abuse of her discretion in view of all of the evidence. *Hogan* v. *Dept. of Children & Families*, supra, 290 Conn. 560–61. Applying this standard, we conclude that the findings and conclusion of the hearing officer upholding the substantiation of the allegations of sexual abuse with respect to A were supported by substantial evidence, and therefore the trial court properly rejected his claim to the contrary.

The plaintiff also contends that the court improperly determined that there was substantial evidence in the record to support the decision to place his name on the central registry. Specifically, he argues that none of the applicable factors, intent, severity, and chronicity, supported the department's decision to place his name on the central registry. We disagree.

Section 22-4 of the policy manual[18] "requires the department to make a separate finding as to whether

[18] Under the heading "Policy," § 22-4 of the policy manual provides: "In all cases in which the [d]epartment substantiates abuse or neglect by an identified perpetrator, the investigator in conjunction with his supervisor shall review the case for a determination of whether the perpetrator poses

a person responsible for child abuse or neglect poses a risk to children, and if so, whether the person's name should be placed on the central registry. In making that determination, the department must consider the responsible person's intent, the severity of the impact on the children, [and] the chronicity of the . . . conduct . . . ." *F.M.* v. *Commissioner of Children & Families*, supra, 143 Conn. App. 463–64; see also *L. D.* v. *Commissioner of Children & Families*, supra, 217 Conn. App. 159; see generally Policy Manual, supra, § 22-4. The presence of all three factors, intent, severity, and chronicity, is not required to place a person's name on the central registry. *Natasha B.* v. *Dept. of Children & Families*, supra, 189 Conn. App. 405 n.10 ("department policy manual . . . clarifies that intent, severity, and chronicity do not all have to be found" to include person on central registry); see also Policy Manual, supra, § 22-4, p. 1 ("[y]ou do not have to have all three elements to justify placement on the central registry").

In *F.M.* v. *Commissioner of Children & Families*, supra, 143 Conn. App. 454, we stated: "The intent factor focuses on whether the plaintiff had sufficient knowledge and resources, the ability to utilize them, and an understanding of the implications of failing to provide appropriate care . . . but that he made a conscious decision not to do so." Id., 464; see also Policy Manual, supra, § 22-4, p. 1 (in determining intent factor, department may also consider whether plaintiff intended to cause harm; whether there was documentation of cruelty by plaintiff, and whether plaintiff reasonably would

a risk to health, safety and well-being of children and make a determination as to whether the perpetrator should be recommended for placement on the [d]epartment's [c]entral [r]egistry. In every case, [d]epartment staff shall engage in an analysis as to the person's intent, the severity of the impact to the child, the chronicity of neglectful conduct and the involvement of substance abuse or intimate partner violence in the abuse or neglect to determine whether or not the person poses a risk to children." Policy Manual, supra, § 22-4, p. 1. The present matter does not involve substance abuse or intimate partner violence.

have been expected to know that his acts or statement would be detrimental to child's health, safety, or well-being).

In addressing the intent factor, the hearing officer stated: "The [plaintiff] . . . is an adult with no apparent cognitive limitations. At the time of the incident, the [plaintiff] was working as a substitute teacher in a local high school. He knew, or was reasonably expected to know, that a relationship between a teacher and a student was prohibited conduct and was likely to have a detrimental impact on the student. Even without specific training, the [plaintiff] had been cautioned about his social media activities and the boundaries between teachers and students. Nevertheless, the [plaintiff] pursued a relationship with his student and kissed her." The trial court similarly observed that "the plaintiff was aware that he could not exceed the boundaries between him and a student."

On appeal, the plaintiff contends that he, as a twenty-one year old, cannot be considered an adult because "male brains don't mature under twenty-five years of age . . . ." In support of this contention, he directs us to the admission by the department's investigator that she was aware of studies to this effect. The hearing officer, however, was not required to credit or rely on that evidence. See *Pizzo* v. *Commissioner of Motor Vehicles*, 62 Conn. App. 571, 578, 771 A.2d 273 (2001) (credibility of witnesses and determination of factual issues are matters within province of hearing officer). Additionally, the plaintiff's contention ignores the other evidence in the record that supports the hearing officer's determination of intent to support placing the plaintiff's name on the central registry. The hearing officer heard testimony from the department social worker that it was reasonable to expect that the plaintiff, as a substitute teacher in a position of authority over students, would know that he should not engage in a

romantic relationship with students such as A. Furthermore, his inappropriate conduct, described by the hearing officer as "wooing" A, occurred after he had been warned about maintaining boundaries with students by the principal at the middle school, including direction to avoid contact with students on social media. Mindful of our deferential standard of review, we conclude that the hearing officer's determination that the department had satisfied the intent criterion for placement on the central registry was supported by substantial evidence under the facts and circumstances of this case.

In addressing the severity factor, the hearing officer stated that there must be a determination of whether "there was a serious adverse impact to the victim, or a serious disregard for [her] welfare."[19] The hearing officer rejected the testimony of the department's social worker that there had not been any significant impact to A as a result of the plaintiff's conduct or that his conduct failed to demonstrate a serious disregard for her well-being. The hearing officer determined: "There are certain boundaries and behavior norms that are expected between students and teachers. When these are violated, there is an inherent risk of trust issues that may be triggered in the victim, even if this response is not immediate or tangible. Adult sexual behavior, even if limited to grooming and kissing, is a violation of the trust between a teacher, who is entrusted with

[19] Section 22-4 of the policy manual sets forth the following questions to consider with respect to the severity criteria for placement on the central registry: "Regardless of intent, would the perpetrator have been reasonabl[y] expected to know that his/her actions had a high likelihood of resulting in serious injury to the victim? Did the abuse result in death; rendering unconscious; concussion; internal head injury; lasting physical impairment of the normal functioning of the child; or from the perspective of qualified medical personnel, the necessity for immediate medical attention for the victim? Is the impact on the child likely to be of lasting duration? If no impact, was there serious disregard for the child's well-being?" Policy Manual, supra, § 22-4, p. 2.

the student's care and well-being, and the student. Further, the consequences of the relationship in terms of peer response also supports the conclusion that the [plaintiff] seriously disregarded [A's] well-being." In dismissing the plaintiff's appeal, the trial court noted that the plaintiff caused harm to A's "emotional status . . . ."

As we stated previously, the hearing officer was free to reject some of the testimony of the department's social worker. *Pizzo* v. *Commissioner of Motor Vehicles*, supra, 62 Conn. App. 578. The social worker also testified that A was impacted negatively in that she "felt uncomfortable and pressured and that it was an awkward and weird relationship to be participating in." A told the department social worker that the plaintiff had contacted her via text messages and social media. She felt some pressure to kiss him at the park, and she spent time with him just "to shut him up." She also concluded that his behavior was "manipulative." Finally, A became the subject of rumor and gossip among the students at two schools.

It is significant that the plaintiff's conduct and interactions with A occurred in the context of his employment as a substitute teacher at A's high school. In a somewhat analogous situation, our Supreme Court stated: "The plaintiff, as [a] teacher, was placed into a unique position to have an impact on [the student's] life. A young person's experience at school shapes his or her identity. School is where our youths learn about the world, how to interact with one another, how to work together, and how to form ties with people inside of a community infused with many cultures." *Frank* v. *Commissioner of Children & Families*, supra, 312 Conn. 425. In the present case, the plaintiff used his position as a teacher in a manner that impacted A's life negatively. On the

basis of the evidence, the hearing officer properly determined that the plaintiff's conduct toward A demonstrated a serious disregard for her well-being. Given the facts and circumstances of this case, the hearing officer's determination that the department had satisfied the severity criterion for placement on the central registry was supported by substantial evidence.

In addressing the chronicity factor, the hearing officer stated that "the [d]epartment reviews whether there was a pattern or chronic nature to the neglect regardless of the measurable impact to the victim."[20] In determining that this criterion supported placing the plaintiff on the central registry, the hearing officer found that he had made "inappropriate comments" to additional students near the time of his interactions with A that demonstrated a pattern where he exploited his position to try to obtain a girlfriend. See, e.g., *F.M.* v. *Dept. of Children & Families*, supra, 143 Conn. App. 465.

There was evidence of multiple incidents of the plaintiff's improper conduct with students. First, the plaintiff, after an interaction online with a middle school student, was warned by the principal at that school against engaging in such behavior and instructed to make his social media "private." Despite this directive, the plaintiff engaged in online communications with A, which in turn led to meeting her outside of school on two separate occasions, culminating with his kissing her. After A blocked him, she described the plaintiff as "desperate to find someone else." Thereafter, the

[20] Section 22-4 of the policy manual sets forth the following questions to consider with respect to the chronicity criteria for placement on the central registry: "Was this an isolated incident? If not, how often has it occurred, and over what period of time? Was there a pattern or chronic nature to the neglect or abuse regardless of the measurable impact to the victim? Was there a previous substantiation of neglect or abuse by this perpetrator and was the prior substantiation for an incident or conduct related to the current substantiation?" Policy Manual, supra, § 22-4, p. 2.

department received information from an anonymous caller that the plaintiff had contacted "some of the female students" of the school on social media. The anonymous caller identified one student in particular, a fourteen year old girl, D. The principal of the high school also told the department's social worker that rumors had been circulating regarding the plaintiff's contacts with students, although he was unable to provide any additional details. The mother of D stated to the department social worker that the plaintiff must have searched for D on social media or had a contact in common with D, the plaintiff told D where he lived, and he commented online that D was "cute." D's mother further reported to the department social worker that D had stated that the plaintiff "was posting on social media pictures of himself wearing [a school employee] badge and talking about how he smokes marijuana." After the plaintiff learned that D was only fourteen years old, he wrote "RIP" on her social media, which meant "dead" according to D. D's mother expressed her concern that the plaintiff would retaliate against her daughter.

Given this record, we conclude that the hearing officer's determination of chronicity was based on substantial evidence. We iterate that the hearing officer determined that "[t]he record reveals that the [plaintiff] engaged in inappropriate comments with more than one student, and continued to do so even after he was admonished against this practice by a school principal. . . . [The plaintiff] used the female students at his place of employment as his dating pool . . . [and his] conduct was not an isolated incident, but rather a pattern of behavior that [the plaintiff] followed in an attempt to find a relationship." Furthermore, we emphasize that it is not our role to second-guess the factual findings and discretionary decisions of the department's hearing officer. *L. D.* v. *Commissioner of Children & Families*,

supra, 217 Conn. App. 170–71. Thus, although it is not necessary to do so, the department presented evidence that supported the hearing officer's finding of all three factors, intent, severity, and chronicity. Those findings supported placing the plaintiff's name on the central registry. On the basis of the foregoing, we conclude that the court properly determined that the hearing officer did not act unreasonably, arbitrarily, illegally, or in abuse of her discretion in upholding the decision placing the plaintiff's name on the central registry. Accordingly, the court properly dismissed the plaintiff's administrative appeal.

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER R. JACOB-DICK *v.* CHARLES H. DICK (AC 46535)

Bright, C. J., and Elgo and Cradle, Js.*

Syllabus

The defendant appealed from the trial court's judgment granting the plaintiff's postdissolution motion for contempt with respect to the defendant's failure to pay certain child health care expenses. The defendant claimed, inter alia, that the court abused its discretion in finding him in contempt. *Held*:

The trial court abused its discretion in finding the defendant in contempt because, in light of the defendant's payment of all health care expenses specified in the plaintiff's motion for contempt prior to the hearing on the motion, the defendant's conduct could not reasonably be viewed as wilful disobedience of a court order.

This court concluded that, although the defendant's incarceration following the trial court's finding of contempt was improper in light of its conclusion that the trial court abused its discretion in finding him in contempt, the trial court's order that the defendant be taken into custody until the alleged arrearage was purged did not constitute an improper criminal sanction, as

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

by its plain terms the sanction was conditional in nature and allowed the defendant to end the sentence and discharge himself by paying the sum of the arrearage.

Argued November 20, 2024—officially released March 18, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Howard T. Owens, Jr.*, judge trial referee; judgment dissolving the marriage and granting certain other relief in accordance with the parties' settlement agreement; thereafter, the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, granted the plaintiff's motion for contempt, and the defendant appealed to this court. *Reversed*; *orders vacated*; *judgment directed.*

Dana M. Hrelic, with whom were *Meagan A. Cauda*, and, on the brief, *Jon T. Kukucka*, for the appellant (defendant).

Jenna McPartland, self-represented, filed a brief as the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Charles H. Dick, appeals from the judgment of the trial court granting the post-judgment motion for contempt filed by the self-represented plaintiff, Jennifer R. Jacob-Dick, known also as Jenna McPartland. On appeal, the defendant claims that the court (1) abused its discretion in finding him in contempt and (2) imposed an improper criminal sanction. We agree with the defendant's first claim and, accordingly, reverse the judgment of the trial court.

The record discloses the following undisputed facts. The parties married in 2004, and three children were

born of the marriage. Following the subsequent breakdown of their marriage, the parties entered into a comprehensive separation agreement that the court incorporated into its judgment of dissolution. Pertinent to this appeal is paragraph 9.2 of that agreement, which obligates each party to pay 50 percent of the children's "reasonable unreimbursed medical, surgical, psychiatric, psychological hospital, dental, optical, and nursing expenses, and the cost of prescriptive drugs . . . ." On October 30, 2015, the court dissolved the marriage, finding that it had broken down irretrievably without attributing fault to either party as to the cause.

On October 13, 2022, the plaintiff filed a postjudgment motion for contempt by completing a form prepared by the Judicial Branch for use in our family courts. See Connecticut Judicial Branch form JD-FM-173. That form asks the applicant to identify the "Court Order and ways the Order has not been followed" and then instructs in relevant part: "List specific language of the court order you claim is not being followed. Then, explain exactly how the order is not being followed. You must be specific. . . ." The plaintiff nonetheless did not list any specific language from a court order but, rather, stated: "See attached. See Stipulation 328.00, Order 328.10, Agreement/Order 148.00." In a document appended to that form, the plaintiff alleged that the defendant had failed to pay (1) an outstanding arrearage of $500 for child health care expenses, (2) $50 "for contact lenses for the youngest child," and (3) $308.50 "for an eye exam, lens fitting, and contact lenses for [the] same child."[1] The plaintiff concluded her motion by asking the court to hold the defendant in contempt and order him "to pay these expenses . . . ."[2]

[1] The plaintiff also alleged in her motion that the defendant had failed to comply with his child support obligations. The plaintiff withdrew that claim at the outset of the April 12, 2023 hearing, affirmatively acknowledging that she was "not owed any money in child support."

[2] The total amount of health care expenses specified in the plaintiff's motion for contempt is $858.50.

The parties appeared before the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, on March 22, 2023. When the court inquired as to whether the defendant was representing himself,[3] the defendant replied: "I am here today to try and get this matter resolved and disposed hopefully once and for all. In my estimation of what has been served on me by the plaintiff, it would cost me more money to have an attorney here, compared to the dollar amounts in question. And so just a simple cost benefit analysis I decided to show up myself and I will do my very best under some very difficult circumstances to represent my interests in my case as best as I can."

In response, the court stated: "I want to advise you that if you're found in contempt, you could be incarcerated . . . ." When the court then informed him that it would entertain a reasonable continuance request, the defendant replied, "[g]iven what Your Honor has just said about incarceration, I would make that request." The court then addressed the plaintiff and stated: "There are certain rules that I have to comply with and one of them, especially when there's a real risk of someone going to jail, is to give that person a last chance to pony up the money . . . ." The court thus continued the matter until April 12, 2023, and cautioned the defendant as follows: "I'll decide your claims and I'll decide [the plaintiff's] claims, and then I'll make a ruling. But you've been forewarned that if I find you in contempt of court, I'll probably incarcerate you. Just beware."

On April 5, 2023, the defendant filed an objection to the motion for contempt, in which he argued, inter alia, that the plaintiff had failed to comply with the requirements of Practice Book § 25-27, as her motion

[3] The defendant appeared in a self-represented capacity before the trial court at the March 22 and April 12, 2023 hearings. He subsequently was represented by counsel at the time of his May 2, 2023 motion for reargument and reconsideration.

failed to specify "the relevant and specific language of the court orders that the plaintiff claims are being 'wilfully violated' by the defendant."[4] The defendant also claimed that he had made payment to the plaintiff for *all* of the health care expenses specified in her motion for contempt, stating: "The plaintiff has received $858.50 in the form of a Schwab Check #106 as a good faith settlement offer seeking full and final resolution of her claims in her motion for contempt . . . in lieu of costly and time-consuming litigation. As of the filing of this objection, the plaintiff has not yet cashed the check."

The court conducted a hearing on April 12, 2023, at which both parties testified. During her testimony, the plaintiff confirmed that she had received the check from the defendant in the amount of $858.50 prior to the hearing. The plaintiff stated that she "believe[d] that check is intended to . . . cure" her motion for contempt. The plaintiff testified that she had not cashed that check because she "wanted to have a hearing." The plaintiff also alleged that the defendant had failed to pay additional health care expenses beyond those specified in her motion for contempt.[5]

In his testimony, the defendant emphasized that he paid $858.50 to the plaintiff "last week" and that he did so "in the hopes that we could have a swift and simple resolution to this matter." The defendant further testified that he was "at a loss for what obligations . . . I

[4] Practice Book § 25-27 (a) provides in relevant part: "Each motion for contempt must state . . . the date and specific language of the order of the judicial authority on which the motion is based [and] the specific acts alleged to constitute the contempt of that order, including the amount of any arrears claimed due as of the date of the motion or a date specifically identified in the motion . . . ."

[5] The plaintiff testified that the defendant had not paid additional expenses that were incurred subsequent to the filing of her motion for contempt—namely, $299 for two dental bills and $219.98 for an order of contact lens. It is undisputed that the plaintiff did not amend her motion for contempt to include those expenses.

am supposed to fulfill that I have not because I cannot see them specified in the plaintiff's motion [for contempt], and . . . the plaintiff has a check in her hand to cover any and all claimed amounts [in her motion for contempt] . . . ." When the defendant then noted that a $100,000 trust fund had been established for child related expenses in accordance with the parties' separation agreement, the following colloquy ensued:

"The Court: Sir, that's all in the record.

"[The Defendant]: Yes, so—

"The Court: You don't have to take my time to read what's already available in the record. That's not in dispute—

"[The Defendant]: Okay, I was going—

"The Court: Don't interrupt me, man. You're going to get into trouble, and it's not civil contempt. It's called criminal contempt. Don't interrupt a judge when he's talking.

"[The Defendant]: I apologize, Your Honor.

"The Court: Just don't do it.

"[The Defendant]: I apologize, Your Honor. I won't do it.

"The Court: Just don't do it. What you're reading is not necessary. It's a waste of my time. It's a waste of your ex-wife's time. It's a waste of the staff's time."

After the defendant's testimony concluded, the court questioned the plaintiff as follows:

"The Court: Okay, is it your testimony that between March 22 and today, April 12, 2023, you've received the money from [the defendant]?

"[The Plaintiff]: I received some money from [the defendant], yes.

"The Court: You did. And is that the check that you received?

"[The Plaintiff]: That is a check, yes.

"The Court: What is the date of the check?

"[The Plaintiff]: April 4, 2023.

"The Court: And what is the amount of the check?

"[The Plaintiff]: $858.50.

"The Court: Okay."

The court then heard closing arguments from the parties. At the time, the defendant argued that he had "acted in good faith" and reiterated that he had "sent the plaintiff a check in the amount of $858.50 corresponding to what I understood were the [amounts specified] in her [motion for contempt]."

When closing arguments concluded, the court stated: "The testimony of the defendant is found to be not credible. He spent more time and effort in delaying payments than he has in being candid with the mother of his children with regard to payment of [health care] expenses, which the court believes to be reasonable. His actions are overwhelmingly, in the court's opinion, done in bad faith to delay making his court-ordered payments in a timely manner. He has engaged historically throughout the history of this case, postjudgment, in obstructing the orders of the court and delaying compliance with court-ordered payments. The court finds [the defendant] in contempt of court. I find an arrearage total . . . of $1377.75. I'm ordering that you be taken into custody until you purge that amount. And the matter is ordered to continue to monitor compliance [on] Wednesday, April 26. Court stands in recess."[6]

[6] The court subsequently issued an order, in which it stated that "the plaintiff has carried her burden of proof by clear and convincing evidence that the defendant has wilfully violated clear orders of the court." The court thus found the defendant in contempt and ordered "the defendant be committed to the custody of the Commissioner of Correction with a purge

The defendant subsequently filed a motion for reargument and reconsideration, in which he argued, inter alia, that the plaintiff's motion for contempt "fails to comply with Practice Book § 25-27 which requires that a motion for contempt must state the date and specific language of the order [and] the specific acts alleged to constitute contempt of that order . . . ." The defendant also argued that the plaintiff, at the April 12, 2023 hearing, "raised other claims of which the defendant did not have notice . . . . The plaintiff did not amend her motion to include these allegations." The court summarily denied that motion by order dated May 19, 2023, and this appeal followed.

I

The defendant's primary contention is that the court abused its discretion in finding him in contempt. On the undisputed facts of this case, we agree.

"To constitute contempt, it is not enough that a party has merely violated a court order; the violation must be wilful. . . . It is the burden of the party seeking an order of contempt to prove, by clear and convincing evidence, both a clear and unambiguous directive to the alleged contemnor and the alleged contemnor's wilful noncompliance with that directive. . . . [T]he trial court's determination that the violation was wilful [is governed by] the abuse of discretion standard." (Citations omitted.) *Puff* v. *Puff*, 334 Conn. 341, 365–66, 222 A.3d 493 (2020); see also *Ramin* v. *Ramin*, 281 Conn. 324, 336, 915 A.2d 790 (2007) ("[t]he abuse of discretion

bond amount of $1377.75." The record before us does not indicate precisely how long the defendant was incarcerated; in her appellate brief, the plaintiff avers that the defendant "was incarcerated for approximately six hours, in which time he was able to make the correct purge payment." Approximately two weeks after the April 12, 2023 hearing, the court entered a supplemental order, which states: "Upon receipt of the funds for the purge, the Clerk's Office is ordered to disburse $1377.75 to [the plaintiff] by sending the funds to [the plaintiff]."

standard applies to a trial court's decision on a motion for contempt"). We review the factual findings that underlie a court's contempt determination pursuant to the clearly erroneous standard. See *Talbot* v. *Talbot*, 148 Conn. App. 279, 289, 85 A.3d 40, cert. denied, 311 Conn. 954, 97 A.3d 984 (2014).

The appellate courts of this state often are presented with complex and challenging claims. This is not one of them. In her motion for contempt, the plaintiff specifically alleged that the defendant failed to pay a total of $858.50 in child health care expenses. The record unequivocally demonstrates that the defendant tendered payment in that amount to the plaintiff more than one week *prior* to the contempt hearing, as the plaintiff repeatedly acknowledged in her testimony. In light of that admission, the court's finding of wilful noncompliance cannot stand.

We are particularly troubled by the fact that, after the plaintiff admitted on cross-examination that she received a check from the defendant in the amount of $858.50 prior to the April 12, 2023 hearing in what she characterized as an attempt to "cure" her motion for contempt, the court conducted its own brief examination of the plaintiff, in which she confirmed not only her receipt of that check, but the date and amount thereof. In light of the plaintiff's admission that the defendant tendered payment for *all* of the health care expenses specified in her motion for contempt prior to the contempt hearing, the court's failure to acknowledge the defendant's compliance in that regard is inexplicable.

Moreover, the defendant had no notice prior to the April 12, 2023 hearing that the plaintiff would be claiming additional unpaid health care expenses as a basis for her motion for contempt beyond the $858.50 specified therein. Nevertheless, at the outset of the plaintiff's

testimony at the hearing, the court stated: "[E]xplain to me what it is that you claim [the defendant] has not paid you with specificity with regard to health care expenses." The defendant, who was self-represented at that time, then stated: "Your Honor, may I ask a question?" The court replied, "No." The plaintiff then proceeded to detail additional health care expenses that were not included in her motion for contempt. See footnote 5 of this opinion.

When the plaintiff finished her testimony on direct examination, the defendant immediately revisited his previous attempt to obtain clarification from the court regarding the scope of the contempt proceeding:

"[The Defendant]: Is now the time where I can ask Your Honor a question first before I ask her any questions?

"The Court: You're going to ask me a question?

"[The Defendant]: Yeah.

"The Court: About what?

"[The Defendant]: Well, I filed [an objection] to her [motion for contempt] that we are having a discussion on right now. And all the information that was relayed in [the plaintiff's] testimony is not included in the motion [for contempt], so I came here today—well, if I read [her motion for contempt], understanding that her claim for monetary—money that she claimed is owed is only $800, like $830."

In response, the court did not address the substance of defendant's objection and simply stated: "Her testimony is what it is."

The defendant then proceeded to cross-examine the plaintiff in an attempt to ascertain the total amount of claimed health care expenses. When the defendant remarked to the plaintiff that "you testified [that the

motion for contempt] does not specify, enumerate or total any dollar amounts owed by the defendant," the court interrupted, stating: "Her testimony does, sir. So, let's move along." The defendant thereafter reiterated in his closing argument that he had "sent the plaintiff a check in the amount of $858.50 corresponding to what I understood were the [amounts specified] in her [motion for contempt]."

Despite the foregoing, the court found the defendant in contempt for having failed to pay a total of $1377.75 in health care expenses, which sum included the $858.50 specified in the plaintiff's motion for contempt. In so doing, the court ignored the uncontroverted fact that the defendant paid the plaintiff $858.50 for those health care expenses *prior* to the contempt hearing, as the plaintiff admitted in her testimony. Furthermore, the court found him in contempt for additional expenses that were not specified in the motion for contempt, in contravention of Practice Book § 25-27; see footnote 4 of this opinion; and principles of due process. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 489, 500, 970 A.2d 570 (2009) (motion for contempt must set forth alleged misconduct with particularity to comply with due process requirements); *Leonova* v. *Leonov*, 201 Conn. App. 285, 316–17, 242 A.3d 713 (2020) (due process of law requires parties charged with contempt to be advised of charges against them), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021).

Civil contempt is "avoidable through obedience . . . ." *International Union, United Mine Workers of America* v. *Bagwell*, 512 U.S. 821, 827, 114 S. Ct. 2552, 129 L. Ed. 2d 642 (1994). In light of the defendant's payment of all health care expenses specified in the plaintiff's motion for contempt prior to the April 12, 2023 hearing, the defendant's conduct cannot reasonably be viewed as wilful disobedience of a court order. See *Connolly* v. *Connolly*, 191 Conn. 468, 483, 464 A.2d

837 (1983). We therefore conclude that the court abused its discretion in finding the defendant in contempt.

II

The defendant also argues that the court imposed an improper criminal sanction by ordering his immediate incarceration until the arrearage was purged.[7] Although we agree that his incarceration was improper in light of our conclusion in part I of this opinion, we disagree that the court's order constituted an improper criminal sanction.

We begin by noting that "[t]he court's authority to impose civil contempt penalties arises not from statutory provisions but from the common law. . . . The penalties which may be imposed . . . arise from the inherent power of the court to coerce compliance with its orders. In Connecticut, the court has the authority in civil contempt to impose on the contemnor either incarceration or a fine or both." (Citations omitted.) *Papa* v. *New Haven Federation of Teachers*, 186 Conn. 725, 737–38, 444 A.2d 196 (1982). The abuse of discretion standard governs claims involving the propriety of a civil contempt sanction ordered by the court. See id., 738; *Edmond* v. *Foisey*, 111 Conn. App. 760, 774, 961 A.2d 441 (2008).

As the United States Supreme Court has explained, the critical consideration in determining whether a sanction is civil or criminal in nature is "the character of the relief that the proceeding will afford. If it is for civil contempt the punishment is remedial, and for the

[7] In the introduction section of his principal appellate brief, the defendant relatedly contends that "because the sanctions imposed were . . . criminal in nature . . . expungement of the record of incarceration is also warranted." Apart from that prefatory statement, the defendant provided no mention or analysis of this contention in either his principal or reply brief, rendering it inadequately briefed. See, e.g., *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008). We therefore decline to review that abstract assertion.

benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. . . . If the relief provided is a sentence of imprisonment, it is remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order, and is punitive if the sentence is limited to imprisonment for a definite period." (Citation omitted; internal quotation marks omitted.) *Hicks* v. *Feiock*, 485 U.S. 624, 631–32, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988); accord *Ullmann* v. *State*, 230 Conn. 698, 709, 647 A.2d 324 (1994) ("it is the nature of the relief itself that is instructive in determining whether a contempt is civil or criminal"). The court emphasized that "the conditional nature of the punishment renders the relief civil in nature because the contemnor can end the sentence and discharge himself at any moment by doing what he had previously refused to do." (Internal quotation marks omitted.) *Hicks* v. *Feiock*, supra, 633; see also *Shillitani* v. *United States*, 384 U.S. 364, 368, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966) ("[w]hen the [contemnors] carry the keys of their prison in their own pockets . . . the action is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees" (citation omitted; internal quotation marks omitted)); *Mays* v. *Mays*, 193 Conn. 261, 266, 476 A.2d 562 (1984) ("[t]he sanction of confinement until purged" is properly "classified as civil rather than criminal" because "the contemnor [is] in a position to purge himself" (internal quotation marks omitted)).

Bound by that precedent, we conclude that the sanction in the present case was civil in nature. At the conclusion of the hearing, the court found the defendant in contempt and found an arrearage of $1377.75. It then stated to the defendant: "I'm ordering that you be taken into custody until you purge that amount." By its plain

terms, that sanction was conditional in nature and allowed the defendant to end the sentence and discharge himself by paying that sum. For that reason, we conclude that the court's order did not constitute an improper criminal sanction.

The judgment of contempt is reversed and the orders stemming from that judgment are vacated, and the case is remanded with direction to deny the plaintiff's October 13, 2022 motion for contempt.

In this opinion the other judges concurred.

L. K. *v.* K. K.*
(AC 47091)

Bright, C. J., and Suarez and Westbrook, Js.**

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed from the judgment of the trial court denying her postdissolution motion for an order requiring the defendant to pay the balance of attorney's fees awarded as part of the judgment of dissolution. The plaintiff claimed, inter alia, that the court improperly denied her motion on the ground that she had failed to ensure that a new, court-ordered fee affidavit was provided to the court. *Held*:

The trial court neither misapplied the law nor abused its discretion in denying the plaintiff's motion for order, as the plaintiff, who did not appeal from the court's order to provide a new fee affidavit, had an obligation to comply with the court's valid and unambiguous order requiring a new fee affidavit in support of her motion for order.

Argued November 21, 2024—officially released March 18, 2025

* 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 endeavor, where possible, not 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 listing of judges reflects their seniority status on this court as of the date of oral argument.

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Tindill*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Colin*, *J.*, denied the plaintiff's postjudgment motion for contempt and ordered certain funds from the sale of the marital residence to be held in escrow; subsequently, the plaintiff filed a motion for order regarding the funds in escrow; thereafter, this court, *Sheldon*, *Elgo* and *Stevens*, *Js.*, reversed in part the judgment of the trial court and ordered further proceedings; subsequently, the court, *Heller*, *J.*, denied the motion to intervene filed by the Law Offices of Attorney Gary I. Cohen, P.C., and ordered, inter alia, an updated affidavit of attorney's fees; thereafter, the court, *Kowalski*, *J.*, denied the plaintiff's motion for order, and the plaintiff appealed to this court. *Affirmed.*

Yakov Pyetranker, for the appellant (plaintiff).

K. K., self-represented, the appellee (defendant).

Opinion

WESTBROOK, J. In this marital dissolution action, the plaintiff, L. K., appeals from the trial court's denial of her postjudgment motion for an order requiring the defendant, K. K., to pay the balance of attorney's fees awarded as a part of the judgment of dissolution. The plaintiff claims that the court improperly denied her motion for order on the ground that the plaintiff had failed to provide the court with a new, court-ordered fee affidavit. The plaintiff argues that the fee affidavit

was unnecessary, waived by the defendant, and impossible to obtain or recreate. We disagree and affirm the judgment of the court.[1]

The record reveals the following relevant facts and procedural history. The parties were married on July 19, 1997, and have three children born of the marriage. In 2014, the plaintiff commenced an action for dissolution of the parties' marriage. The plaintiff sought, inter alia, custody of the children and temporary and permanent alimony and child support. On June 21, 2016, the court, *Tindill*, *J.*, dissolved the parties' marriage. In addition to ordering the defendant to pay unallocated alimony and support to the plaintiff,[2] the court issued a variety of other financial orders and resolved a number of outstanding motions. As part of its equitable distribution of property, the court ordered the defendant to transfer title to the marital home to the plaintiff. The court also ordered the defendant to pay certain

[1] The plaintiff raises additional claims challenging the court's other bases for denying the motion for order, namely, that the court misinterpreted and/or misapplied our Supreme Court's holding in *Shirley P.* v. *Norman P.*, 329 Conn. 648, 650, 189 A.3d 89 (2018), and incorrectly determined that the defendant was entitled to retain any remaining balance of the attorney's fee award pursuant to a settlement agreement that the parties reached on remand following this court's partial reversal of the dissolution judgment. See *Keusch* v. *Keusch*, 184 Conn. App. 822, 833, 195 A.3d 1136 (2018). As the plaintiff's counsel conceded at oral argument before this court, however, we may affirm the judgment on appeal if we agree with any one of the trial court's stated grounds for denying the motion for order. Accordingly, because we agree with the trial court regarding the plaintiff's failure to provide the fee affidavit, we do not reach these additional claims.

[2] Specifically, "the court ordered, inter alia, that the defendant pay unallocated alimony and support to the plaintiff in the amount of $12,500 per month until the death of either party, the [p]laintiff's remarriage, or November 3, 2025, whichever shall occur first. The duration and the amount to be paid were nonmodifiable by either party. The court indicated that it was deviating from the child support guidelines' . . . presumptive support amount of $752 per week based on the extraordinary disparity in income and the provision of alimony." (Footnote omitted; internal quotation marks omitted.) *Keusch* v. *Keusch*, 184 Conn. App. 822, 824–25, 195 A.3d 1136 (2018).

attorney's fees that the plaintiff owed for services provided by her then counsel, Attorney Gary I. Cohen. On June 24, 2016, the plaintiff filed a motion asking the court to prospectively terminate any appellate stay with respect to the transfer of the marital home and the attorney's fees award. Following a contested hearing, the court granted the motion.[3] The defendant subsequently appealed from the dissolution judgment, claiming that the court improperly computed his presumptive minimum child support obligation and abused its discretion by ordering him to pay nonmodifiable unallocated alimony and support. See *Keusch* v. *Keusch*, 184 Conn. App. 822, 823–24, 195 A.3d 1136 (2018).

On February 2, 2017, the plaintiff filed a motion for contempt with the trial court arguing that the defendant had failed to comply with the court's attorney's fees orders. The court, *Colin*, *J.*, conducted an evidentiary hearing on the motion for contempt and other outstanding motions. On October 12, 2017, the court issued a ruling in which it declined to hold the defendant in contempt because it concluded that his failure to pay was not wilful but, rather, was due to his inability to pay. The court ordered in relevant part that "[t]he fees previously awarded by the dissolution trial court in the amount of $142,341.75 shall constitute a money judgment in that amount and shall be paid without interest to the plaintiff's counsel at the closing on the sale of the parties' [marital] home." On November 6, 2017, in response to a motion for reargument regarding the court's October 12, 2017 ruling, the court ordered $200,000 from the sale of the home be set aside in escrow.

[3] The defendant filed a motion with this court seeking review of the trial court's termination of the automatic appellate stay with respect to the June 21, 2016 financial orders. This court granted review, but denied the relief requested therein.

On May 7, 2018, while the appeal from the judgment of dissolution remained pending, the plaintiff filed the motion for order that is the subject of the present appeal. She stated in her motion that the $200,000 in funds from the sale of the marital home remained in escrow and that the defendant had filed nothing with the court seeking to recover any portion of those funds. She also stated in relevant part that "[t]he plaintiff's counsel is entitled to $87,452.33 from any portion recoverable by the defendant, counsel having received a $54,889.42 disbursement at closing on the $142,341.75 in attorney's fees."

On September 18, 2018, this court released its opinion with respect to the defendant's appeal from the dissolution judgment. See *Keusch* v. *Keusch*, supra, 184 Conn. App. 822. We reversed the court's financial orders and remanded the case to the trial court for further proceedings but otherwise affirmed the judgment of the court. Id., 824, 833.

On January 14, 2019, Attorney Cohen, on behalf of the Law Offices of Attorney Gary I. Cohen, P.C., filed a motion to intervene in the dissolution action. He argued that Judge Colin's October 12, 2017 order had converted the various attorney's fees awarded as part of the dissolution judgment into a separate money judgment that made the firm a judgment creditor with priority over the defendant with respect to a portion of the funds currently held in escrow. Attorney Cohen argued that this court's reversal in part of the dissolution judgment had no bearing on the October 12, 2017 order, which Attorney Cohen argued was a separate judgment from which the defendant had failed to appeal.

The parties subsequently entered into an agreement to forgo a remand hearing and to resolve all outstanding matters (remand agreement). The remand agreement "reincorporated" many of the financial orders from the

original dissolution judgment and provided that all other orders not expressly incorporated "shall remain null and void." Part of the remand agreement addressed the issue of the outstanding attorney's fees, providing in relevant part: "Attorney Cohen's claimed fees of $87,452.33 will continue to be held in escrow until resolution by the court or settlement. If Attorney Cohen's claim for said fees fails, the husband shall retain these funds." Pursuant to the agreement, 60 percent of any remaining funds in the escrow account would go to the plaintiff, with the remaining 40 percent placed in a college fund for two of the children. The court, *Heller*, *J.*, conducted hearings on the remand agreement on May 2 and 10, 2019. During the hearing, the court stated that she was intending to deny the pending motion to intervene but wanted "to confirm where everybody believes the issue of the [attorney's] fees stands . . . ." The parties agreed that the remand agreement left unresolved the attorney's fees issue because the parties disagreed regarding the continued enforceability of the October 12, 2017 order, including to what extent that order established the amount of attorney's fees owed by the defendant.[4] After canvassing both parties, the court approved the remand agreement and made it an order of the court.

On June 3, 2019, the court issued a memorandum of decision denying the motion to intervene. In addition to concluding that Attorney Cohen was not entitled to intervene either as of right or permissively, the court also addressed the outstanding attorney's fees issue.

[4] The court informed the parties that it intended to resolve in its forthcoming ruling on the motion to intervene not only the issue of intervention but also the validity and the enforceability of Judge Colin's postjudgment orders. The court stated: "I don't think the intervention issue is necessarily dispositive . . . because I think the other issue is what, if anything, of Judge Colin's [October 12, 2017] order survives. . . . And then of course there is the underlying claim in any event."

The court stated: "Although Attorney Cohen is not entitled to intervene in these [postjudgment] proceedings, he nonetheless has an important role to play in the disposition of the funds remaining in escrow from the sale of the [marital home]. Pursuant to the October, 2017 order, those funds were to be paid to Attorney Cohen at the closing of the sale of the [marital home]. As [Judge Colin] noted, no automatic stay was in effect that impacted the attorney's fees orders at issue. The time for payment had passed, and the defendant had not complied with the court's orders. The defendant had no reasonable basis for refusing to authorize the release of the entire amount to Attorney Cohen when the [marital home] was sold on January 5, 2018.

"After the Appellate Court reversed and remanded the case on September 18, 2018, for reconsideration of all financial orders, there was no court order requiring the defendant to pay the fees of the plaintiff's attorney and her expert. However, those fees should have been paid more than eight months earlier, and the funds earmarked to pay them still remain in escrow. The parties in the May, 2019 remand agreement acknowledged this quandary and reserved the issue for the court to decide." The court accordingly ordered "that all counsel, including Attorney Cohen, shall contact family caseflow to schedule a hearing on the plaintiff's claim for payment of her outstanding attorney's fees and expert fees from the funds held in escrow. Attorney Cohen shall prepare an updated affidavit of attorney's fees in advance of the hearing."

The defendant filed a motion to reargue and for reconsideration of the court's June 3, 2019 order.[5] The defendant asked the court to vacate its order requiring the scheduling of a hearing regarding the plaintiff's claim

[5] The defendant also filed an appeal from the court's order, which this court dismissed for lack of a final judgment.

for attorney's fees and to enter a new order releasing all remaining escrow funds to the defendant. The defendant simultaneously filed a motion for clarification and articulation of the court's June 3, 2019 order, asking the court to clarify what it envisioned a new hearing on attorney's fees would entail. Among the requests for articulation, the defendant asked the court to explain the purpose for requiring Attorney Cohen to provide a new affidavit of fees, "even though Judge Colin's order identified a specific amount of fees owed to Attorney Cohen with no interest." The court denied both of the defendant's motions on November 12, 2019.

On March 13, 2020, the plaintiff reclaimed her motion for order seeking a release of the escrow funds that she claimed were owed by the defendant for attorney's fees. Disruptions in proceedings in family matters caused by the COVID-19 pandemic resulted in a lengthy delay of the matter, which was ultimately scheduled for a hearing before the court, *Kowalski*, *J*.[6] The court heard argument on multiple days and conducted an evidentiary hearing, following which, on October 25, 2023, it issued a memorandum of decision denying the plaintiff's motion for order.

The court provided three reasons for denying the plaintiff's motion. It first observed that the plaintiff's arguments for release of the escrow funds were founded primarily on Judge Colin's October 12, 2017 orders. It then cited our Supreme Court's decision in *Shirley P.* v. *Norman P.*, 329 Conn. 648, 655–56, 189 A.3d 89 (2018), for the proposition that, "[w]hen a judgment loses preclusive effect because it is reversed, the great weight of authority holds that the court in a later action in which the first judgment was given preclusive effect

[6] Also before the court were the plaintiff's motion for an award of statutory interest on any outstanding attorney's fees as well as the defendant's objections to the plaintiff's motions.

should then normally set aside the later judgment." (Internal quotation marks omitted.) The court reasoned that Judge Colin's orders had been "issued to effectuate financial orders contained in the dissolution judgment" and that "the Appellate Court's reversal of all financial orders in the dissolution judgment rendered [Judge Colin's] order null and void."

Second, the court concluded that the parties' remand agreement, by its clear and unambiguous terms, did not expressly require the defendant to pay any portion of the plaintiff's counsel fees. Rather, the court noted, the remand agreement provided in relevant part that, if Attorney Cohen's claim for attorney's fees failed, the defendant "shall retain [the escrow] funds." The court reasoned that Judge Heller's denial of Attorney Cohen's motion to intervene in the present action constituted "a failure of Attorney Cohen's claim for counsel fees and, by the plain language of the remand agreement, entitles the defendant to retain the $200,000 in escrowed funds."

Finally, the court concluded in the alternative that "any claim for an award of counsel fees by the plaintiff asserted in [the motion for order] is also denied because the plaintiff has not produced or introduced into evidence an updated affidavit of attorney's fees from Attorney Cohen as required by [Judge Heller's June 3, 2019 decision on the motion to intervene]." This appeal followed.

The plaintiff claims on appeal that the court improperly denied her motion for order on the ground that she failed to provide the court with a fee affidavit because, according to the plaintiff, a new fee affidavit was unnecessary, the defendant had waived the requirement, and it would have been impossible to obtain or recreate a fee affidavit. We disagree.

We begin with the relevant standard of review and other applicable legal principles. "[T]he standard of review in family matters is well settled. [Generally] [a]n appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review." (Internal quotation marks omitted.) *Tannenbaum* v. *Tannenbaum*, 208 Conn. App. 16, 24, 263 A.3d 998 (2021). To the extent we are called on to construe an order or judgment of the court, however, this presents "a question of law over which our review is plenary. . . . As a general rule, [orders and] judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the [order or] judgment. . . . The interpretation of [an order or a] judgment may involve the circumstances surrounding [its] making . . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The [order or] judgment should admit of a consistent construction as a whole." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 24–25.

"The weight of authority indicates that more than the trial court's mere general knowledge is required for an award of attorney's fees." *Smith* v. *Snyder*, 267 Conn. 456, 472, 839 A.2d 589 (2004). "[T]o support an award of attorney's fees, there must be a clearly stated and

described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee. Although we have been careful not to limit the contours of what particular factual showing may suffice, our case law demonstrates that a threshold evidentiary showing is a prerequisite to an award of attorney's fees." Id., 477.

Having reviewed the transcripts of the proceedings before Judge Heller, in which she thoroughly canvassed the parties regarding the scope of their remand agreement, it is clear that the court determined that the parties remained in disagreement about the continued vitality and effect of Judge Colin's order converting to a money judgment the various attorney's fee awards set forth in the dissolution judgment and that a proper resolution of the parties' dispute regarding attorney's fees would require conducting a new attorney's fees hearing. After all, the dissolution judge had terminated the appellate stay with respect to its orders requiring the defendant to pay a portion of the plaintiff's attorney's fees, meaning those orders were subject to execution during the pendency of the appeal. Accordingly, the plaintiff believed that she remained entitled to some award of attorney's fees even in the face of this court's reversal of all financial orders.

It is reasonable to infer from Judge Heller's order that she believed that the parties' inability to reach an agreement on the issue of attorney's fees would require relitigation of that issue. To that end, Judge Heller ordered Attorney Cohen to provide a new fee affidavit to aid the court, if necessary, in making new findings regarding what constitutes a reasonable fee. At oral argument before this court, although the plaintiff's counsel argued that Judge Heller's order was "clearly a mistake," counsel admitted that Judge Heller's intent was to have a new hearing regarding attorney's fees

and that it was well within her authority to do so and to order a new fee affidavit. Counsel further conceded that the plaintiff was not appealing from Judge Heller's order in the present appeal and, thus, the propriety of Judge Heller's order was not properly before us. Therefore, contrary to the plaintiff's assertion that a new fee affidavit was unnecessary, the plaintiff had an obligation to comply with the court's valid and unambiguous order requiring a new fee affidavit in support of her motion for order.

The plaintiff argues that it was "impossible" to provide a new fee affidavit because her current counsel no longer is associated with Attorney Cohen's law firm. Nonetheless, the plaintiff's counsel admits that the records needed to prepare a fee affidavit exist and, when asked at oral argument before this court whether he could have sought the required affidavit from Attorney Cohen or subpoenaed the records necessary to comply, counsel agreed that he could have done so.

Moreover, we find unpersuasive the plaintiff's argument that the defendant somehow "waived" the requirement of a new fee affidavit by seeking articulation of Judge Heller's order, in which he stated that "Judge Colin's order identified a specific amount of fees owed to Attorney Cohen." Simply put, the defendant had no authority to "waive" an order of the court. We cannot conclude on the basis of the record provided that Judge Kowalski either misconstrued Judge Heller's orders or that the court misapplied the law or abused its discretion when it declined to grant the plaintiff's motion for order on the ground that the plaintiff failed to ensure that a new fee affidavit was provided.

The judgment is affirmed.

In this opinion the other judges concurred.

BRANDON GUSAN *v.* COMMISSIONER OF CORRECTION (AC 46490)

Bright, C. J., and Suarez and Sheldon, Js.*

Syllabus

The petitioner, who previously had been convicted, on a plea of guilty, of possession of a controlled substance with intent to sell, appealed, on the granting of certification, from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claimed, inter alia, that the court erred in rejecting his claim that his right to the effective assistance of trial counsel was violated. *Held*:

This court concluded that it was unnecessary for it to consider whether the habeas court was correct in its assessment of the performance of the petitioner's trial counsel because, even if his counsel were deficient in failing to file motions for discovery and to suppress, the petitioner failed to demonstrate, in accordance with *Strickland* v. *Washington* (466 U.S. 668) and *Hill* v. *Lockhart* (474 U.S. 52), that he was prejudiced as a result of those omissions, as he did not demonstrate a reasonable probability that a motion to suppress would have been granted.

Argued September 18, 2024—officially released March 18, 2025

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.*

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

Rocco A. Chiarenza, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Elizabeth Moseley*, senior assistant state's attorney, for the appellee (respondent).

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

Opinion

SUAREZ, J. Upon the granting of certification to appeal, the petitioner, Brandon Gusan, appeals from the judgment of the habeas court denying his corrected, revised, first amended petition for a writ of habeas corpus. The petitioner claims that the court erred in rejecting his claim that his right to the effective assistance of trial counsel was violated by virtue of his trial counsel's failure (1) to file a motion for discovery with respect to data that had been extracted from his cell phone and (2) to file a motion to suppress evidence obtained following an allegedly illegal traffic stop. We affirm the judgment of the habeas court.

The record reflects the following undisputed procedural history. In March, 2017, the petitioner pleaded guilty pursuant to the doctrine set forth in *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970),[1] to one count of possession of a controlled substance with intent to sell in violation of General Statutes (Rev. to 2015) § 21a-277 (b).[2] After accepting

[1] "Under *North Carolina* v. *Alford*, [supra, 400 U.S. 37], a criminal defendant is not required to admit his guilt, but consents to being punished *as if he were guilty* to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the 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. . . . The entry of a guilty plea under the *Alford* doctrine carries the same consequences as a standard plea of guilty. By entering such a plea, a defendant may be able to avoid formally admitting guilt at the time of sentencing, but he nonetheless consents to being treated as if he were guilty with no assurances to the contrary." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 204–205, 842 A.2d 567 (2004).

[2] Hereinafter, all references to § 21a-277 in this opinion are to the 2015 revision of the statute.

The petitioner's plea was the result of a plea agreement with the state concerning charges that arose from the petitioner's alleged conduct on February 26, 2016. The state brought charges against the petitioner under two docket numbers. In the first case, the state charged the petitioner with operating a motor vehicle while holding a telephone or an electronic device in violation of General Statutes § 14-296aa (b) (1) and operating a motor

the plea, the court, *Oliver*, *J.*, imposed a total effective sentence of twenty-five months of incarceration followed by fifty-nine months of special parole. The petitioner was represented by Attorney Jefferson Jelly prior to and at the time of sentencing, including during the plea negotiation stage.

In August, 2017, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus. In March, 2022, the petitioner, represented by counsel, filed the operative petition, a corrected, revised, first amended petition for a writ of habeas corpus, in which he alleged a deprivation of his right to the effective assistance of trial counsel as guaranteed by the state and federal constitutions. In count one of the petition, the petitioner alleged that Jelly performed deficiently in a number of ways, including by failing to file a motion for discovery with respect to data that had been extracted from his cell phone and by failing to file a motion to suppress evidence obtained following an

vehicle without a license in violation of General Statutes (Rev. to 2015) § 14-36 (a). See *State* v. *Gusan*, Superior Court, judicial district of Tolland, Docket No. MV-16-0376112-S. Following the petitioner's plea, the state did not continue to pursue the charges brought under this docket number, instead entering a nolle prosequi to those charges. As our Supreme Court has explained, "[t]he effect of a nolle is to terminate the particular prosecution of the defendant without an acquittal and without placing him in jeopardy. . . . Therefore, the nolle places the criminal matter in the same position it held prior to the filing of the information. Indeed, no criminal matter exists until, and if, the prosecution issues a new information against the defendant. . . . If subsequently the prosecuting authority decides to proceed against the defendant, a new prosecution must be initiated." (Citation omitted; internal quotation marks omitted.) *State* v. *Richardson*, 291 Conn. 426, 430, 969 A.2d 166 (2009).

In the second case, the petitioner was charged with possession of a controlled substance, more than one-half ounce of cannabis, in violation of General Statutes (Rev. to 2015) § 21a-279 (a) (1) and possession of a controlled substance with intent to sell in violation of § 21a-277 (b). See *State* v. *Gusan*, Superior Court, judicial district of Tolland, Docket No. CR-16-0108498-S. Prior to the petitioner's plea, the state filed a substitute information under this docket number in which it relied solely on the latter charge.

allegedly illegal traffic stop.[3] The petitioner alleged that, but for Jelly's deficient performance, he would have rejected the state's plea offer and insisted on going to trial. With respect to these claims, the respondent, the Commissioner of Correction, left the petitioner to his proof.

On April 5 and 11 and June 1, 2022, the habeas court, *M. Murphy, J.*, held a trial on the merits of the petition. The petitioner presented the testimony of multiple witnesses and introduced numerous exhibits. Thereafter, the parties filed posttrial briefs.

In its memorandum of decision denying the petition, the habeas court set forth the following facts: "On the morning of February 26, 2016, at about 6:49 a.m., [the petitioner], who resided in Massachusetts, was driving through Coventry when Officer Mark Samsel [of the Coventry Police Department] observed [the petitioner] operating a motor vehicle while holding a black object, which appeared consistent with a cell phone, to his right ear. Samsel conducted a motor vehicle stop based on the conduct that he had observed. Although Samsel's body camera was off when he first observed [the petitioner] and pulled him over, Samsel turned on the body camera when [the petitioner's] vehicle came to a complete stop.

"Samsel approached the driver's door to speak with [the petitioner], who had lowered the window. Samsel asked if [the petitioner] was talking on his cell phone and if there was an emergency. [The petitioner] told Samsel that he was not on his cell phone and that the phone connects to the vehicle's stereo. Samsel asked

[3] Because the petitioner limits his appellate claims to the court's resolution of these grounds as alleged in count one of the operative petition, we need not and do not consider the court's resolution of the remaining grounds set forth in count one of the petition or the petitioner's freestanding claim of prosecutorial impropriety as alleged in count two of the petition.

[the petitioner] if he had his driver's license with him. After [the petitioner] responded that he did not have it with him, Samsel asked if [the petitioner] had a suspended license, which [the petitioner] acknowledged had been suspended for several years. Samsel, who had detected the odor of marijuana when he stood next to the open driver's window, asked [the petitioner] how much marijuana was in the vehicle. [The petitioner] responded that he had about two ounces. Samsel asked where the marijuana was, and [the petitioner] pointed to a bag. Samsel asked to see the bag and [the petitioner] handed it to Samsel. Inside the bag was another smaller bag containing individually knotted bags that, to Samsel, appeared to contain marijuana. Samsel asked [the petitioner] to step [out of] his vehicle. [The petitioner] complied with the request. Samsel observed [the petitioner] reach to his right between his thigh and the center console and remove a black cell phone, which appeared to Samsel to be consistent with the object he observed [the petitioner] holding at his right ear. Samsel handcuffed [the petitioner] and searched him for additional contraband. Samsel seized the black cell phone, which he considered reasonably to contain evidence of narcotics transactions and arrangements, and later applied for, and was granted, a search warrant to collect and analyze the cell phone data. Officer Brian Flanagan [of the Coventry Police Department] arrived on the scene of the motor vehicle stop after Samsel had made the arrest.

"[The petitioner] retained the services of [Jelly], who has practiced law since 1976. Jelly estimated that about [one] half of his cases historically have involved representing criminal defendants. Jelly has filed and argued many motions to suppress in his nearly [one-half] century of practicing criminal law, is familiar with the applicable legal standards for such motions, and has successfully argued motions to suppress. According to Jelly,

[the petitioner] maintained from the very [outset] that he had been illegally stopped because he had not been using his cell phone, which [the petitioner] insisted was connected to his vehicle via Bluetooth [wireless technology], and that Samsel was lying about his basis for the motor vehicle stop. Jelly obtained Samsel's body [camera] footage and reviewed it to prepare [the petitioner's] defense strategy, which focused on [the petitioner's] claim that Samsel lied about seeing [the petitioner] holding a cell phone to his right ear.

"Jelly reviewed all available video footage and police reports. Because the state had an open file policy and provided Jelly with all [of the] contents of its investigation, he did not file any pretrial motions. Jelly's file, which was entered into evidence in the habeas trial, contains a copy of an incident narrative dated March 28, 2016, as prepared by Samsel. The narrative details Samsel's actions subsequent to retrieving [the petitioner's] cell phone after [Lieutenant Andrew] Weaver [of the Hartford Police Department] completed [an extraction and analysis of the data stored in the cell phone by means of a forensic program known as Cellebrite]. Samsel reviewed the extracted data and 'discovered casual references to smoking "bud" and "weed" occurring in August and September of 2015.' . . . Samsel also noted: 'Other data contained on the disk was reviewed and found to be unremarkable or the file extension could not be opened.' . . .

"Jelly and [the petitioner] discussed a motion to suppress, which Jelly did not think would be successful. Jelly concluded that a motion to suppress would be a credibility determination between [the petitioner] and Samsel. [The petitioner's] lengthy criminal history and record would negatively impact his credibility. Even if [the petitioner] had not been holding a cell phone in his right hand, he nevertheless would have to discredit Samsel's reported observation to prevail on a motion

to suppress. Samsel's probable cause for the traffic stop was his reasonable and articulable suspicion that [the petitioner] was operating a motor vehicle while using a cell phone in violation of General Statutes § 14-296aa (b). Jelly also took into consideration that pursuing a motion to suppress that was not likely to be successful could make the state more resistant to resolving the criminal charges or result in a less favorable plea offer. Jelly noted that, earlier in his career, case law was more favorable when defendants filed motions to suppress. Jelly also referenced *Stone* v. *Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), noting that, after the United States Supreme Court released that opinion, unsuccessful state challenges in search and seizure cases could not be subsequently raised in a federal habeas [case]. Jelly did not view the cell phone data extraction report as necessary to guiding his advice to [the petitioner] about pleading guilty.

"Jelly sought permission to withdraw from representation because of a breakdown in the attorney-client relationship. On March 30, 2017, when the matter was on the docket for [the petitioner] to change his plea, Jelly informed the court that he was not proceeding on his motion to withdraw. The court, *Oliver*, *J.*, questioned [the petitioner] about the motion to withdraw to clarify that he still intended to change his plea and resolve the cases. [The petitioner] acknowledged that he did not feel pressured to plead because of Jelly's motion to withdraw. [The petitioner] then pleaded guilty pursuant to [the *Alford* doctrine] to one count of possession with intent to sell marijuana in violation of . . . § 21a-277 (b). Judge Oliver conducted a thorough canvass, explained in detail the open-ended plea with a [sentence] rang[ing] from zero to seven years, and found that the plea was voluntarily and understandingly made with the assistance of competent counsel. The court ordered a presentence investigation (PSI) report

and continued the matter for sentencing. Jelly was present for the PSI interview and reviewed the report with [the petitioner] prior the sentencing.

"At the sentencing hearing on June 8, 2017, the state requested that [the petitioner] receive a sentence of twenty-five months to serve, followed by thirty-five months of special parole. Jelly noted that [the petitioner] had been offered eighteen months to serve during the plea negotiations but had rejected that offer when Jelly had recommended it. Jelly told the court that he nevertheless viewed the open plea as preferable to a trial because he was not optimistic about an acquittal. Jelly presented his arguments to the court and concluded by requesting that [the petitioner] receive a sentence such as the one that had been offered during the plea negotiations (i.e., eighteen months to serve). [The petitioner] then at length addressed the court, telling the court that he had been amenable to a twelve month sentence but balked at eighteen months followed by probation, which he did not think he could complete successfully. [The petitioner] informed the court that he had 'told [Jelly] from the beginning [that he] wanted the call log [extracted from his cell phone] because the call log itself can prove [that he was] not on the phone.' . . . [The petitioner] also told the court about the motion to suppress he wanted to pursue and [Jelly's] assessment about the credibility contest between [the petitioner] and Samsel. [The petitioner] continued to deny that he had been using his cell phone at the time Samsel indicated [that] he saw [the petitioner]. The court imposed a total effective sentence of twenty-five months to serve and fifty-nine months of special parole, which totaled eighty-four months, the equivalent of the seven year maximum [sentence that the petitioner] could receive.

"Jelly testified at the habeas trial that initially there were two alternative plea offers, one which involved

more incarceration followed by either special parole or probation, while the other involved less incarceration but more special parole. [The petitioner] did not accept either of these alternative offers. Then a court-indicated sentence was presented that entailed an open plea where both sides would present their respective sentencing arguments, which the court would consider together with the support letter [that the petitioner] provided and the PSI report. The sentence range [the petitioner] faced in an open plea was from no incarceration to a maximum of seven years to serve.

"Jelly had reservations [about] an open plea because he instead prefers a known, firm number that is negotiated and agreed upon. An open plea with arguments to the court can be riskier by comparison. Jelly recommended a negotiated sentence for a specific term of years. However, [the petitioner] wanted to have the opportunity to argue for the lowest sentence he could get from the court, so he accepted an open plea giving him the opportunity to present all the good things [the petitioner] had done since being released from [a previous term of incarceration].

"Samsel testified at the habeas trial that he observed an individual he did not recognize, but [who] was later determined to be [the petitioner], driving past his police cruiser. To Samsel, who estimated that he was about twenty-five feet away from [the petitioner] at the closest point, it appeared as though [the petitioner's] right hand was holding a black object that was consistent with being a cell phone to his right ear. Samsel then initiated a traffic stop based on that observation. Samsel manually activated his [body camera] prior to approaching [the petitioner's] vehicle. Samsel acknowledged at the habeas trial that [the petitioner] from the very [outset] protested and said that he was not on the phone, that he has Bluetooth connectivity for hands-free operation, and demonstrated its functionality. Samsel's incident

report contains [the petitioner's] protestation that he was not on the cell phone, [his statement that he] used Bluetooth, and [the fact that the petitioner] showed Samsel how his phone connect[ed] to the vehicle.

"When Samsel approached the vehicle, he detected an odor coming from the vehicle's interior that he suspected was marijuana. Samsel asked [the petitioner] for his license, registration, and proof of insurance. [The petitioner] essentially told Samsel that his driver's license was suspended in Massachusetts. Additionally, after Samsel asked [the petitioner] how much marijuana was in his vehicle, [he] told Samsel that he had about two ounces. Samsel asked [the petitioner] to hand him the marijuana, which [he] did. [The petitioner's] statements and the marijuana gave Samsel probable cause to further search the vehicle. [The petitioner] was arrested. It was determined that [the petitioner] had a total of 3.75 ounces of marijuana packaged in eighteen separate smaller bags, which is indicative of preparing the marijuana for sale to others. [The petitioner] also had $500 in cash that was confiscated.

"According to Samsel, he did not investigate the cell phone use any further once the marijuana became the focus, and he had no interest in [the petitioner's] cell phone unless it contained information that related to drug sales. The search warrant prepared by Samsel sought to recover evidence pertaining to drugs or drug sales. The extracted cell phone information did not show anything remarkable in the calls and texts that could assist the investigation into drug sale activities.

"[Weaver] of the Hartford Police Department received [the petitioner's] cell phone and utilized the Cellebrite forensic software program to extract data from the device. Cellebrite will produce call and message log reports from the recovered data. The extracted information was provided to Samsel so that the Coventry Police

Department could review the reports as part of the investigation into [the petitioner's] drug sale activity. At the habeas trial, Weaver confirmed that the reports do not indicate that any calls were deleted for the relevant time frame (i.e., prior to and during the traffic stop). Deleted calls could suggest an attempt to hide or cover up activity; however, the extracted cell phone data did not show any deleted calls during the relevant time.

"James Oulundsen, of I.R.I.S., LLC, a licensed private investigative agency specializing in criminal defense and digital forensics, testified about [the petitioner's] cell phone activity. [Weaver] . . . conducted the cell phone extraction of [the petitioner's] cell phone pursuant to a search warrant. Samsel initiated the traffic stop at 6:49 a.m., February 26, 2016, as indicated by Samsel and his [body camera] time stamp. Oulundsen estimated that the alleged cell phone violation would have occurred during the five minutes prior to Samsel initiating the traffic stop. The last cell phone activity prior to the traffic stop was an outgoing text message at 6:36:25 a.m. There was no cell phone activity between 6:44 and 6:49 a.m. However, there was cell phone activity during the traffic stop. At 6:51:34 a.m., there was a missed call; this time is consistent with the incoming call notification heard on Samsel's [body camera footage] at 6:52 a.m. A second missed call occurred at 6:54:22 a.m. Next, at 6:55:20 [a.m.], a text message was received by [the petitioner's] cell phone. A third missed call occurred at 7:00:05 a.m., which was also audible on the [body camera footage] at time stamp 7 a.m.

"[The petitioner] testified that the vehicle he was driving, a 2003 Chevrolet Trailblazer, had been equipped with an aftermarket radio with Bluetooth capability. [The petitioner] used the cell phone via the Bluetooth connection, which allowed him to make hands-free calls. Being able to make hands-free calls was important

to [the petitioner] because he was driving without a valid driver's license. The hands-free operation of the phone would decrease the risk of him being pulled over as he commuted regularly to and from Massachusetts and Connecticut. [The petitioner] took routes that he considered were less likely to be monitored by the police to reduce the likelihood of a traffic stop. [The petitioner] told Samsel his phone was connected to the vehicle's radio via Bluetooth and that he was not using the cell phone when Samsel observed him.

"[The petitioner] told Jelly that he was not on his cell phone and [that he] wanted [Jelly] to get the cell phone records to exonerate him. According to [the petitioner], Jelly said it did not matter if he was on the phone or not so long as Samsel thought he saw a cell phone in his hand at his right ear. [The petitioner] requested that Jelly obtain his cell phone records, but Jelly did not request them. According to [the petitioner], [Jelly] never told him that a search warrant had been executed on his cell phone, nor did he know that Weaver had conducted a search, extracted the data, and provided a Cellebrite report to the Coventry Police Department. Had [the petitioner] known this information, then he would have insisted that Jelly file a motion to suppress.

"[The petitioner] pleaded guilty under the *Alford* doctrine because he could then argue at sentencing that he was not on his cell phone and deny the other facts he contested. [The petitioner] and Jelly had discussed his criminal history and how that might impact the sentencing court. According to [the petitioner], Jelly told him his criminal history would not matter, nor would mistakes in the PSI report about his criminal history, because the conduct was ten or even twenty years ago.

"[The petitioner] had a separate criminal case in Rockville, the same district in which he pleaded guilty

in the present matter, in which there were plea negotiations. In the fall of 2021, the prosecutor who handled the present underlying criminal cases extended a plea offer to resolve the new criminal case on the condition that [the petitioner] would withdraw the present habeas [petition] with prejudice and agree to not bring other habeas challenges to the sentence. [The petitioner] rejected the state's offer. The state made a second plea offer that was better but still required withdrawal of the habeas [petition]. [The petitioner] again rejected the offer. Ultimately, [the petitioner] accepted a plea offer in 2022 that did not require him to withdraw the present habeas [petition] with prejudice.

"Although Samsel's report describes the cell phone as black, [the petitioner] testified at the habeas trial that his cell phone was silver. However, the cell phone, which was destroyed after the criminal case concluded, is more accurately described as having a silver back, while the glass screen appeared black on the screen side.

"[The petitioner] denied telling Samsel that he sold marijuana to pay bills such as his utility bill. [The petitioner] and Jelly reviewed the [body camera] footage, which does not show that [the petitioner] told Samsel he sold marijuana. [The petitioner] asked Jelly to file a motion to suppress in this case. [The petitioner] testified that he had criminal cases in both New Hampshire and Massachusetts where he benefitted from motions to suppress. Jelly's assessment was that a motion to suppress would not be successful because it would be a credibility contest between [the petitioner] and Samsel, and [the petitioner] was not likely to prevail. . . .

"[The petitioner] testified that the relief he seeks in this matter is to have the habeas court vacate his guilty plea and sentence and then remand the matter back to

the criminal court so that he can pursue a motion to suppress.

"Attorney Brian Carlow, [the petitioner's] expert witness on the standards of representation for criminal defense counsel, noted that it is an attorney's decision whether to file a motion to suppress after making a full assessment of the case. Additionally, the information given by the client to counsel is important to making an assessment. Carlow indicated that a cell phone search report pursuant to a search warrant would be an item that counsel should obtain and review with the client. However, if the police had the report and only provided a summary to the prosecutor, then an open file policy would not result in defense counsel having access to the report in the absence of discovery motions.

"A motion to suppress hearing challenging Samel's justification to initiate a traffic stop would require defense counsel to impeach Samsel. The information retrieved by Weaver could have been used to support [the petitioner's] contention that he was not on his cell phone when Samsel believed he saw [the petitioner] with the phone in his hand at his right ear. Carlow acknowledged that, if Samsel's testimony was found credible, then the traffic stop would be legally permissible, as well as the evidence obtained subsequent to the traffic stop. If Samsel was not found credible, conversely, then the traffic stop would not be legally permissible, and the drugs would be excluded.

"According to Carlow, the [body camera] footage is important because a comparison can be made to Samsel's report to highlight differences. Such differences can be used to attack Samsel's credibility. The results of Weaver's cell phone extraction could be used to show that [the petitioner's] phone was not in use when he was pulled over. Samsel's [body camera footage] could

be used in conjunction with the cell phone extraction report to show Samsel was not credible.

"Carlow emphasized that it is not a question of whether [the petitioner] was in fact using his cell phone. The critical question is whether Samsel truly believed that [the petitioner] had what appeared to be a cell phone in his right hand at his right ear. Carlow agrees that an attorney must have a good faith basis to file a motion to suppress and cannot file a frivolous motion. According to Carlow, filing a motion to suppress early in a case can be advantageous. Even if the motion to suppress is denied, a defendant can use it to negotiate a more favorable sentence in a plea negotiation. Another potential option is for a defendant to plead guilty in a written nolo contendere plea and preserve the ability to challenge the motion to suppress ruling on appeal." (Citations omitted; footnote omitted.)

Relevant to the claims raised in this appeal, the court set forth the following analysis: "The evidence clearly establishes that Jelly did not file a motion to suppress because he concluded that there was little likelihood of being successful. Jelly viewed a motion to suppress premised on the traffic stop as being a credibility contest between Samsel and [the petitioner]. The court agrees with that assessment. [The petitioner] has presented the extracted data and evidence from Oulundsen, as well as from Weaver, that presents a consistent body of evidence that [the petitioner's] cell phone was not in use immediately prior to the motor vehicle stop. Nevertheless, Samsel's basis for initiating the motor vehicle stop was that he believed that [the petitioner] was operating his vehicle while his right hand, holding what was consistent with a cell phone, was at his right ear. . . .

"The crux of any challenge to Samsel's observation can only center on whether it was reasonable and articulable, whether he had probable cause based on his

belief. It must be emphasized that Samsel conducted a motor vehicle stop because he believed [the petitioner] was operating his motor vehicle while holding a cell phone to his ear. Once Samsel approached the open driver's window, he detected what his experience led him to conclude was marijuana. Samsel then directly asked [the petitioner] how much marijuana he had in the vehicle. [The petitioner] told Samsel about two ounces. Samsel testified at the habeas trial about his observations and actions taken thereafter. The court found Samsel to be credible and discerns no reason why another court would find otherwise.

"The decision of whether to file a motion to suppress is made by counsel and is guided by experience, discretion, the evidence developed by investigation, the information provided by a client to counsel, and the strategy developed in a case. Filing a motion to suppress is a tactical decision made by counsel and, therefore, given great deference by courts reviewing postconviction habeas claims. . . . Jelly is presumed to have made a sound strategic decision when he did not file a motion to suppress unless [the petitioner] rebuts that presumption with sufficient evidence. Additionally, [the petitioner] must demonstrate that had Jelly filed a motion to suppress, that it would have been granted. . . .

"Given [the petitioner's] criminal history and all the circumstances surrounding the motor vehicle stop, the court concludes that Jelly's decision to not file a motion to suppress was a reasonable strategy. The court has no basis, given its own conclusion that Samsel was credible, to find that [the petitioner] would have prevailed in his motion to suppress. Furthermore, [the petitioner] has not presented any evidence or made a showing that had Jelly filed a motion to suppress, that the criminal court would have granted the motion. Jelly's concern that an unsuccessful motion to suppress could make the state more resistant to resolving the case with

a favorable plea agreement was neither unfounded nor unreasonable. . . . It was reasonable for Jelly to consider the effect of filing a motion to suppress on the likelihood of obtaining a favorable plea agreement.

"[The petitioner] alleges that Jelly rendered deficient performance because he failed to file a motion for discovery, which would have led to the defense having all the data extracted from the cell phone instead of Samsel's summary. Jelly did not view the cell phone data extraction report as necessary to guiding his advice to [the petitioner] about pleading guilty. While the cell phone date extraction report is consistent with [the petitioner's] representations that he was not using his cell phone at the time Samsel believed he was using the phone, that information was not knowable without the full extraction data. Because it is information that is consistent with [the petitioner's] representations to Samsel and Jelly, it was incumbent on Jelly to obtain and review the data extracted by Weaver.

"It was deficient performance by Jelly to not obtain the complete data extraction report. However, given what the court has already concluded about the likelihood of prevailing on the motion to suppress, which includes this court's consideration of the complete data extraction report, the court fails to see how this deficient performance prejudiced [the petitioner]. . . .

"[A]though [the petitioner] asserts that but for these alleged deficiencies, he would have rejected the state's plea offer and would have insisted on going to trial, he never testified that he would have proceeded to trial. [The petitioner] did testify that he wanted a motion to suppress hearing, presumably because he anticipates prevailing and the state's case imploding. What [the petitioner] never attested to was that he wanted to proceed to trial, a necessary component of [his cause

of action under the two-pronged test that governs ineffective assistance of counsel claims under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), as modified for guilty plea cases by *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. Therefore, [the petitioner] has failed to show how any alleged deficiencies by Jelly prejudiced him." (Citations omitted.)

After it disposed of all claims raised in the petition, the court denied the petition. Subsequently, the court granted the petitioner's petition for certification to appeal.

Before turning to the merits of the claims raised in this appeal, we set forth the governing legal principles and our standard of review. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong of the *Strickland* test, the petitioner must demonstrate that his attorney's

representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . .

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Citations omitted; internal quotation marks omitted.) *Soto* v. *Commissioner of Correction*, 215 Conn. App. 113, 119–20, 281 A.3d 1189 (2022).

Cases, such as the present case, in which the petitioner's conviction follows a guilty plea, are governed by

Hill v. *Lockhart*, supra, 474 U.S. 58–60, which modified the prejudice prong of the *Strickland* test to focus on the extent to which counsel's allegedly deficient performance affected the outcome of the plea process. In *Hill*, the Supreme Court explained: "[T]he two-part [*Strickland*] test applies to challenges to guilty pleas based on ineffective assistance of counsel. In the context of guilty pleas, the first half of the [*Strickland*] test is nothing more than a restatement of the standard of attorney competence . . . . The second, or prejudice, requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

"In many guilty plea cases, the prejudice inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the prejudice inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial. . . . As we explained in [*Strickland*] these predictions of the outcome at a possible trial, where necessary, should be

made objectively, without regard for the idiosyncrasies of the particular decisionmaker." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id.

The alleged errors of trial counsel at issue in the present claim of ineffective representation include Jelly's failure to file a motion for discovery. This failure is inextricably intertwined with Jelly's failure to file a motion to suppress. In light of the Supreme Court's focus in *Hill* on the extent to which counsel's errors, if any, affected the outcome of the plea process, our inquiry is not whether there was any basis in fact and law to file a motion to suppress, but whether there was a reasonable probability that filing a motion to suppress would have resulted in the suppression of the evidence of the petitioner's guilt.[4] This is because it is the court's suppression of the evidence, not merely the filing of a motion to suppress, that would have given rise to a reasonable probability that the petitioner would not have pleaded guilty.[5] As the United States Supreme

[4] In what appears to have been an alternative ground to support its conclusion that the petitioner had failed to demonstrate prejudice, the court considered the petitioner's failure to present evidence that he wanted to proceed to trial. In this case, however, the petitioner bore the burden of demonstrating that Jelly's allegedly deficient performance in failing to file a motion to suppress affected the outcome of the plea process. Because the petitioner could have demonstrated prejudice by demonstrating that it was reasonably likely that a motion to suppress would have resulted in the suppression of all of the evidence of his guilt—thus rendering a trial and a guilty plea under *Alford* unnecessary—it is irrelevant that the petitioner did not present evidence that he wanted to proceed to trial.

[5] Although the petitioner argues that, if Jelly had brought a motion to suppress based on the extraction report, such motion would have resulted in the exclusion of the evidence on which the state relied, he nonetheless argues that it was not necessary for him to demonstrate that the motion to suppress would have resulted in the suppression of the evidence at issue. The petitioner argues that it was sufficient for him to demonstrate that Jelly failed to bring a suppression motion that was not frivolous, merely having a basis in law or fact. The petitioner does not cite any persuasive authority in support of his proposition and, in light of the authority discussed herein, we agree with the respondent that the petitioner mischaracterizes his burden in proving prejudice in connection with the present claim.

Court has observed, "[w]here defense counsel's failure to litigate a [f]ourth [a]mendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove *that his* [*f*]*ourth* [*a*]*mendment claim is meritorious* and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." (Emphasis added.) *Kimmelman* v. *Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

These principles are illustrated in *Ricks* v. *Commissioner of Correction*, 98 Conn. App. 497, 499, 909 A.2d 567 (2006), cert. denied, 281 Conn. 907, 916 A.2d 49 (2007), an appeal from the judgment denying a petition for a writ of habeas corpus. In *Ricks*, the petitioner pleaded guilty under the *Alford* doctrine to felony murder. Id., 501. Following his conviction, he brought a habeas action in which he asserted a claim that his trial counsel rendered ineffective assistance, in part, because he failed to pursue a motion to suppress certain evidence integral to a finding of his guilt. Id., 501–502. In its plenary review of the ineffective representation claim under the *Strickland-Hill* standard set forth previously in this opinion, this court evaluated the merits of the suppression issue not for the purpose of determining whether a motion to suppress merely had a basis in law or fact, but whether it would have resulted in the exclusion of the evidence at issue. See id., 514. This court concluded, contrary to the petitioner's arguments, that his detention by the police was legal and, therefore, that he could not demonstrate prejudice in connection with his plea because a motion to suppress the evidence obtained as the fruit of that detention "would not have been successful." Id. This court cited the following principle: " 'In order to show ineffective assistance for the failure to make a suppression motion,

the underlying motion must be shown to be meritorious, and there must be a reasonable probability that the verdict would have been different if the evidence had been suppressed.' " (Emphasis added.) Id., quoting *United States* v. *Matos*, 905 F.2d 30, 32 (2d Cir. 1990).

The petitioner agrees with the court's determination that it was deficient performance by Jelly not to obtain the extraction report. The petitioner argues that, without the report, Jelly could not make a fully informed tactical decision about whether to file a motion to suppress. The respondent, however, urges us to conclude that the court failed to afford due deference to Jelly's view that, as it pertained to the issues that would have been before the court had a motion to suppress been filed, the report would not have assisted the defense because the question of whether the petitioner was actually using his cell phone was not dispositive of whether Samsel had a reasonable and articulable suspicion that he was doing so.

The petitioner disagrees with the court's determination that Jelly's failure to file a motion to suppress did not constitute deficient performance. Although the petitioner acknowledges that Jelly articulated tactical reasons for his decision, he argues that "any tactical decision must be based upon a proper investigation of the case and [Jelly] did not make such an investigation." The petitioner asserts that, without the ability to review the extraction report that was consistent with his representations concerning his cell phone use, Jelly was unable to provide him with a fully informed opinion with respect to the viability of a motion to suppress and whether he should accept the state's plea offer. The petitioner argues that, for these reasons, the court improperly deferred to Jelly's uninformed tactical decision in this case.

We conclude that it is unnecessary for us to consider whether the court was correct in its assessment of

Jelly's performance as it pertained to both his failure to file a motion for discovery and his failure to file a motion to suppress. Instead, affording plenary review to the issue of prejudice, we conclude that, even if Jelly's performance were deficient, his omissions did not prejudice the petitioner because the petitioner has not demonstrated a reasonable probability that the motion to suppress would have been granted. See *Soto* v. *Commissioner of Correction*, supra, 215 Conn. App. 120 (court may focus on whichever prong of *Strickland* test is easier). More specifically, we are persuaded that, even if a suppression motion had been filed on the basis of the contents of the extraction report, it would not have contradicted the essential observation of Samsel that the petitioner was driving with a black, phone like object in his hand, in apparent violation of statute. Consequently, under the *Strickland-Hill* analysis, Jelly's omissions could not be said to have affected the plea process.

Because the court's resolution of the claim of ineffective assistance hinged on its analysis of the suppression issue, we set forth the principles that govern the denial of a motion to suppress.[6] "The standard of review in

[6] We recognize that the court's consideration of the suppression issue occurred in the context of a habeas corpus proceeding, not in connection with a motion to suppress evidence filed in a criminal proceeding. For several reasons, we are satisfied that, in its evaluation of prejudice, the court fully considered the suppression issue and that we may review the court's findings and conclusion with respect to that issue. First, the record reflects that the court heard the evidence on which the petitioner would have relied if Jelly had obtained the extraction report and presented it to the court in connection with a motion to suppress. Second, the parties presented relevant arguments to the court concerning the likelihood that the petitioner would have prevailed on a motion to suppress. Third, after setting forth relevant legal principles pertaining to the validity of the warrantless seizure at issue in this case, the court distinctly set forth its relevant findings and legal conclusions concerning the likelihood that the petitioner would have prevailed on a motion to suppress. In light of the foregoing, the petitioner has been afforded and has availed himself of an opportunity to make a showing with respect to the likelihood of his prevailing on a motion to suppress. The petitioner has not explained how the evidence he would

connection with the court's denial of a motion to suppress is well settled. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision; where 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. That is the standard and scope of this court's judicial review of decisions of the trial court. Beyond that, we will not go. . . . In other words, to the extent that the trial court has made findings of fact, our review is limited to deciding whether those findings were clearly erroneous. Where, however, the trial court has drawn conclusions of law, our review is plenary, and we must decide whether those conclusions are legally and logically correct in light of the findings of fact." (Internal quotation marks omitted.) *State* v. *Kaminski*, 106 Conn. App. 114, 124–25, 940 A.2d 844, cert. denied, 287 Conn. 909, 950 A.2d 1286 (2008).

Our Supreme Court has set forth the principles that govern investigatory detentions such as the one that occurred in the present case: "Under the fourth amendment to the United States constitution, and under article first, [§§ 7 and 9, of the] Connecticut constitution, a police officer may briefly detain an individual for investigative purposes if the officer has a reasonable and articulable suspicion that the individual has committed or is about to commit a crime. . . . When considering the validity of [an investigatory detention pursuant to

have presented in support of a motion to suppress in his criminal proceeding would be any different than the evidence he submitted on that issue before the habeas court. We therefore are satisfied that the court resolved the factual and legal merits of the fourth amendment claim on which the petitioner relied to demonstrate prejudice in his habeas case.

Terry v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], our threshold inquiry is twofold. . . . First, we must determine at what point, if any . . . the encounter between [the police officers] and the defendant constitute[d] an investigatory stop or seizure. . . . Next, [i]f we conclude that there was such a seizure, we must then determine whether [the police officers] possessed a reasonable and articulable suspicion [that the individual is engaged in criminal activity] at the time the seizure occurred. . . . In assessing whether the police officers possessed the requisite reasonable and articulable suspicion, we must consider whether, relying on the whole picture, the detaining officers had a particularized and objective basis for suspecting the particular person stopped of criminal activity. When reviewing the legality of a stop, a court must examine the specific information available to the police officer at the time of the initial intrusion and any rational inferences to be derived therefrom. . . .

"Reasonable and articulable suspicion is an objective standard that focuses not on the actual state of mind of the police officer, but on whether a reasonable person, having the information available to and known by the police would have had that level of suspicion. . . . The police officer's decision . . . must be based on more than a hunch or speculation. . . . In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 331 Conn. 239, 247–48, 203 A.3d 1233 (2019).

As he did before the habeas court, on appeal the petitioner attempts to demonstrate that the traffic stop itself was legally impermissible because Samsel did not have a reasonable and articulable suspicion to justify the stop. The petitioner argues, and we agree, that "all

of the evidence in [this] case was the result of the traffic stop conducted by [Samsel]. Therefore, if the stop itself were to be deemed illegal, then all of the evidence obtained from the petitioner's vehicle and cell phone—that is, all of the evidence in the case—would be inadmissible. There would be no prosecution possible."

According to the petitioner, "the evidence developed during the habeas hearing, including evidence [Jelly] did not bother to obtain despite being aware of its existence, raises significant questions about the validity of the traffic stop. . . . [D]espite [Jelly's] uninformed opinion that a motion to suppress would have been nothing but a credibility contest between [Samsel] and the petitioner . . . the court [in ruling on the suppression issue] would have been required to view all of the evidence and all of the circumstances of the case to determine if the traffic stop was warranted. . . .

"In this case, Samsel testified that he saw the petitioner driving with a black object that appeared to be a cell phone held to his right ear. The additional evidence in the case, however, strongly supports the petitioner's contention that it was not possible for Samsel to have made such an observation. The phone records indicate no phone calls in the relevant time frame. The [petitioner's vehicle] was equipped with a Bluetooth hands-free device that would have made holding the phone to one's ear unnecessary. The [body camera] footage reveals that the petitioner, when asked to exit the vehicle, retrieved the cell phone from a different location than the one claimed by [Samsel]. The state introduced no evidence, and there is none apparent in the footage of the incident, that reveals a plausible, reasonable alternat[ive] object that the petitioner could have been holding near his ear that might have led Samsel to the erroneous conclusion that the petitioner was using a cell phone. Further, only the screen of the cell phone was black, which raised questions as to how

the petitioner would be using his cell phone with the screen facing away from his ear.

"Based on the entire evidentiary picture, in short, the petitioner's motion [to] suppress . . . stood significant chance of success if the [proper degree of] scrutiny . . . were applied to this inquiry. The habeas court's conclusion that there was no credible evidence that a motion to suppress would have been meritorious is erroneous." (Citations omitted.)

The court's memorandum of decision plainly contradicts the petitioner's argument that the court did not consider all of the relevant evidence and relied solely on Samsel's testimony. The court specifically referred to the fact that, in considering the merits of the motion to suppress, it had considered the "complete data extraction report," which, as it aptly observed, was consistent with the petitioner's testimony that he was not using his cell phone at the time that Samsel had observed him. Although the petitioner refers in his appellate arguments to other evidence, including the body camera footage, that the court did not specifically discuss in its memorandum of decision, we decline the petitioner's invitation to speculate that the court overlooked that evidence in its assessment of the merits of the motion to suppress. To do so would violate the cardinal rule of appellate review that "[t]his court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. . . . It is well settled that [we] do not presume error; the trial court's ruling is entitled to the reasonable presumption that it is correct unless the party challenging the ruling has satisfied its burden [of] demonstrating the contrary." (Citations omitted; internal quotation marks omitted.) *White* v. *Latimer Point Condominium Assn., Inc.*, 191 Conn. App. 767, 780–81, 216 A.3d 830 (2019).

The petitioner's remaining appellate arguments are not a model of clarity. Relying on evidence other than Samsel's testimony, he argues that the court failed to apply the proper degree of scrutiny to the issue before it. The petitioner appears to invite this court to second-guess the court's explicit finding that it "found Samsel to be credible and discerns no reason why another court would find otherwise." Although the petitioner may challenge the court's factual findings, he may not invite this court to revisit the court's credibility determinations. Indeed, a "pure credibility determination" made by a habeas court is "unassailable." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017).

During Samsel's testimony at the habeas trial, the following colloquy between the petitioner's attorney and Samsel occurred:

"Q. Now, prior to you pulling [the petitioner] over at 6:49 a.m., you would've had to witness something in order to pull him over. What did you witness?

"A. I saw a white male who I didn't know as the defendant at the time holding his right hand to his right ear . . . . It was a black object consistent with a cell phone being held to his right ear by his right hand.

"Q. Okay. Now when you observed that, were you traveling on the road? Were you parked? Where were you? Were you in a car? Were you outside of your car? Where were you [when you] observed this white male holding his hand to his right ear?

"A. I was seated in my marked patrol vehicle on the shoulder of the highway at a right angle to the highway. And the [petitioner's vehicle] approached from my right going to my left.

"Q. All right. So, would you have been looking at the traffic as it was coming toward you?

"A. It was at a right angle to me, sir.

"Q. Well, at a right angle, but you were observing the traffic as it was coming toward you, away from you? What direction was the traffic traveling?

"A. Both directions, but the defendant was traveling as I said from my right to my left.

"Q. Okay. Do you recall what street or route he was on at the time that morning?

"A. Main Street . . . Route 31 . . . .

"Q. And in Coventry, Connecticut. Correct?

"A. That's true, yes.

"Q. All right. Now I know this is a long time ago, but from the time you saw this white man you didn't know holding the cell phone to his ear to the time you actually pulled him over, can you estimate how long that would've taken?

"A. I would estimate it was twenty to forty seconds."

During cross-examination of Samsel by the respondent's attorney, the following colloquy occurred:

"Q. . . . [I]f you remember with regard to [the petitioner], do you remember if you pulled him over for a motor vehicle stop?

"A. Yes, I did.

"Q. And . . . do you remember why you pulled him over?

"A. Because as he passed by the position I was in with my marked cruiser, I saw his right hand held to his right ear holding a black object I knew to be consistent with a cell phone."

Consistent with his testimony during his direct examination and cross-examination, Samsel testified during

his redirect examination that he stopped the petitioner's vehicle because he saw him holding a device to his right ear that looked like a cell phone. Samsel testified that he believed that the petitioner was engaged in a motor vehicle violation, specifically, using his cell phone while operating a motor vehicle.

Samsel's testimony was consistent, and his testimony was deemed to be credible by the court. Although other evidence, including the extraction report, may have cast doubt as to whether the petitioner actually held a cell phone to his ear as he drove past Samsel, none of that evidence undermined the court's reliance on Samsel's testimony as to what he had perceived prior to the stop or precluded the court from relying on that testimony to find that Samsel believed in good faith that the petitioner was holding an object that appeared to be a cell phone to his ear. Thus, our careful review of the evidence as a whole, including the evidence on which the petitioner relies, does not lead us to conclude that the court erroneously found that an adequate factual basis existed to support the *Terry* stop. Here, Samsel articulated a credible, particularized, and objective basis for suspecting that the petitioner was engaged in a motor vehicle violation. The specific information on which Samsel relied, and the rational inferences to be derived therefrom, supported the stop because a reasonable person, having the information available to and known by Samsel, would have suspected that the petitioner was engaged in illegality.

In the context of the habeas trial, the court fully analyzed the suppression issue raised by the petitioner. In light of its proper analysis of that issue, we agree with its ultimate conclusion that Jelly's allegedly deficient performance in failing to file a motion to suppress did not affect the plea process. Accordingly, under the

Strickland-Hill test, the petitioner has failed to demonstrate that he was prejudiced as a result of the omissions on which he relied.

The judgment is affirmed.

In this opinion the other judges concurred.

CATHERINE SPINNATO, EXECUTOR (ESTATE OF NANCY A. BRUNO), ET AL. *v.* FRANCINE BOYD ET AL.
(AC 47071)

Bright, C. J., and Moll and Seeley, Js.*

Syllabus

The defendant C, a beneficiary of a trust that consisted primarily of a certain piece of real property and that terminated upon the death of his mother, the decedent, appealed from the trial court's judgment for the plaintiff, individually and in her fiduciary capacities, on the complaint in part and on C's counterclaim. C claimed, inter alia, that the court improperly determined that the trust instrument did not require the sale of the trust property within one year of the decedent's death. *Held*:

The trial court properly interpreted the term "liquidate" in the trust instrument to include actions other than a sale of the trust property, as contemporary dictionary definitions of "liquidate" and the discretion afforded to the plaintiff by the trust instrument and the relevant statute (§ 45a-235) supported the conclusion that the decedent intended to permit the trustees to distribute the interests of the beneficiaries in an alternative manner to a sale of the trust property.

The trial court properly concluded that the trust instrument did not require the plaintiff to sell the trust property within one year of the decedent's death because the discretion afforded to the trustees in the trust instrument demonstrated that the decedent contemplated the possibility that the trustees could distribute the property outside of the one year timeline prescribed in the trust instrument.

The trial court properly rendered judgment for the plaintiff on the breach of fiduciary duty claim in C's counterclaim because, although it found that the plaintiff had engaged in self-dealing and had failed to establish by clear and convincing evidence that such self-dealing was otherwise fair to C, the

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

court also found that the plaintiff was acting in good faith and was therefore shielded from liability pursuant to a provision in the trust instrument.

This court declined to review C's claim that the trial court improperly refused to impute knowledge of the terms of the trust instrument to the plaintiff because the claim was inadequately briefed.

This court found no error in the trial court's adoption of a procedure whereby it would determine in a future proceeding the amount of reasonable expenses incurred by the plaintiff in prosecuting the action and defending against the failed counterclaim.

Argued November 18, 2024—officially released March 18, 2025

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of New London, where Dennis Goggin et al. were cited in as additional defendants; thereafter, the defendant Charles Bruno filed a counterclaim; subsequently, the complaint was withdrawn as to the named defendant et al.; thereafter, the case was tried to the court, *Jacobs*, *J.*; judgment in part for the named plaintiff et al. on the complaint and judgment for the named plaintiff et al. on the counterclaim, from which the defendant Charles Bruno appealed to this court. *Affirmed.*

Mathew Olkin, for the appellant (defendant Charles Bruno).

Conrad Ost Seifert, for the appellees (named plaintiff et al.).

Opinion

MOLL, J. The defendant Charles Bruno[1] appeals from the judgment of the trial court, rendered after a bench

[1] The following additional defendants either were named in the original complaint or were cited into the present action: Francine Boyd, individually and in her capacity as trustee of the Bruno Irrevocable Living Trust; Dennis Goggin, individually and in his capacity as administrator of the estate of Joanne Goggin; and Stephan Goggin. The claims against these defendants were withdrawn on September 20, 2021. In the interest of simplicity, we refer to Charles Bruno as the defendant.

trial, in favor of the plaintiff Catherine Spinnato[2] on the plaintiff's request for a declaratory judgment in the operative complaint and on the defendant's operative counterclaim. On appeal, the defendant claims that the court erred in (1) construing the word "liquidate" in the trust instrument to require neither the sale nor the distribution of the trust property within one year of the death of the decedent, Nancy A. Bruno (decedent), (2) ruling against him on one of his claims for breach of fiduciary duty, (3) refusing to impute knowledge of the terms of the trust to the plaintiff, and (4) declining to rule simultaneously on the plaintiff's claim for reimbursement of attorney's fees and, instead, ordering additional proceedings to be held on that issue. For the reasons that follow, we disagree with the defendant's first, second, and fourth claims and deem the defendant's third claim to be abandoned as inadequately briefed. Accordingly, we affirm the judgment of the trial court.

The following procedural history and facts, as set forth by the trial court or undisputed in the record, are relevant to our resolution of this appeal. "[The plaintiff] and [the defendant] are siblings. Together with their sisters, Francine Boyd [(Francine)] and Joanne Goggin [(Joanne)], they were named the beneficiaries of an inter vivos irrevocable trust [(trust)] established in 2006 by their mother, [the decedent], the res of which was the real property owned by [the decedent] and located at 209B Pendleton Hill Road, Stonington . . . [(trust property)]. [The plaintiff, Francine, and Joanne] were named cotrustees."

[2] Catherine Spinnato is appearing in the present action in three different capacities, namely, (1) individually, (2) as the executrix of the estate of the decedent, Nancy A. Bruno, and (3) as the trustee of the Bruno Irrevocable Living Trust. For convenience, we refer to Catherine Spinnato as the plaintiff without distinguishing among the various capacities in which she is appearing and use the terms executor and executrix interchangeably.

Part VIII of the trust instrument provides that, "[u]pon the death of the [decedent], all of the [t]rust [p]roperty shall be liquidated and distributed in accordance with [p]art IX below." Part IX of the trust instrument provides: "Upon the death of [the decedent], the [t]rustees shall distribute all of the [t]rust property and accumulated income as follows: [t]hirty percent . . . to [the plaintiff]; thirty percent . . . to [Joanne], thirty percent . . . to [Francine] and ten percent . . . to [the defendant]. The [t]rustees shall have the sole and absolute discretion as to the manner, timing, transfer, sale, lease or any other use and disposition of the [t]rust [p]roperty so as to accomplish the distributions to the beneficiaries of this [t]rust within one year after the death of [the decedent]." Moreover, part V (H) of the trust instrument provides: "With respect to the exercise or non-exercise of discretionary powers granted by this [d]eclaration of [t]rust, the [t]rustees shall not be liable for actions taken in good faith. Such actions shall be binding on all persons interested in the [t]rust [p]roperty" (section H).

"[The decedent] continued to reside at [the trust property] until April, 2016. So long as she lived there, she covered all of the household expenses out-of-pocket from her own funds. When by April, 2016, her dementia had progressed to the point that she could no longer live independently, she was placed in an assisted living facility in Westerly, Rhode Island, where [the plaintiff] was then living. [The plaintiff] was appointed [as the decedent's] guardian and assumed the responsibility for managing [the decedent's] personal and financial needs. In reviewing [the decedent's] finances to cover the assisted living expense, [the plaintiff] discovered that her sister, Francine, had transferred approximately $110,000 from [the decedent's] savings account into her own account. [The plaintiff's] repeated demands to Francine that she restore the funds to [the decedent's] account were ignored."

"[The decedent] died testate on October 9, 2017. Her will, as amended by codicil, bequeathed her estate to [the plaintiff, Francine, and Joanne] only, in equal shares [per stirpes]." (Footnote omitted.) Joanne predeceased the decedent by one month and was survived by her two sons, Stephan Goggin (Stephan) and Dennis Goggin (Dennis).

"After [the decedent's] death, [the plaintiff] found [the trust property] to be in a state of significant disrepair. She spent months cleaning the [trust property] and making repairs and upgrades." These repairs and upgrades included installing a new water filtration system because the home did not have potable water, making repairs after a tornado damaged the trust property, and replacing the roof in order to comply with a precondition to obtaining homeowners insurance coverage. An accounting prepared by the plaintiff reflected that she spent 446.5 hours repairing and maintaining the trust property.

"After Francine's theft of the funds in [the decedent's] bank account, an account balance of approximately $14,500 remained. Those funds were applied to cover the cost of the repairs and improvements to [the trust property]. Once [the funds were] exhausted, [the plaintiff] covered the cost out of her own pocket. An itemized accounting reflecting expenditures made for [the decedent's] welfare and the upkeep and maintenance, including taxes and utilities, of the [trust property], totaled $97,837.34. To cover these expenditures, [the plaintiff] exhausted the funds—approximately $75,000—in her [personal] 401 (k) account.

"Upon [the decedent's] death, [the plaintiff] retained Attorney Salvatore Ritacco to assist in the administration of [the decedent's] estate and the recovery of the purloined funds. A final guardianship accounting was completed and submitted, and on March 20, 2019, [the

plaintiff] was appointed executrix of [the decedent's] estate. Thereafter, [on May 6, 2019], this action was commenced against [Francine, individually and in her capacity as trustee of the trust] for, inter alia, breach of fiduciary duty, constructive trust, and dissolution of the trust. That claim was settled in December, 2020, when [Francine] agreed to resign as cotrustee and transfer her 30 percent stake in the trust to [the plaintiff]. [Joanne] having died in 2017, [the plaintiff] was then the sole trustee of the trust.

"[The plaintiff] believed that she and her sisters had inherited the [trust] property by operation of [the decedent's] will until she was told otherwise by [Ritacco] upon his receipt of the trust instrument in May, 2019. Suffice it to say that she did not know prior to that time that the trust instrument called for the 'liquidation' of the trust res within one year of [the decedent's] death in October, 2017.

"Despite the condition of the [trust property], [the plaintiff] found the property to be a desirable place to live. She found it to be 'very peaceful,' 'the deer . . . running in the woods and the birds . . . chirping.' She 'just started falling in love and really realizing how beautiful it is there.' Having suffered a broken femur, she determined that the house, with the bedroom, bathroom, and kitchen all on one level and an outside ramp, made for easier living than her house in Westerly, Rhode Island, with the bedroom upstairs and the bathroom downstairs. She decided then that [the trust property] is where she wanted to live. Having settled her claim against Francine, she set about acquiring the interests of Stephan and Dennis . . . and [the defendant] in the trust.

"By letter to [the defendant] [in] December 22, 2020, [Ritacco], writing on behalf of [the plaintiff], offered to purchase [the defendant's] [10] percent share in the

trust for $10,500, his share of the appraised value of the [trust] property net of the expenses and property taxes paid by [the plaintiff] since the time of [the decedent's] death. In that letter, [Ritacco] wrote that 'a recent appraisal' of the [trust] property had determined the fair market value of that property to be $140,000 and that [the plaintiff] had 'expended over $35,000 of her own monies in order to preserve and maintain the trust [property] and to pay property taxes, insurance and utilities for the past three years.' A copy of the appraisal report was enclosed; an accounting of the amount paid by [the plaintiff] to cover property taxes, insurance and utilities was not as it was still in the process of being compiled." (Footnote omitted.) The final paragraph of the letter also advised the defendant that there was a pending lawsuit to dissolve the trust and that if a resolution could not be worked out between the plaintiff and the defendant, the defendant may need to be made a party to the lawsuit.

"Once compiled, a copy of the accounting was sent to Stephan and [Dennis]. A copy was not also sent to [the defendant]." Ritacco testified that he " 'would have absolutely provided it to [the defendant] . . . but [the defendant] indicated that he had seen it . . . . [In] subsequent discussions with [the defendant, he] indicated that he had reviewed the expenses with Stephan and Dennis.' [Ritacco] recalled a conversation with [the defendant] that took place in January, 2021, during which the expenses were discussed and [the defendant] expressed his feeling that 'rather than going back and forth that . . . he and his nephews [Stephan and Dennis] should just take the offer, resolve the case, and be done with it all.' According to [Ritacco], [the defendant's] main concern at that time was whether [the plaintiff] had the means to 'make a payment quickly.' "

On March 1, 2021, Ritacco spoke with the defendant by telephone. In that conversation, the defendant "said

that the offer, as set forth in [Ritacco's] letter to him [on] December 22, 2020, was acceptable but that his 'big issue' was that the agreement not be contingent on [the plaintiff] having to sell her home in Westerly, Rhode Island. In response, [Ritacco], citing the enormity of the expenses which [the plaintiff] had incurred in keeping up the [trust] property and the attorney's fees and costs which she had incurred as trustee, told him that [the plaintiff] would 'either need a home equity line or to sell her home to pay out all the beneficiaries.' [Ritacco] added that this was just one of a number of occasions ('most likely in the January and/or the March discussion') on which [the defendant] had indicated that the offer was acceptable and that '. . . [Stephan and Dennis] [should] stop messing around, to just accept the offer and get this done with.'

"[The defendant] remembers things differently. While he may have told [Ritacco] that he would consider the offer, he did not indicate that the offer was acceptable as 'it wasn't clear to [him] as to what else was going on' and that 'he just felt a little bit uneasy as far as trusting what was said to [him].' . . . When he asked [Ritacco] when he would get paid, [Ritacco] had no answer for that—a response that was unacceptable to [the defendant]. . . . That conversation prompted him to hire a lawyer." (Citations omitted.) The subsequent negotiations between the plaintiff and the defendant, through their attorneys, were not successful, and the parties never executed an agreement for the plaintiff to buy out the defendant's interest in the trust property.

On March 3, 2021, the plaintiff filed a motion to cite in the defendant, Stephan, and Dennis, individually and in his capacity as administrator of Joanne's estate, to this action as additional party defendants. The plaintiff argued that "[t]he prospective defendants ha[d] failed to pay their share of the taxes and expenses for the preservation and maintenance of [the trust property].

For nearly three years [the plaintiff] has had to expend over $35,000 for the care of [the decedent] and the trust [property] and will likely expend additional monies to preserve the trust [property]." On March 15, 2021, the court, *Calmar*, *J.*, granted the plaintiff's motion to cite in the additional party defendants.

"On March 18, 2021, [the plaintiff] listed her Westerly, Rhode Island home for sale. She closed on the sale of the house on May 20, 2021. Since that time, she has resided at the [trust] property. She has made monthly use and occupancy payments of $1800 into a bank account established by the trust."

On September 20, 2021, after Stephan and Dennis executed a settlement agreement with her, the plaintiff withdrew her claims against all parties except for the defendant. On April 13, 2023, the plaintiff filed an eight count fourth revised substitute complaint (operative complaint). The first four counts asserted claims of (1) breach of contract, (2) unjust enrichment, (3) fraud and misrepresentation, and (4) breach of the covenant of good faith and fair dealing. In count five, the plaintiff requested that the court provide declaratory relief by determining the parties' rights under the terms of the trust and/or the provisions of the Connecticut Uniform Trust Code, General Statutes § 45a-499a et seq. In count six, the plaintiff requested "trust remedies and relief under the Connecticut Uniform Trust Code." In count seven, the plaintiff sought the court's approval of a final trust accounting and issuance of orders authorizing payment or reimbursement of trust expenses. In count eight, the plaintiff sought termination and/or dissolution of the trust.

On May 19, 2023, the defendant filed an answer to the operative complaint and a nine count amended counterclaim (operative counterclaim). In the first seven counts, the defendant asserted (1) three claims of

breach of trust, (2) two counts of breach of fiduciary duty, (3) conversion, and (4) statutory theft pursuant to General Statutes § 52-564. In counts eight and nine, the defendant sought (1) removal of the plaintiff as trustee of the trust or, alternatively, (2) an accounting of the trust. On May 23, 2023, the plaintiff filed an answer and asserted several special defenses to the defendant's operative counterclaim. On June 7, 2023, the defendant filed a reply to the plaintiff's special defenses.

A bench trial took place on July 11 and 12, 2023. Several witnesses testified, including the plaintiff and the defendant, and several exhibits were admitted into evidence. On October 26, 2023, the court, *Jacobs*, *J.*, issued a memorandum of decision. The court found in favor of the defendant on the plaintiff's breach of contract claim on the grounds that (1) the defendant had not unequivocally accepted the plaintiff's offer to buy out his interest in the trust property for $10,500, and (2) the plaintiff was "hard-pressed to claim, with a straight face, that she had relied to her detriment on [the defendant's] purported acceptance of the $10,500 offer . . . as she had already determined by that time to make that move [from Rhode Island to Connecticut] . . . ." The court also rendered judgment for the defendant on the plaintiff's claims for unjust enrichment, breach of the covenant of good faith and fair dealing, and misrepresentation. The court found in favor of the plaintiff on the defendant's counterclaim in its entirety. With respect to the defendant's claim that the plaintiff breached her fiduciary duty, the court concluded that, although the plaintiff had engaged in self-dealing as a trustee, she acted in good faith and, therefore, was shielded from liability pursuant to section H of the trust instrument.

The court, in addressing the plaintiff's request for a declaratory judgment regarding the interpretation of

part VIII of the trust instrument, agreed with the plaintiff's interpretation of that provision of the trust instrument. Specifically, the court held that the term "liquidation," as used in the trust instrument, did not mandate a *sale* of the trust property, and the plaintiff's failure to sell the property did not amount to a breach of her fiduciary duty. The court noted that the trust instrument reflected the expressed intent of the settlor to conform the trust instrument with the prescriptions and restrictions of the Connecticut Fiduciary Powers Act, General Statutes § 45a-233 et seq., including General Statutes § 45a-235 (9) and (27),[3] and, in light of the broad discretion afforded to trustees therein, " 'liquidate' cannot, as the defendant has argued, reasonably be interpreted to allow for, let alone mandate, the sale of the [trust] property . . . ." The court also noted that, "if [the decedent], having expressly granted to the trustees all authority and powers conferred on them by Connecticut

[3] General Statutes § 45a-235 provides in relevant part that "[a]ny one or more or all of the following additional powers or any portion thereof may be incorporated by reference . . . but only to the extent they are individually referred to in such will or other instrument. . . . (9) Residential Realty. To retain any residential real property or apartment and the contents of such real property or apartment received by it hereunder, to purchase, to rent and to maintain residential real property including an ordinary, cooperative or condominium apartment for occupancy, rent free, by any of the beneficiaries hereunder, so long as one or more of them wish to use and occupy it as a home, and to sell it when it is no longer so used and occupied, to pay all rent, taxes, assessments, repairs and other charges for maintaining such real and personal property or apartment, including title, public liability, fire and extended coverage insurance, and to make such purchases or payments out of such beneficiary's portion of the principal or income, in accordance with applicable law, as the fiduciary in its sole discretion shall determine. . . . (27) General Powers. To exercise every power and discretion in the management of the estate and the trusts created hereunder as the fiduciary would have if it were the absolute owner thereof. . . ."

Section 45a-235 was the subject of an amendment in 2019; see Public Acts 2019, No. 19-32, § 10; however, that amendment has no bearing on the merits of this appeal. Accordingly, we refer to the current revision of the statute.

law, had intended to qualify that grant she would presumably have chosen the word 'sell' . . . instead of 'liquidate' which, according to [Merriam-Webster's Collegiate Dictionary], does not portend a sale." Moreover, in response to the defendant's argument that such a sale must have occurred within one year, the court held that the mention in part IX of a one year timeline was "merely aspirational, its efficacy entirely dependent on the clause which precedes it endowing the trustees with 'sole and absolute discretion as to the manner, timing, transfer, sale, lease or any other use and disposition of the trust property.' "

With respect to the value of the defendant's 10 percent interest in the trust property, which both parties disputed, the court found that the plaintiff spent $29,371.19 to maintain the property, that her $20,425 fee as trustee was reasonable, and that, after reimbursing the plaintiff for her expenses, the resulting net value of the trust property was $160,203.81. The defendant was awarded 10 percent of that amount, totaling $16,020.38, "subject to further proceedings to determine the amount of additional expenses reasonably incurred by the [trust] in prosecuting this action and defending against the failed counterclaim . . . ."[4] This appeal followed.[5] Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims on appeal that the trial court erred by rejecting his argument that the trust

[4] In a subsequent articulation, the court further stated that "[t]he amount of the defendant's 10 percent beneficial interest in the trust asset, $16,020.38, is subject to reduction, proportionate to his beneficial interest in the trust asset, for the amount of expenses reasonably incurred by the [plaintiff, as trustee] in prosecuting this action and defending against the failed counterclaim as determined by the court in further proceedings."

[5] On April 25, 2024, the plaintiff filed a motion to dismiss this appeal for lack of a final judgment, which this court denied on May 15, 2024.

instrument required (1) a sale of the trust property and (2) the distribution of the trust property within one year of the decedent's death.[6] We disagree.

We begin by setting forth the applicable standard of review and relevant legal principles. "The cardinal rule of construction of all trusts . . . is to find and effectuate the intent of the testator or settlor." *Hartford National Bank & Trust Co.* v. *VonZiegesar*, 154 Conn. 352, 359, 225 A.2d 811 (1966). "The issue of intent as it relates to the interpretation of a trust instrument . . . is to be determined by examination of the language of the trust instrument itself and not by extrinsic evidence of actual intent. . . . The construction of a trust instrument presents a question of law to be determined in the light of facts that are found by the trial court or are undisputed or indisputable. . . . [W]e cannot rewrite . . . a trust instrument. The expressed intent must control, although this is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the . . . settlor when the instrument was executed, including the condition of [her] estate, [her] relations to [her] family and beneficiaries, and their situation and condition. The construing court will put itself as far as possible in the position of the . . . [settlor] in the effort to construe . . . [any] uncertain language used by [her] in such a way as shall, conformably to the language, give force and effect to [her] intention. . . . But [t]he quest is to determine the meaning of what the . . . [settlor] said and not to speculate upon what [she] meant to say." (Citation omitted; internal quotation marks omitted.) *Spencer* v. *Spencer*, 71 Conn. App. 475, 482, 802 A.2d 215 (2002).

A

In support of his claim, the defendant first contends that the court erred in its interpretation of part VIII of

[6] The defendant's appellate brief does not specify as to which counts of his operative counterclaim this claim relates.

the trust instrument[7] because, in the defendant's view, "[t]he term 'liquidate' is commonly defined to mean 'converted into cash,' i.e., sold." (Emphasis omitted.) We disagree with the defendant because he too narrowly defines "liquidate" and otherwise disregards the discretion afforded to the plaintiff under the trust instrument.

We first must construe the term "liquidate" to determine whether the decedent, as settlor, contemplated any other methods, apart from a sale, to distribute the trust property. At the time when the trust instrument was created, Black's Law Dictionary defined "liquidate" in relevant part as: "1. To settle (an obligation) by payment or other adjustment; to extinguish (a debt). 2. To ascertain the precise amount of (debt, damages, etc.) by litigation or agreement. 3. To determine the liabilities and distribute the assets of (an entity), esp. in bankruptcy or dissolution. 4. To convert (a non-liquid asset) into cash. 5. To wind up the affairs of (a corporation, business, etc.)." Black's Law Dictionary (8th Ed. 2004) p. 949. "Liquidated" was defined as: "1. (Of an amount or debt) settled or determined, esp. by agreement. 2. (Of an asset or assets) converted into cash." Id. "Liquidation" was defined as: "1. The act of determining by agreement or by litigation the exact amount of something (as a debt or damages) that before was uncertain. 2. The act of settling a debt by payment or other satisfaction. 3. The act or process of converting assets into cash, esp. to settle debts." Id., p. 950. Additionally, Merriam-Webster's Collegiate Dictionary (Merriam-Webster) contemporaneously defined "liquidate" in relevant part as: "to determine by agreement or by litigation the precise amount of (indebtedness, damages, or accounts)"; "to determine the liabilities and apportion assets toward

[7] As stated previously, part VIII of the trust instrument provides: "Upon the death of the [decedent], all of the [t]rust [p]roperty shall be liquidated and distributed in accordance with [p]art IX below."

discharging the indebtedness of"; "to settle (a debt) by payment or other settlement"; "to make clear"; "to do away with"; "to convert (assets) into cash"; "to liquidate debts, damages, or accounts"; and "to determine liabilities and apportion assets toward discharging indebtedness." Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 726.

On the basis of the foregoing definitions, we do not agree with the defendant's argument that part VIII's inclusion of the words "liquidated and distributed" reflects an intent by the decedent that the trust property be sold, nor do we agree with the defendant that "[s]uch distribution would be virtually impossible absent a sale." (Emphasis omitted.) Although the defendant is correct that Merriam-Webster's definition of "liquidate" includes the possibility of a sale; Merriam-Webster's Collegiate Dictionary, supra, p. 726; the contemporaneous definitions of "liquidate" also include other manners of distribution. Specifically, one other method that appears in multiple definitions is "[t]o settle (an obligation) by payment"; Black's Law Dictionary, supra, p. 949; or, in slightly different words, "settling a debt by payment or other satisfaction." Id., p. 950. Thus, paying out the interest of another individual, which was the plaintiff's intended approach in the present case, falls within the definition of "liquidate," as that term is used in the trust instrument.

Moreover, the defendant's argument that a sale was the sole means by which the plaintiff could distribute the trust property ignores the fact that the trust instrument gives the trustee broad discretion as to the manner of the distribution. As was previously iterated, part IX of the trust instrument provides in relevant part that "[t]he [t]rustees shall have the sole and absolute discretion as to the *manner*, timing, transfer, sale, lease *or any other use and disposition of the* [*t*]*rust* [*p*]*roperty* so as to accomplish the distributions to the beneficiaries

of this [t]rust within one year after the death of [the decedent]." (Emphasis added.)

This conclusion is further bolstered by the fact that the trust instrument was explicitly intended to conform with Connecticut law, which, as noted by the court, includes "the prescriptions and restrictions of [§ 45a-235] . . . ." Section 45a-235 (9) empowers a fiduciary "[t]o retain any residential real property or apartment and the contents of such real property or apartment received by it hereunder, to purchase, to rent and to maintain residential real property including an ordinary, cooperative or condominium apartment for occupancy, rent free, by any of the beneficiaries hereunder, so long as one or more of them wish to use and occupy it as a home, and to sell it when it is no longer so used and occupied . . . ." It is not conceivable that the trust instrument would require the trustee to sell the property to comply with the liquidation requirement while simultaneously empowering the trustee to have broad discretion to determine the manner of distribution and/or retain the trust property for occupancy as a home.

Thus, the definitions of the term "liquidate," as well as the discretion afforded to the plaintiff by both the trust instrument itself and § 45a-235, support the conclusion that the decedent intended to permit the trustee(s) to distribute the interests of the beneficiaries in an alternative manner to a sale. Accordingly, we conclude that the court properly interpreted that term in the trust instrument.

B

The defendant next argues that the court improperly determined that the trust instrument did not require the sale of the trust property within one year of the decedent's death. The defendant maintains that a sale was required to have occurred within one year of the decedent's death because, in his view, part IX of the trust instrument directs the trustees to accomplish the

distribution of the trust property to the beneficiaries within that period. We disagree with the defendant's argument because it ignores the discretion afforded to the plaintiff in part IX of the trust instrument.[8]

We again emphasize that part IX of the trust instrument empowers the trustees with "the sole and absolute discretion as to the . . . timing . . . of [the distribution of] the [t]rust [p]roperty so as to accomplish the distributions to the beneficiaries of this [t]rust within one year after the death of [the decedent]." The court correctly noted that, although part IX "contemplates the disposition of the [trust] property within one year of [the decedent's] death . . . [such] language [is] merely aspirational, its efficacy entirely dependent on the clause which precedes it endowing the trustees with 'sole and absolute discretion as to the manner, *timing*, transfer, sale, lease or any other use and disposition of the [t]rust [p]roperty.' " (Emphasis added.) We agree with the court's conclusion that the discretion afforded to the trustee(s) in the trust instrument demonstrates that the settlor contemplated the possibility that the trustee(s) could distribute the trust property outside of the one year timeline prescribed in part IX.[9]

[8] The plaintiff argues that this portion of the defendant's claim is inadequately briefed. See *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021). We conclude, however, that the defendant's claim is adequately briefed and, therefore, address its merits.

[9] Even if we were to accept the defendant's argument that the one year timeline was a mandate, the plaintiff would still be shielded from liability for her failure to distribute the trust property within one year. As noted earlier in this opinion, section H of the trust instrument provides in relevant part: "With respect to the exercise or non-exercise of discretionary powers granted by this [d]eclaration of [t]rust, the [t]rustees shall not be liable for actions taken in good faith." The court found that "the [plaintiff's] delay in disposing of the trust property resulted not from neglect or bad faith on the part of [the plaintiff] but from the priority given to addressing [Francine's] theft of funds from [the decedent's] estate and [the plaintiff's] belated discovery that the [trust] property had been placed in [the] trust and was thus not an asset of [the decedent's] estate." That finding is not clearly erroneous. See *C. D.* v. *C. D.*, 218 Conn. App. 818, 824, 293 A.3d 86 (2023) ("[a] finding

In sum, the court properly concluded that the trust instrument did not require the plaintiff to sell the trust property within one year of the decedent's death.

II

The defendant next claims that the trial court erred in ruling against him on his breach of fiduciary duty claim as alleged in the fourth count of the operative counterclaim. We disagree.

The following legal principles and standard of review govern our resolution of this claim. "A trustee owes a fiduciary duty to administer the trust in the interest of the beneficiaries, and that duty commences when the trustee accepts the trusteeship. . . . The trustee's administration of the trust must comport with her duties of loyalty and prudence." (Citations omitted.) *Barash* v. *Lembo*, 348 Conn. 264, 285, 303 A.3d 577 (2023). "[I]n order to allege a claim against a trustee for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, giving rise to a duty, (2) breach of that duty, (3) causation, and (4) damages." Id., 302–303. A breach of fiduciary duty claim presents a mixed question of law and fact. "Accordingly, we review the court's factual findings for clear error and conduct a plenary review of the court's ultimate conclusion as to whether the plaintiff proved that [she] did not breach [her] fiduciary duty to the defendant." *ASPIC, LLC* v. *Poitier*, 208 Conn. App. 731, 743, 267 A.3d 197 (2021). "A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with

of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" (internal quotation marks omitted)). Thus, the plaintiff, acting in good faith, may not be held liable for her failure to distribute the trust property within one year of the decedent's death.

the definite and firm conviction that a mistake has been committed. . . .

"In determining whether the court's decision was clearly erroneous, we must examine the court's decision in the context of the heightened standard of proof imposed on a fiduciary. . . . Once a fiduciary relationship is found to exist, the burden of proving fair dealing properly shifts to the fiduciary. . . . Furthermore, the standard of proof for establishing fair dealing is not the ordinary standard of proof of fair preponderance of the evidence, but requires proof either by clear and convincing evidence, clear and satisfactory evidence or clear, convincing and unequivocal evidence." (Citations omitted; internal quotation marks omitted.) *Spector* v. *Konover*, 57 Conn. App. 121, 126–27, 747 A.2d 39, cert. denied, 254 Conn. 913, 759 A.2d 507 (2000). "The construction of a trust instrument presents a question of law to be determined in the light of facts that are found by the trial court or are undisputed or indisputable." (Internal quotation marks omitted.) *Taylor* v. *Taylor*, 117 Conn. App. 229, 235, 978 A.2d 538, cert. denied, 294 Conn. 915, 983 A.2d 852 (2009).

The fourth count of the defendant's operative counterclaim alleged in relevant part that the plaintiff breached her fiduciary duty by (1) failing to timely liquidate and distribute the trust property as required by the trust instrument, (2) "[seeking] to have the value of the beneficiaries' distributive shares determined by judicial decree rather than by liquidation of the trust property on the open market as required by the [trust instrument]," (3) "[seeking] to have the trust property conveyed to herself by judicial decree rather than sold on the open market as provided in the [trust instrument]," and (4) committing such acts with "reckless indifference to the rights of [the defendant] or in intentional and wanton violation of his rights." The court rendered

judgment in favor of the plaintiff on this claim. Specifically, the court stated that (1) the plaintiff had engaged in self-dealing, which she had failed to establish by clear and convincing evidence as having been "otherwise fair to [the defendant]," but (2) it "[did] not find [that] the plaintiff's self-dealing, while perhaps ill-advised, was either odious or motivated by ill will" and that "self-dealing was within her discretion under the broad terms of the trust instrument . . . ." Moreover, the court found that, despite the plaintiff's delay in liquidating the trust property, she "was acting in good faith and, thus, shielded from liability under [section H]."

The defendant's argument on appeal, in essence, is that the court's findings that the plaintiff (1) was self-dealing by moving into the trust property and maintaining the home and (2) "failed to prove by clear and convincing evidence that her self-dealing was otherwise fair to [the defendant]" required the court to render judgment in his favor on his breach of fiduciary duty claim. We disagree.

The defendant's argument is unavailing because it ignores the critical determination made by the court that the plaintiff "was acting in good faith and, thus, shielded from liability under [section H]." Although the court found that the plaintiff had engaged in self-dealing and that she failed to prove that her self-dealing was otherwise fair to the defendant, the court "credit[ed] the testimony of [the plaintiff] and [Ritacco]" and "[found], by clear and convincing evidence, that the delay in disposing of the trust property resulted not from neglect or bad faith on the part of [the plaintiff] but from the priority given to addressing [Francine's] theft of funds from [the decedent's] estate . . . ." The court iterated its conclusion, stating that "the plaintiff has proven, by clear and convincing evidence, that [she] has exercised her duties as trustee of the [trust] in good faith and in accordance with the terms and purposes

of the trust, the [decedent's] intent, and the interests of the beneficiaries—of which she is one—and that she has not engaged in shameless self-dealing . . . ." The defendant does not dispute these findings on appeal.[10] Accordingly, pursuant to section H, the plaintiff was shielded from liability for breach of a fiduciary duty.

In sum, we conclude that the court correctly found that the plaintiff did not breach her fiduciary duty and, therefore, properly rendered judgment for the plaintiff on the defendant's breach of fiduciary duty claim.

III

The defendant next claims that the trial court improperly refused to impute knowledge of the terms of the trust instrument to the plaintiff. In connection with this claim, the defendant asserts that ignorance of the trust's terms is not a defense for the delay in liquidating the trust property because "[a] reasonable person would inform themselves of the terms of a trust which they had executed; and to which they had transferred property; and of which they had agreed to serve as a fiduciary." The plaintiff argues that the defendant's claim is inadequately briefed. We agree with the plaintiff.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented

[10] In a footnote of his appellate brief, the defendant states that the court's determination "that the plaintiff had exercised her duties as trustee 'in good faith and in accordance with the terms and purposes of the trust' is arguably inconsistent but ultimately inapposite. The plaintiff's specific burden under [*Konover Development Corp.* v. *Zeller*, 228 Conn. 206, 219, 635 A.2d 798 (1994)] was to prove fair dealing, a concept distinct from good faith or fulfillment of the trust's terms." (Emphasis omitted.) We disagree with the defendant. The critical difference between the present case and the circumstances in *Konover Development Corp.* is the existence of section H in the trust instrument. We interpret section H to provide protection for the plaintiff for actions done in good faith, regardless of whether the plaintiff proved fair dealing pursuant to *Konover Development Corp.* Thus, although *Konover Development Corp.* describes the default burden of proof imposed on the fiduciary, the trust instrument added an additional protection for the plaintiff.

to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Robb* v. *Connecticut Board of Veterinary Medicine*, 204 Conn. App. 595, 611, 254 A.3d 915, cert. denied, 338 Conn. 911, 259 A.3d 654 (2021); see also *Lewis* v. *Commissioner of Correction*, 211 Conn. App. 77, 99–100, 271 A.3d 1058 (concluding that petitioner inadequately briefed claims because he "failed to provide any legal analysis as to how the court erred with respect to [his] claims"), cert. denied, 343 Conn. 924, 275 A.3d 1213, cert. denied sub nom. *Lewis* v. *Quiros*, U.S. , 143 S. Ct. 335, 214 L. Ed. 2d 150 (2022).

In part III of the defendant's appellate brief, spanning fewer than two pages, the defendant makes no attempt to explain how, even if the plaintiff were deemed to have known of the terms of the trust at the time of its execution, the court erred in rendering its judgment and, therefore, has not provided the type of legal analysis necessary for us to review this claim. Accordingly, we deem this claim to be abandoned as inadequately briefed.[11]

IV

Finally, the defendant cursorily claims that the trial court, upon concluding that the record was insufficient

[11] Even if we were to address the defendant's third claim on the merits, however, it would still fail for the reasons explained in part II of this opinion, namely, that the good faith provision in section H shields the plaintiff from liability for actions taken in good faith.

to enable it to assess the reasonableness of the plaintiff's request for attorney's fees, should have simply denied the plaintiff's request, instead of ordering additional proceedings to be held on that issue. We disagree.

By way of brief review, the plaintiff claimed to have incurred attorney's fees totaling $88,509.81 in the defense or administration of the trust, i.e., $44,988.13 of which was paid to the Law Office of Salvatore Ritacco, LLC, and $43,521.68 of which was paid or payable to the Law Office of Gerald Del Piano, LLC. Affidavits of Attorneys Ritacco and Gerald A. Del Piano, as well as detailed bills, were in evidence. In its memorandum of decision, the court acknowledged the foregoing evidence but ordered additional proceedings to determine, pursuant to rule 1.5 of the Rules of Professional Conduct, its commentary, and the twelve factor test set forth in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717–19 (5th Cir. 1974), the amount of expenses the plaintiff reasonably incurred in prosecuting the action and defending against the failed counterclaim. In doing so, the court stated that it was "mindful of the fact that (1) it was [the plaintiff's] fiduciary duty to bring an action to dissolve the trust; (2) given the inability of the parties to agree on an amount representing the value of the defendant's 10 percent beneficial interest in the trust, the plaintiff had no choice but to seek a declaratory judgment determining that value; (3) even if, arguendo, there had been an agreement, the agreement would have been subject to court approval; and (4) while the plaintiff's claims for breach of contract, unjust enrichment, breach of the covenant of good faith and fair dealing, and misrepresentation failed, the plaintiff successfully defended the claims made by the defendant in his counterclaim."

We find no error in the court's adopting a procedure whereby, against the backdrop of its liability findings at trial, it would determine in a future proceeding the

amount of reasonable expenses incurred by the plaintiff in prosecuting the action and defending against the failed counterclaim.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

GAMA AVIATION (MANAGEMENT), INC. *v.* IZAK SENBAHAR (AC 46852)

Alvord, Seeley and Palmer, Js.

Syllabus

The defendant appealed from the trial court's judgment granting the plaintiff's motion for summary judgment in its action to recover from the defendant for his breach of an agreement to guarantee payment of a promissory note executed by a third-party borrower. The defendant claimed that the trial court erred in rejecting his statute of limitations special defense. *Held*:

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[12] We further note that it is implicit, in the context of our final judgment jurisprudence, that a trial court does not err when it puts off for another day the determination of the amount of attorney's fees to be awarded. That is, our appellate courts repeatedly have applied the bright-line rule that "a judgment on the merits is final for purposes of appeal even though the recoverability or amount of attorney's fees for the litigation remains to be determined." *Paranteau* v. *DeVita*, 208 Conn. 515, 523, 544 A.2d 634 (1988); see also *Ledyard* v. *WMS Gaming, Inc.*, 330 Conn. 75, 90–91, 191 A.3d 983 (2018) (reversing dismissal of defendant's appeal from decision of trial court, which had ordered that plaintiff town was entitled to recover certain attorney's fees but had not yet determined amount of those fees when defendant appealed); *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014) (reversing dismissal of appeal and concluding that appealable final judgment existed when all that remained for trial court to do was to determine amount of attorney's fees comprising common-law punitive damages that it previously had awarded). To conclude that the court in the present action erred in essentially adopting a bifurcated procedure would conflict with this jurisprudence.

We also fail to see how the defendant is harmed by the court's decision to permit him to challenge in a later proceeding the affidavits submitted in support of the plaintiff's application for attorney's fees. Furthermore, the defendant can appeal from any final determination the court makes after giving him a full opportunity to challenge the plaintiff's requested fees.

The trial court properly granted the plaintiff's motion for summary judgment, as the undisputed evidence established the defendant's breach of the guaranty agreement and clearly demonstrated that the defendant had acknowledged the debt prior to the expiration of the limitation period, thereby resetting the limitation period.

Argued September 17, 2024—officially released March 18, 2025

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Frechette, J.*, granted the plaintiff's motion for summary judgment and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed*.

Nathan C. Zezula, for the appellant (defendant).

Michael J. Donnelly, for the appellee (plaintiff).

Opinion

PALMER, J. The plaintiff, Gama Aviation (Management), Inc., commenced this action against the defendant, Izak Senbahar, alleging breach of the defendant's agreement to personally guarantee payment of a promissory note that had been executed in favor of the plaintiff by a third-party borrower. The trial court rendered summary judgment for the plaintiff and, in so doing, rejected the defendant's statute of limitations defense, concluding that, although the plaintiff's action was not brought within the original six year limitation period, the action was not time barred because the defendant acknowledged the debt owed under the guaranty agreement, thereby resetting that six year period. On appeal, the defendant challenges the trial court's determination that he could not prevail on his statute of limitations defense as a matter of law because, the defendant contends, he never acknowledged the debt and, consequently, the plaintiff's action is barred by the original limitation period. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On July 13, 2021, the plaintiff filed a one count complaint claiming breach of a guaranty agreement by the defendant and alleging in relevant part as follows.[1] On or about January 30, 2012, the plaintiff, as the lender, and Zulu Air Service, LLC (Zulu), as the borrower, entered into a commercial loan evidenced by a promissory note (note) in the principal loan amount of $1,100,000 with a maturity date of December 31, 2013.[2] On January 30, 2012, the defendant executed a guaranty agreement in favor of the plaintiff as additional security for the note, guaranteeing the prompt satisfaction of Zulu's indebtedness to the plaintiff in the event of Zulu's default of its payment obligation under the terms of the note. Zulu made one payment of $500,000 to the plaintiff but failed to tender the balance due to the plaintiff by December 31, 2013, or thereafter, thereby breaching the terms of its obligation under the note. As a result, the defendant was required, pursuant to the terms of the guaranty agreement, to tender all sums due and owing to the plaintiff under the note. On October 31, 2018, the plaintiff made demand upon the defendant, in accordance with the terms of the guaranty agreement, for payment of the amount owed under the note. The defendant did not pay the plaintiff.

Throughout 2019, the plaintiff's president and the defendant engaged in email communications in which the former sought payment. As set forth more fully

[1] Previously, on March 11, 2021, the plaintiff filed an application for a prejudgment remedy, which the court, *Hon. Arthur A. Hiller*, judge trial referee, granted on July 9, 2021, in the amount of $1,675,000.

[2] The complaint alleges that the defendant was affiliated with Zulu, which is not a party to this case. The record further reflects that the defendant and a friend purchased a Falcon 2000 jet aircraft from the plaintiff and formed Zulu as a single purpose entity to own the aircraft. Both the defendant and his friend were to pay Zulu for the maintenance and usage of the plane, and, in turn, Zulu was responsible for paying the plaintiff.

hereinafter, these communications included representations by the defendant referring to the debt and a proposed payment plan. The plaintiff, however, never received any payments from the defendant.[3]

In his response to the plaintiff's action, the defendant filed an answer and, inter alia, a special defense alleging that the plaintiff's claim of breach of the guaranty agreement was barred by the six year limitation period set forth in General Statutes § 52-576.[4] Thereafter, the plaintiff moved for summary judgment. In support of its motion, the plaintiff maintained that the undisputed facts established that the defendant had breached the terms of the guaranty agreement because it was uncontested that the plaintiff was owed a debt from Zulu, the defendant executed a guaranty agreement to pay that debt when due in the event Zulu failed to do so, and the debt had not been paid.[5] The plaintiff further maintained that its claim was not barred by the statute of limitations because the undisputed facts, as reflected in certain email communications between the defendant and the plaintiff's president, as well as the defendant's deposition testimony, established conclusively that the defendant acknowledged the debt prior to the expiration of the limitation period and, consequently, that period began anew with the acknowledgement. In opposing the

[3] The plaintiff also never received any additional payments on the note from Zulu.

[4] General Statutes § 52-576 provides in relevant part: "(a) No action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

It is undisputed that the six year limitation period of § 52-576 applies to actions for breach of a guaranty agreement. See, e.g., *Associated Catalog Merchandisers, Inc.* v. *Chagnon*, 210 Conn. 734, 746 n.6, 557 A.2d 525 (1989) (limitation period of § 52-576 is applicable to claim of breach of guaranty agreement).

[5] See, e.g., *Tolland Meetinghouse Commons, LLC* v. *CXF Tolland, LLC*, 211 Conn. App. 1, 6, 271 A.3d 1118 (2022) (reciting elements of breach of guaranty agreement).

plaintiff's motion for summary judgment, the defendant asserted that the statute of limitations barred the plaintiff's claim and that that bar had not been removed because, contrary to the plaintiff's claim, he had not acknowledged the debt.

In its memorandum of decision, the trial court, *Frechette, J.*, granted the plaintiff's motion for summary judgment.[6] The court agreed with the plaintiff that the undisputed evidence established the defendant's breach of the guaranty agreement. With respect to the defendant's statute of limitations defense, the court also concluded that the undisputed evidence—in particular, three emails between the plaintiff's president and the defendant, and certain deposition testimony of the defendant—clearly demonstrated that the defendant had acknowledged the debt, thereby resetting the limitation period.[7] In the first such email, dated January 10, 2019, the defendant informed the plaintiff's president as follows: "I am working on a $250,000 payment. I anticipate [thirty] to [forty-five] days for the first installment." Further, when questioned at his deposition concerning his reference in that email to the $250,000 payment, the defendant stated: "You know, another payment—they claim 1.1 million. There's a note against it. And I said I'll—I guess I said I'll send—I'm working on sending you another $250,000."[8]

In a second email sent to the plaintiff's president on January 14, 2022, the defendant stated: "I am working

[6] We note that the defendant previously had filed his own motion for summary judgment, which the trial court denied in its memorandum of decision.

[7] The defendant also filed two additional special defenses, laches and unclean hands, both of which the trial court rejected as a matter of law. The defendant has not appealed from the court's judgment with respect to either of those defenses.

[8] There was no prior payment of $250,000. In stating that he was working on sending the plaintiff "another" payment of $250,000, the defendant is referring to the only payment, which was in the amount of $500,000, that previously was made to the plaintiff by Zulu.

on a payment of $250,000 in the next [thirty] to [forty-five] days. I will know better towards the end of the week. I anticipate starting a program of monthly payments starting in June. I am around if you want to meet or talk on the phone." In a third email to the plaintiff's president dated January 15, 2022, the defendant repeated verbatim what he had stated in his email to the plaintiff's president the day before. In addition, when asked in his deposition to explain the statement in his email correspondence that he would pay the plaintiff $250,000 in the next thirty to forty-five days, the defendant confirmed the statement as follows: "I'm seeing that I'm saying I'll make a 250 payment with some installments." Questioned further in his deposition as to whether he was stating that he would make payments toward the $250,000 in installments, the defendant replied, "I think so, yeah."

In its decision, the trial court observed that the defendant had repeatedly and unequivocally acknowledged the debt, concluding that there was no genuine issue of material fact with respect to that issue "based on the defendant's plain acknowledgment of the debt, in writing, and his deposition testimony affirming his acknowledgment of the debt." Accordingly, the court further concluded that the plaintiff was entitled to prevail as a matter of law on the defendant's statute of limitations claim.[9] After granting the plaintiff's motion

[9] We note that, in the trial court, the plaintiff also claimed that the defendant could not prevail as a matter of law on his statute of limitations defense because the guaranty agreement itself contains an express blanket waiver of that defense. In reliance on *Haggerty* v. *Williams*, 84 Conn. App. 675, 680, 855 A.2d 264 (2004), the trial court rejected the plaintiff's claim on the ground that the purported waiver violated public policy and, therefore, was unenforceable. The plaintiff raises its claim of a blanket waiver on appeal as an alternative ground for affirmance. In view of our determination that the trial court properly rejected the statute of limitations defense because the defendant acknowledged the debt, thereby resetting the limitation period, we need not address the plaintiff's claim of a blanket waiver under the guaranty agreement.

for summary judgment, the court entertained the plaintiff's claim for damages, attorney's fees and interest, and rendered judgment for the plaintiff in the amount of $2,140,760.95. Subsequently, the court also awarded the plaintiff offer of compromise interest in the amount of $354,253.55.[10] This appeal followed.

The defendant maintains that the court improperly concluded that the plaintiff's action for breach of the guaranty agreement was not time barred by the applicable six year statute of limitations.[11] Specifically, he contends that, as the plaintiff alleged in its complaint, Zulu defaulted on the note in December, 2013, and the plaintiff did not file its action until 2021, more than seven years after its cause of action accrued. The defendant further contends that the original six year limitation period was not reset because, despite the trial court's contrary determination, he never acknowledged the debt. We are not persuaded.

The following legal principles guide our resolution of this appeal, beginning with the well established standard governing our review of a trial court's decision to grant a motion for summary judgment. "Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts [that], under applicable principles of substantive law, entitle [it] to a judgment as a

[10] The amounts of the judgment and the award are not the subject of this appeal.

[11] On appeal, the defendant does not challenge the trial court's determination that he breached the guaranty agreement.

matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact [that] will make a difference in the result of the case. . . . Finally, the scope of our review of the trial court's decision to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Day* v. *Seblatnigg*, 341 Conn. 815, 825, 268 A.3d 595 (2022).

This case implicates our law governing the tolling of a statute of limitations by virtue of an acknowledgment of a debt. "The statute of limitations creates a defense to an action. It does not erase the debt. Hence, the defense can be lost by an unequivocal acknowledgment of the debt, such as a new promise, an unqualified recognition of the debt, or a payment on account. . . . A general acknowledgment of an indebtedness may be sufficient to remove the bar of the statute. The governing principle is this: The determination of whether a sufficient acknowledgment has been made depends upon proof that a defendant has by an express or implied recognition of the debt voluntarily renounced the protection of the statute. . . . But an implication of a promise to pay cannot arise if it appears that although the debt was directly acknowledged, this acknowledgment was accompanied by expressions which showed the defendant did not intend to pay it, and did not intend to deprive himself of the right to rely on the [s]tatute of [l]imitations . . . . [A] general acknowledgment may be inferred from acquiescence as well as from silence, as where the existence of the debt has been asserted in the debtor's presence and he did not contradict the assertion." (Internal quotation marks omitted.) *Ajluni* v. *Chainani*, 184 Conn. App. 650, 655–56,195 A.3d 694 (2018). Ordinarily, whether statements or conduct by a defendant constitute an acknowledgment of a debt sufficient to toll the statute

of limitations is a question for the trier of fact. See id., 656.

With the foregoing considerations in mind, we conclude that the trial court properly determined that the plaintiff produced undisputed evidence, specifically email communications between the defendant and the plaintiff's president, as well as the defendant's deposition testimony, that the defendant unequivocally acknowledged the existence of the debt. In his emails, the defendant never indicated that he would not pay the debt. Rather, he repeatedly stated that he intended to make payments on the debt in installments, the first of which he planned to make within thirty to forty-five days. In his deposition testimony, the defendant confirmed that the payment to which he was referring in these email communications pertained to the debt he owed under the guaranty agreement, which expressly referenced the $1,100,000 note, and he further confirmed the statement in his email that he was working on sending the plaintiff $250,000. This evidence definitively established that the defendant acknowledged the debt and was taking steps to pay it. As this court has previously stated in a case also involving email communications, "[w]e thus agree with the [trial] court's determination that there was nothing equivocal about the reaffirmation of the existence of the debt; the defendant merely hedged on if and when he would be *able* to repay it." (Emphasis in original; internal quotation marks omitted.) Id., 658.

Although not disputing that the note and guaranty agreement both are in the stated amount of $1,100,000, the defendant asserts that he never acknowledged the full amount of the debt and, in fact, shortly after the note and guaranty agreement were executed, he began questioning whether that amount accurately reflected the value of the services actually rendered by the plaintiff to Zulu, and he requested records to back up the

amount. As the trial court observed, however, the defendant has provided no case law for the proposition that a statement is insufficient to constitute an acknowledgment of the debt merely because the guarantor has not explicitly acknowledged the precise total of the debt owed.

The defendant also claims that the determination of whether a guarantor has acknowledged a debt and, as a result, tolled the statute of limitations is a "classic example" of a decision that should be left to the finder of fact and not decided by summary judgment. We agree that that determination usually is one for the fact finder and, further, that most of this state's appellate jurisprudence on the issue involves claims concerning the evidentiary sufficiency of a factual finding on the issue.[12] We also are mindful that "summary judgment is appropriate only if a fair and reasonable person could conclude only one way. . . . [A] summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict for the moving party. . . . [A] directed verdict may be rendered only where, on the evidence viewed in the light most favorable to the nonmovant, the trier of fact could not reasonably reach any other conclusion than that embodied in the verdict as directed." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Dugan* v. *Mobile Medical Testing Services, Inc.*, 265 Conn. 791, 815, 830 A.2d 752 (2003).

[12] See, e.g., *Ajluni* v. *Chainani*, supra, 184 Conn. App. 657–59 (evidence was sufficient to support finding by trial court that defendant acknowledged debt, thereby resetting statutory limitation period); *Williams Ground Services, Inc.* v. *Jordan*, 174 Conn. App. 247, 251–55, 166 A.3d 791 (2017) (same); *Alarmax Distributors, Inc.* v. *New Canaan Alarm Co.*, 141 Conn. App. 319, 334, 61 A.3d 1142 (2013) (same); *Zatakia* v. *Ecoair Corp.*, 128 Conn. App. 362, 369–71, 18 A.3d 604 (same), cert. denied, 301 Conn. 936, 23 A.3d 729 (2011); *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, 76 Conn. App. 599, 610–12, 821 A.2d 774 (same), cert. denied, 264 Conn. 919, 828 A.2d 617 (2003); *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 460–65, 802 A.2d 887 (same), cert. denied, 262 Conn. 918, 812 A.2d 861 (2002).

Considering, however, the undisputed evidence in the present case, namely, the email correspondence between the defendant and the plaintiff's president, and the defendant's deposition testimony concerning that correspondence, we are satisfied that no reasonable fact finder could reach any conclusion other than that the defendant had unconditionally recognized the debt and that the limitation period was thereby reset by that acknowledgment. In such circumstances, the plaintiff is entitled to prevail on the issue as a matter of law. Consequently, the defendant's claim must fail.

The judgment is affirmed.

In this opinion the other judges concurred.