IN RE J. D.*
(AC 47971)

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

Syllabus

The respondent mother appealed from, inter alia, the judgment of the trial court terminating her parental rights as to her minor child. The mother

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

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

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

claimed that she did not receive the effective assistance of counsel in opposing the petition to terminate her parental rights and advocating for her motion for posttermination visitation because her counsel did not present the testimony of a psychologist who had evaluated her. *Held*:

This court concluded that the record was inadequate to review the respondent mother's claim that counsel rendered ineffective assistance by failing to call the psychologist as a witness, as the record was silent as to the testimony the psychologist would have provided at the termination trial and the mother failed to present this court with a sufficient record to overcome the strong presumption that counsel's decision not to call the psychologist to testify was strategically sound.

Argued January 16—officially released May 19, 2025***

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the respondent mother filed a motion for posttermination visitation; thereafter, the case was tried to the court, *Knight, J.*; judgment terminating the respondents' parental rights and denying the respondent mother's motion for posttermination visitation, from which the respondent mother appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent mother).

Lori Ann Knuth, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Nisa Khan*, assistant attorney general, for the appellee (petitioner).

Opinion

ELGO, J. The respondent mother, A. T., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families,

*** May 19, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

terminating her parental rights and denying her motion for posttermination visitation rights with respect to her daughter, J.[1] On appeal, the respondent claims that she did not receive effective assistance of counsel in opposing the petition to terminate her parental rights because her trial counsel did not present the testimony of Ralph Balducci, a psychologist, who had evaluated the respondent in January, 2023. We conclude that the respondent has not presented an adequate record by which we can review that claim and, accordingly, affirm the judgment of the court.[2]

The following undisputed facts, as found by the court or otherwise disclosed by the record, are relevant to this appeal. J was born in May, 2021. At that time, the Department of Children and Families (department) had been involved with the respondent's family since 2019.[3] The respondent was facing eviction and did not receive adequate prenatal care during her pregnancy with J. As a result of concerns the department had with the respondent's care of her older children, the respondent was referred to mental health therapy but inconsistently availed herself of that service and was discharged unsuccessfully. The respondent also was referred to programming to address ongoing issues with misuse of marijuana but was discharged twice due to poor

[1] The respondent father, who participated at the termination of parental rights trial, does not challenge on appeal the termination of his parental rights. Throughout this opinion, we refer to the mother as the respondent.

Additionally, we note that, although the respondent's parental rights with regard to another child were terminated in this same trial, she does not make any claims on appeal with respect to the propriety of that determination. We note as well that a third child of the respondent was adjudicated neglected on that same date, which determination is also not the subject of this appeal.

[2] On appeal, the attorney for the minor child adopted the position of the petitioner.

[3] At the time of J's birth, the respondent's two other children were under protective supervision, having been adjudicated neglected in 2019. These children, born to a different father than J's father, were committed to the custody of the petitioner in October, 2021.

attendance. On October 29, 2021, the petitioner filed a neglect petition as to J.

On March 25, 2022, J was adjudicated neglected and committed to the care of the petitioner. Citing the respondent's failure to participate in in-home visits, as well as her failure to engage with substance abuse treatment and a failure to maintain communication with the department, the court found that it was in the best interest of the child to be committed to the petitioner's custody.[4]

After the court ordered J committed to the custody of the petitioner, the respondent and J's father attempted to prevent her from being taken into care by hiding her, in what a previous court referred to as a " 'shell game.' " The respondent claimed that J was with the father, and the father refused all attempts to communicate with him. As a result, a "silver alert" was issued through an emergency notification system to the public. See *In re Cassandra C.*, 316 Conn. 476, 490 n.5, 112 A.3d 158 (2015). Three days after the court's order, J was located at the respondent's apartment and placed in the custody of the petitioner. On April 8, 2022, the father, acting with the knowledge and support of the respondent, abducted J from foster care, and transported her to his sister's home. The father's sister notified the police, and J was returned to the care of the petitioner the following day.

On July 7, 2022, both the father and the respondent were arrested and charged with the crimes of risk of injury to a child and interfering with an officer after an incident in which the father refused to return his seven

[4] In 2015 and 2019, the department had placed the father on the Central Registry of Abuse and Neglect following its substantiation of sexual abuse of two minors. At the time of J's commitment, and throughout the events relevant to this appeal, the father was unwilling to comply with the department's requests to assess his home and for him to participate in evaluations to determine if sex offender treatment was recommended.

year old daughter from a different relationship to that child's mother following a weekend visit. Pursuant to a court order, police officers arrived at the respondent's apartment to retrieve the child. The respondent refused to grant the officers entry to her home. Upon forcing entry into the respondent's residence, and despite the respondent's insistence that the father was not present, police officers located the father hiding with the child in a stairwell of the residence.

On September 21, 2022, updated specific steps were ordered for each parent with regard to J. These specific steps required the respondent, inter alia, to sign releases so that the department could receive updates regarding her treatment, to participate in parenting education and supervised visitation, and to prohibit the father from residing in her home without department approval. At the request of the court, Balducci evaluated the respondent and produced a report detailing his findings in January, 2023.[5] Balducci concluded that it would be "detrimental" to the children for visitation with the respondent to be reduced or eliminated, as the children "appear bonded" with the respondent and it would be "confusing and represent a significant loss to the children to have their contact with [the respondent] reduced or discontinued."[6] Balducci also determined that "[r]eunification appears possible" given the circumstances, but that "[i]t remains uncertain what role [the father] will play in his children's lives and as a support, or detriment, to [the respondent] given that [the father]

[5] The January, 2023 report was attached to the respondent's appellate brief. Additionally, we note that Balducci previously had evaluated the respondent in February, 2020, but the 2020 report is not contained in the record.

[6] Due to the fact that the father did not appear for the court-ordered evaluation, Balducci noted that he had insufficient and limited information from which to render an opinion as to whether the father should undergo a sexual offender evaluation or otherwise receive treatment for "problem sexualized behavior."

did not participate in these [c]ourt-ordered evaluations."

Throughout the events leading up to the termination trial, and despite the full no-contact protective order, the court found that the respondent "was observed in the father's company multiple times." As the court noted in its memorandum of decision, on April 12, 2023, "the father went to a multifamily dwelling in Bridgeport where the [respondent] and the father's sister were living in separate apartments. The father broke down the door to the [respondent's] first floor apartment in an attempt to locate her, while the [respondent] attempted to escape by running up to the father's sister's apartment where the sister and eight children were present. The father kicked in the door to the sister's apartment, brandished a gun, and began arguing with the [respondent] over the location of a gaming console. Police were called to the scene and soon recovered a 'ghost' gun[7] and another fully loaded firearm in a vehicle the parents shared. Subsequently, the father was charged with eight counts of risk of injury, violation of a protective order, various firearms violations, disorderly conduct, and criminal mischief. Following his arrest, full no-contact protective orders issued, with the father as the subject and the [respondent] and the father's sister as the protected parties. The [respondent] denied being assaulted despite the father's sister's claim that the father had indeed assaulted the [respondent]. Notably, several months later during a court-ordered evaluation in February, 2024, the [respondent] provided . . . an account of the incident totally at odds with the police report." (Footnote in original.)

[7] "Ghost guns are guns that have no serial numbers and are usually made by piecing together firearm components in a do-it-yourself manner. When assembled, they operate as fully functioning firearms that are largely untraceable."

Further, "[o]n April 24, 2023, the father's sister called the police to report that the father was in the [respondent's] home. The department went to the home accompanied by a Bridgeport police officer, but the [respondent] refused to let them in to search for the father. Two days later, a department employee saw the [respondent] and the father together at a New Haven courthouse where the father had a scheduled court hearing." Additionally, "on June 19, 2023, the father's sister reported that the father and the [respondent] drove to her home and threatened and harassed her. When the father's sister approached the father, who was seated in the back seat of the car, he rolled down the window, knocked a phone she was using to record the incident from her hand, and punched her in the face. She stated he then got out of the car, brandished a gun, and threatened that he would return to shoot up the house. The [respondent] was also in the car goading another individual to fight the father's niece. The father was eventually arrested for this conduct and charged with two counts of violating a protective order, assault in the third degree, threatening with a firearm, and breach of the peace."[8]

In August, 2023, department social worker Christopher Traylor prepared a social study in support of the termination petition. Traylor's report noted that the respondent had been compliant with providing releases for all her providers. The report, nonetheless, noted that "mental health, intimate partner violence and the lack of safe housing" were ongoing issues "due to [the father] having consistent access to her home as there have been multiple reports of [the respondent] being seen with [the father]." Noting the substantiation of sexual violence by the father, Traylor concluded that

[8] The trial court noted that, on August 27, 2023, the father was "again" charged with violation of a protective order, but that the "circumstances of this violation are unclear."

the respondent "fails to comprehend how allowing [the father] access to her home and children puts them at risk for safety."

On September 6, 2023, the petitioner filed a petition seeking to terminate the respondent's parental rights with respect to J. The petition alleged that the department had made reasonable efforts to locate the parents and reasonable efforts to reunify J with her parents. The petitioner further alleged that grounds existed for termination of parental rights because the child had been found in a previous proceeding to have been neglected, abused, or uncared for and both parents had failed to achieve the degree of personal rehabilitation that would encourage the belief that within a reasonable time, considering the age and needs of J, the parents could assume a responsible position in her life.

On January 31, 2024, police officers were dispatched to the respondent's residence in response to an altercation between the respondent and the father's mother. Finding the father present, despite the full no-contact order, the officers arrested the father. As a result of these events, the department concluded that, despite the respondent's claims otherwise, the respondent was sharing her apartment with the father.

Jessica Biren Caverly, a psychologist, evaluated the respondent and submitted a report to the court on April 4, 2024. The court credited the testimony of Caverly, who conducted interviews and psychological testing of both parents and observed visitation sessions between the respondent and the children. Caverly recommended that the respondent's rights to J be terminated, based on several factors, "including but not limited to the [respondent's] failure to acknowledge [intimate partner violence] and to follow through with [intimate partner violence] services and counseling; her inconsistent and deficient engagement in mental health treatment; her

unwillingness to be forthcoming with providers and the department regarding several issues, including her relationship with the father and her pregnancies with [her other children]; and her inability to recognize the danger that the father posed to the children given the prior substantiations of allegations that he sexually abused minors, his poor decision-making, and his purported criminal behavior. During the interview, [Caverly] was alarmed that the [respondent] expressed that she did not believe that the father needed to be supervised with the children despite the numerous allegations that he sexually assaulted minors, including minors who are related to him. [Caverly] stated overall that she had concerns about the respondent being in a parenting role. . . . [Caverly] further expressed that, although the respondent and her children are familiar with each other, there was no evidence that they were bonded."[9]

In April, 2024, Eleanor Buchanan, a department social worker, filed an addendum to the social study in support of the termination of parental rights. The addendum to the social study stated that, since the filing of the petition for termination of parental rights, the respondent had given birth to her fifth child despite having denied her pregnancy to the department. Buchanan also reported that the respondent had been refusing to provide the petitioner with her address and had "consistently refused to sign releases for the [d]epartment to obtain provider updates on a regular basis." Most recently, Buchanan reported that, on April 4, 2024, she had met with the respondent during a supervised visit

[9] We note that Caverly reviewed Balducci's psychological evaluation reports from 2020 and 2023, in preparing her April, 2024 report. In addition, Caverly discussed the respondent's mental health treatment with two of the respondent's providers, Claire Utz and Diane Dodge. Caverly also consulted with Melanie Vitelli regarding the respondent's participation in 'r Kids Family Center's therapeutic family time program.

with the respondent's youngest child and the respondent had refused to sign releases.[10]

The respondent filed a motion for posttermination visitation on May 10, 2024. Trial on the petition for termination of parental rights, as well as the motion for posttermination visitation, was held on May 13, 2024, and lasted a single day. The petitioner called Caverly, Traylor, and Buchanan and introduced numerous exhibits.[11] The respondent also testified.

On July 5, 2024, the court issued its memorandum of decision, granting the petition to terminate the parental rights of the respondent and denying her motion for posttermination visitation with J.[12] The court found that

[10] Buchanan testified at trial as to these events, noting specifically that the department had referred the respondent to the Yale Child Study Center in an attempt to address the issue of intimate partner violence. Buchanan further testified that, despite having engaged with that program, the respondent had failed to sign a release allowing the department to communicate with that provider.

[11] The exhibits accepted into evidence included: (1) the father's specific steps filed September 20, 2022; (2) the respondent's specific steps filed September 20, 2022; (3) Traylor's social study dated August 10, 2023; (4) a social study addendum authored by Buchanan, dated April 25, 2024; (5) a permanency plan study filed December 28, 2022; (6) a permanency plan study addendum filed May 19, 2023; (7) a study filed in support of the neglect petition filed July 14, 2022; (8) a social worker affidavit filed June 17, 2023; (9) a study filed in support of the neglect petition filed March 27, 2024; (10) a parenting/psychological evaluation filed April 5, 2024; (11) Caverly's curriculum vitae; (12) the respondent's certified criminal history; and (13) the father's certified criminal history. The court also took judicial notice of the record of the various child protection proceedings regarding all three children that were the subject of the trial.

[12] We note that " '[p]roceedings to terminate parental rights are governed by [General Statutes] § 17a-112. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun.' . . . Section 17a-112 (j) provides in relevant part that '[t]he Superior Court, upon notice and hearing . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [d]epartment . . . has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing

the respondent was not fully cooperating with the department, having refused to sign a release to enable the department to get updated information and to permit the department to conduct home visits, and having failed to provide proof of employment. The court noted that the respondent's most recent therapist had offered to include in her treatment a component regarding intimate partner violence, but that the respondent "demurred, claiming she was not a victim of domestic violence." Further, the court found that the department "has made reasonable efforts to reunify the respondent with the children . . . . Notwithstanding the department's attempt to support and assist the [respondent], the [respondent] refused to open her eyes to the reality of her situation. She rebuffed assistance from mental health providers by refusing to discuss the father or [intimate partner violence]. She forfeited her chance at potentially reunifying with the children after completing [the therapeutic family time program] because of her unwillingness to truly engage in mental health treatment and her choice to remain with the father despite his

pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .' " (Citation omitted.) *In re Niya B.*, 223 Conn. App. 471, 487–88, 308 A.3d 604, cert. denied, 348 Conn. 958, 310 A.3d 960 (2024). "Under § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence." (Internal quotation marks omitted.) Id., 476 n.5.

conduct and history. Additionally, the [respondent] is unable and/or unwilling to benefit from reunification efforts."[13] The court further found that J, being three years old, needed "a reliable and attentive caregiver who can attend to [her] needs and keep [her] safe. [She has] been in the care of the department for a relatively lengthy period of time . . . . [She needs] permanency. Given the totality of the circumstances, including the [respondent's] history and the minimal progress she has made over the years, the [respondent] has failed to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of [J], she could assume a responsible position in [her life]." The court further found that, given the totality of the circumstances, the petitioner had proven, by clear and convincing evidence, that it was in the best interest of J to terminate the respondent's parental rights pursuant to General Statutes § 17a-112 (k).[14] This appeal followed.

[13] We note that the court's memorandum of decision makes clear that, "[a]ccording to testimony, [Balducci] conducted a second evaluation of the [respondent] in January, 2023, and proposed that reunification of the children with the [respondent] 'appears possible' because testing of the [respondent] no longer indicated clinical concerns for depression or anxiety and the respondent's emotional regulation and behavior control capabilities had improved. The court gives little weight to this assessment as [Balducci] did not testify at trial, nor were any of his reports offered into evidence. As such, the court has no context for this opinion." We note, as well, that Balducci reported that the respondent described her relationship with the father as "supportive" but that he did not evaluate the father and, as a result, left open the question of what role the father would play in the children's lives "and as a support, or detriment" to the respondent. This conclusion came at the end of the paragraph that began with "[r]eunification appears possible."

[14] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe

The respondent's sole claim, raised for the first time on appeal, is that she did not receive the effective assistance of counsel in opposing the petition to terminate her parental rights and advocating for her motion for posttermination visitation because her trial counsel failed to call Balducci as a witness. The petitioner argues that the respondent did not create a record sufficient to support the claim of ineffective assistance of counsel because there is no record of the reasons why counsel elected not to call Balducci as a witness—leaving open the possibility that such a decision was a reasonable trial strategy. Further, the petitioner argues that the record is silent as to whether Balducci would have continued to opine that reunification was possible in light of the respondent's "many violations of her specific steps" *after* Balducci's 2023 evaluation. According to the petitioner, potential avenues existed for the respondent to create a sufficient record for appellate review, but the respondent did not pursue those avenues. We agree with the petitioner that the record is inadequate for us to review the respondent's claim.

Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent." We note that the respondent has not challenged any of the factual findings by the court.

We next set forth the principles that guide our review. "In Connecticut, a parent who faces the termination of his or her parental rights is entitled, by statute, to the assistance of counsel."[15] *In re Alexander V.*, 223 Conn. 557, 569, 613 A.2d 780 (1992). Consistent with that statutory right, our Supreme Court has held that a parent facing such proceedings has the right to the effective assistance of counsel. See *State* v. *Anonymous*, 179 Conn. 155, 160, 425 A.2d 939 (1979); *In re Danyellah S.-C.*, 167 Conn. App. 556, 567, 143 A.3d 698, cert. denied, 323 Conn. 913, 150 A.3d 228 (2016). "Moreover, a parent whose rights have been terminated may assert, on direct appeal, that he or she was deprived of the right to the effective assistance of counsel at trial. . . . [I]t is the responsibility of the respondent to demonstrate trial counsel's ineffectiveness by reference to the record and not merely by allegation." (Citations omitted.) *In re Peter L.*, 158 Conn. App. 556, 563–64, 119 A.3d 23 (2015).

As we have recently reiterated, we evaluate counsel's performance in a termination proceeding under the following two-pronged standard: "The range of competence . . . requires not errorless counsel, and not

[15] General Statutes § 45a-717 (b) provides: "If a respondent parent appears without counsel, the court shall inform such respondent parent of his or her right to counsel and upon request, if he or she is unable to pay for counsel, shall appoint counsel to represent such respondent parent. No respondent parent may waive counsel unless the court has first explained the nature and meaning of a petition for the termination of parental rights. Unless the appointment of counsel is required under section 46b-136, the court may appoint counsel to represent or appear on behalf of any child in a hearing held under this section to speak on behalf of the best interests of the child. If the respondent parent is unable to pay for his or her own counsel or if the child is unable to pay for the child's counsel, in the case of a Superior Court matter, the reasonable compensation of counsel appointed for the respondent parent or the child shall be established by, and paid from funds appropriated to, the Judicial Department and, in the case of a Probate Court matter, the reasonable compensation of counsel appointed for the respondent parent or the child shall be established by, and paid from funds appropriated to, the Judicial Department, however, in the case of a Probate Court matter, if funds have not been included in the

counsel judged ineffective by hindsight, but counsel whose performance is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in [that particular area of the] law. . . . A showing of incompetency without a showing of resulting prejudice . . . does not amount to ineffective assistance of counsel. . . . In making such a claim, it is the responsibility of the respondent to create an adequate record pointing to the alleged ineffectiveness and any prejudice the respondent claims resulted from that ineffectiveness. . . . In the absence of findings by the trial court in this regard, we directly review the trial court record. . . . We are mindful that a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that [the] conduct [of trial counsel] falls within the wide range of reasonable professional assistance; that is, [an appellant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citations omitted; internal quotation marks omitted.) *In re Wendy G.-R.*, 225 Conn. App. 194, 204–205, 314 A.3d 1029, cert. denied, 349 Conn. 916, 316 A.3d 357 (2024).

In *In re Wendy G.-R.*, we considered the claim, raised for the first time on direct appeal, that the respondent mother's counsel had rendered ineffective assistance during a termination of parental rights trial. That claim was centered on the fact that the respondent mother's counsel did not object, after the presentation of evi-

budget of the Judicial Department for such purposes, such compensation shall be established by the Probate Court Administrator and paid from the Probate Court Administration Fund."

dence, to a motion by counsel for the petitioner to amend the petition seeking termination of parental rights. The respondent mother argued that " 'no reasonable attorney' " would have failed to object to such a motion and that there was no possible way to construe trial counsel's inaction as anything but deficient. Id., 203. The respondent mother also argued that there could be "no dispute" that she was prejudiced by her counsel's deficient performance because, without the amendment to the petition, her parental rights would not have been terminated. Id. We determined that the respondent mother could not satisfy her burden. Id., 211. In so concluding, we noted that, in order to satisfy the respondent mother's burden of proving that counsel had rendered deficient representation, a party "must do more than demonstrate that counsel failed to object to the motion to amend. Instead, she must demonstrate that counsel's failure to object cannot be explained by one or more possible strategic reasons that are objectively reasonable." Id. We noted that "the record [was] bereft of any evidence of the *actual* strategy, if any, that the [respondent mother's] counsel employed when she did not object [to the motion to amend]." (Emphasis in original.) Id., 208.

The lack of an adequate record is an inherent pitfall in any direct appeal of a termination judgment that alleges ineffective assistance of counsel. See *In re Jonathan M.*, 255 Conn. 208, 235, 764 A.2d 739 (2001) ("[i]n a case such as this, wherein a parent alleges ineffective assistance of counsel at the termination trial, the record may not contain the factual predicates sufficient to review, on direct appeal, the appointed attorney's adequacy") As our Supreme Court in *In re Jonathan M.* has observed, and, as we also discussed in *In re Wendy G.-R.*, there are, however, possible avenues by which a parent whose parental rights have been terminated can develop an adequate record: "General Statutes

§ 45a-719 provides a number of alternatives through which a party may attempt to open the final judgment of termination and assert a claim of ineffective assistance of counsel. The first option permits a motion to open the judgment in accordance with General Statutes § 52-212 or General Statutes § 52-212a. These provisions allow a four month window from the date of judgment within which such a motion may be brought. Second, the principles governing the opening of judgments at common law may also provide an indigent parent a means of gaining a review of the adequacy of trial counsel at the termination proceeding. It is a well-established general rule that even a judgment rendered by the court . . . can subsequently be opened [after the four month limitation] . . . if it is shown that . . . the judgment . . . was obtained by fraud . . . or because of mutual mistake. . . . Thus, when a judgment of termination is predicated on fraud or mutual mistake and the indigent's appointed counsel fails to address these issues, presumably rendering the assistance ineffective, the parent may have a remedy to open the judgment at common law. . . . [A] parent may [also] file a petition for a new trial. See General Statutes § 52-582. Under this option, a parent whose rights have been terminated has three years within which to file a petition. General Statutes § 52-270 provides that the court may grant such a petition for reasonable cause. . . . Finally, we recognize that § 45a-719 . . . limits all of the available options by precluding the court from granting any motion or petition filed after a final decree of adoption has *been entered.*" (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *In re Jonathan M.*, supra, 255 Conn. 236–40; see also *In re Wendy G.-R.*, supra, 225 Conn. App. 205 ("the respondent had an opportunity to develop a factual record related to counsel's allegedly deficient performance and any resulting prejudice").[16]

[16] We note that the petitioner's counsel, in oral argument to this court, conceded that § 45a-719 allows a parent who alleges ineffectiveness of coun-

Under the circumstances presented by this case, we conclude that the record before us is inadequate to review the respondent's claim that counsel rendered ineffective assistance by failing to call Balducci as a witness. We note that, at oral argument before this court, the respondent's counsel conceded that it would be "speculative" to guess as to what Balducci may have concluded, if presented with evidence of the events that transpired between the date of his report and the termination hearing, because there is "no way to know" how these events—including the April, 2023 incident

sel at a trial terminating his or her parental rights to petition for a new trial on that basis.

General Statutes § 45a-719 provides: "The court may grant a motion to open or set aside a judgment terminating parental rights pursuant to section 52-212 or 52-212a or pursuant to common law or may grant a petition for a new trial on the issue of the termination of parental rights, provided the court shall consider the best interest of the child, except that no such motion or petition may be granted if a final decree of adoption has been issued prior to the filing of any such motion or petition. Any person who has legal custody of the child or who has physical custody of the child pursuant to an agreement, including an agreement with the Department of Children and Families or a licensed child-placing agency, may provide evidence to the court concerning the best interest of the child at any hearing held on the motion to reopen or set aside a judgment terminating parental rights. For the purpose of this section, 'best interest of the child' shall include, but not be limited to, a consideration of the age of the child, the nature of the relationship of the child with the caretaker of the child, the length of time the child has been in the custody of the caretaker, the nature of the relationship of the child with the birth parent, the length of time the child has been in the custody of the birth parent, any relationship that may exist between the child and siblings or other children in the caretaker's household, and the psychological and medical needs of the child. The determination of the best interest of the child shall not be based on a consideration of the socioeconomic status of the birth parent or the caretaker." See also *In re Jonathan M.*, supra, 255 Conn. 238–39 (discussing available avenues to develop factual record, including, "as the department concedes, a parent may file a petition for a new trial"); *In re Shanice P.*, Superior Court, judicial district of Middlesex, Child Protection Session at Middletown, Docket No. JV-97-0006404-S (October 6, 2000) (28 Conn. L. Rptr. 284, 286) ("[w]here a new trial is sought in a proceeding to terminate parental rights, the legislature has decreed [through § 45a-719] that the court must also consider the best interests of the child"), appeal dismissed, 64 Conn. App. 78, 779 A.2d 151 (2001).

in which the father brandished a firearm during a conflict with the respondent, as well as the respondent's ongoing relationship with the father—would have shaped Balducci's conclusion as to whether reunification efforts were likely to be successful. Similarly, the record is devoid of any explanation as to why trial counsel decided not to call Balducci—including whether he was available and willing to testify at the termination hearing. See *In re Alexander V.*, supra, 223 Conn. 571 ("[a]lthough we acknowledge the possibility that counsel could, under some circumstances, be deemed ineffective for failure to make an adequate trial record of an important legal issue, we are, as an appellate court, limited to the record presented to us in deciding the merits of an appeal"); *Banks* v. *Commissioner of* Correction, 225 Conn. App. 234, 244, 314 A.3d 1052 ("[t]he trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action" (internal quotation marks omitted)), cert. denied, 349 Conn. 922, 321 A.3d 1130 (2024); *Harris* v. *Commissioner of Correction*, 134 Conn. App. 44, 57, 37 A.3d 802 ("[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" (internal quotation marks omitted)), cert. denied, 304 Conn. 919, 41 A.3d 306 (2012). In sum, the respondent has failed to present us with a sufficient record to overcome the strong presumption that the decision not to call Balducci was strategically sound.[17]

The judgment is affirmed.

In this opinion the other judges concurred.

[17] This logic applies equally to the respondent's claim that counsel's failure to call Balducci contributed to the denial of the respondent's motion for posttermination visitation.

THERESA GIBSON *v.* DENMO'S ORIGINAL DRIVE-IN, LLC (AC 47533)

Suarez, Seeley and Wilson, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant in her premises liability action. She claimed that the court abused its discretion in denying her motion to set aside the verdict because the court provided the jury with an incorrect version of interrogatories and the jury's use of those interrogatories precluded the jury from fully evaluating the essential elements of her cause of action. *Held*:

The trial court did not abuse its discretion in denying the plaintiff's motion to set aside the verdict, as the version of the interrogatories submitted to the jury properly followed the evidence adduced at trial and were consistent with the pleadings, and the first interrogatory as to the plaintiff's burden of proof that the jury answered in the negative properly articulated an essential element of a premises liability claim and was properly dispositive of that claim, such that the erroneous submission of the interrogatories to the jury was harmless.

Argued March 20—officially released May 27, 2025

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Parkinson*, *J.*; verdict for the defendant; thereafter, the court, *Parkinson*, *J.*, denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

Andrew J. Pianka, for the appellant (plaintiff).

Christopher S. Acquanita, for the appellee (defendant).

Opinion

WILSON, J. In this premises liability action, the plaintiff, Theresa Gibson, appeals from the judgment of the

trial court, rendered after a jury trial, in favor of the defendant, Denmo's Original Drive-In, LLC. On appeal, the plaintiff claims that the trial court abused its discretion by denying her motion to set aside the verdict because the court provided the jury with an incorrect version of the interrogatories and the jury's use of those interrogatories precluded the jury from fully evaluating the essential elements of the cause of action. We disagree and, accordingly, affirm the judgment of the trial court.

The following procedural history is relevant to our consideration of the present appeal. The plaintiff commenced this action in August, 2022. Her revised complaint (operative complaint) consisted of one count sounding in premises liability. In the operative complaint, the plaintiff alleged that, on March 27, 2022, she was a customer at the defendant business, a drive-in eatery in Southbury. After she placed her order at the walk-up window, she walked to her vehicle to wait for her order and, while doing so, tripped and fell when she "stepped on a loose, uneven surface or defect that was covered with leaves and debris which obstructed the view of the same." The plaintiff alleged that (1) she sustained physical injuries while on a path between the walk-up window and the parking area, (2) the defendant had actual or constructive notice of the defective condition and took no steps to remedy the defect or to warn patrons, and (3) her injuries were caused by the defendant's negligence. In paragraph 8 of her complaint, the plaintiff alleged ten different negligent acts by the defendant that caused her injuries and damages.[1] Although the defendant admitted to having possession and control of the premises, it denied, or denied having sufficient knowledge to respond to, the material allegations of the operative complaint.

[1] Specifically, in paragraph 8 of the operative complaint, the plaintiff alleged:

"8. The injuries and damages suffered by the plaintiff . . . were caused by the defendant in one or more of the following ways:

The case was tried to a jury. Prior to trial, both parties filed proposed jury interrogatories and verdict forms with the court, *Parkinson*, *J.*, pursuant to Practice Book § 16-18.[2] Evidence commenced and concluded on Feb-

"a. in that the defendant was aware or should have been aware of the defect, and the defendant allowed the hazardous condition to remain for an unreasonable period of time;

"b. in that the walkway in which [the plaintiff] was caused to fall was not reasonably safe for the use and purpose intended;

"c. in that there were no warnings as to the hazardous nature or condition of the walkway;

"d. in that the defendant failed to inspect or performed inadequate inspections of the area for hazardous conditions despite having adequate time to discover the same;

"e. in that the defendant failed to remedy the defect in the walkway, although it was well aware of the dangerous conditions;

"f. in that the defendant failed to notify those responsible for maintaining the area of the defective and dangerous condition of the area that its patrons were utilizing to park and access the [business];

"g. in that the defendant failed to inspect or made an inadequate inspection of said property to locate and remedy any defect which may pose a hazard to the health or safety of those utilizing the parking and access way to their business, and that the defendant had actual or constructive notice of such hazards, and such inadequate inspection constituted a disregard for the health and safety under all relevant circumstances;

"h. in that the defendant allowed leaves and debris to litter the area and to cover and conceal the defects that existed, creating a dangerous and unsafe condition to those, including the plaintiff, who were utilizing the facility;

"i. in that the defendant failed to maintain, patch, or repave the walkway despite the fact that the asphalt had long exceeded its useful life and had become cracked, uneven, loose, and otherwise created a trip[ping] hazard; and

"j. in that the defendant invited the general public to patronize their facility, and knew or with the exercise of due care, should have known that the walkway and parking lot contained loose pavement, defects, cracks, and uneven areas and that these areas could and would be covered with leaves and debris concealing the hazards, yet the defendant failed to take any steps to safeguard their patrons from this risk."

[2] Practice Book § 16-18 provides: "The judicial authority may submit to the jury written interrogatories for the purpose of explaining or limiting a general verdict, which shall be answered and delivered to the clerk as a part of the verdict. The clerk will take the verdict and then the answers to the several interrogatories, and thereafter the clerk will take the judicial authority's acceptance of the verdict returned and the questions as answered, and proceed according to the usual practice. The judicial authority will not accept a verdict until the interrogatories which are essential to the verdict have been answered."

ruary 15, 2024, after which time the court addressed the parties' proposed jury interrogatories. Counsel for each of the parties and the court agreed that the interrogatories submitted by the parties would be "combined" into a single set of interrogatories. At the instruction of the court, the defendant's counsel edited the defendant's proposed interrogatories to include a question requested by the plaintiff's counsel and, on February 16, 2024, emailed a new set of proposed interrogatories to the court and the plaintiff's counsel. In response, the plaintiff's counsel emailed the court and the defendant's counsel his objections to the defendant's edited proposed interrogatories. Specifically, the plaintiff's counsel stated that "question 1 should be deleted as it is repetitive of paragraph 4 (d)," that question 2 should be modified, and that "[t]he interrogatories unduly limit the plaintiff's claim." The plaintiff's counsel then submitted a revised draft to the court and to the defendant's counsel.

On February 20, 2024, the court again reviewed the proposed jury interrogatories with the parties' counsel. After further discussion, the parties' counsel agreed to a revised version of the plaintiff's proposed jury interrogatories (modified interrogatories), which stated in relevant part:

"1. Did the plaintiff prove by a preponderance of the evidence that on March 27, 2022, the defendant's premises were in a defective condition: loose, uneven surface or defect that was covered with leaves and debris which obstructed the view of same.

"YES _____ NO _____

"(If you answer 'YES,' continue to the next question. If you answer 'NO,' do not complete the rest of these

interrogatories. Sign below. Fill in and return a defendant's verdict on the defendant's verdict form.)"

After question 1, there were two additional questions asking the jury to specify whether it had found that the plaintiff proved by a preponderance of the evidence that the defendant had notice of the specific defective condition that caused the plaintiff's physical injuries and whether the defective condition was a substantial factor in causing those injuries. The latter question had ten subparts asking the jury to specify which of the defendant's alleged negligent acts was a substantial factor in causing the plaintiff's injuries and damages. These subparts corresponded to the ten allegations of negligence set forth in paragraph 8 of the operative complaint. See footnote 1 of this opinion.

Before the court submitted the case to the jury, the court confirmed with the parties that the materials to be submitted to the jury were ready, including the full exhibits, the jury interrogatories, and the verdict form. The clerk asked if "everyone is satisfied," to which the plaintiff's counsel and the defendant's counsel each replied "[y]es." Thereafter, the jury was provided with the exhibits, jury interrogatories and verdict form and was asked to begin its deliberations. When the jury returned with a verdict, the clerk read aloud the completed jury interrogatories and verdict form, at which time it became apparent that the jury had not been given the modified interrogatories but, rather, the defendant's proposed interrogatories that were emailed to the court and to the plaintiff's counsel on February 16, 2024 (unmodified interrogatories).

The unmodified interrogatories that were provided to the jury stated in relevant part:

"1. Did the plaintiff . . . prove by a preponderance of the evidence that the defendant . . . failed to use

reasonable care to inspect and maintain the premises and to make the premises reasonably safe?

"YES _____ NO _____

"(If you answer 'NO,' do not complete the rest of these interrogatories. Sign below. Fill in and return a defendant's verdict on the defendant's verdict form. If you answer 'YES,' continue on to the next question.)

"2. Did the plaintiff . . . prove by a preponderance of the evidence that the proximate cause of her fall on March 27, 2022, was a defect or dangerous condition that being a loose, uneven surface or defect that was covered with leaves and debris which obstructed plaintiff's view and made the premises not reasonably safe?

"YES _____ NO _____

"(If you answer 'NO,' do not complete the rest of these interrogatories. Sign below. Fill in and return a defendant's verdict on the defendant's verdict form. If you answer 'YES,' continue to the next question.)"

Following the second question, there were two additional questions, addressing whether the plaintiff had proved by a preponderance of the evidence that the defendant had notice of the specific defective condition and whether the plaintiff had proved that the defendant breached its duty to the plaintiff. The latter question had ten subparts inviting the jury to specify which, if any, of the defendant's alleged negligent acts was a substantial factor in causing the plaintiff's injuries and damages. The alleged negligent acts described in this question corresponded with the ten allegations of negligence set forth in paragraph 8 of the operative complaint. See footnote 1 of this opinion.

The jury responded negatively to the first interrogatory and returned a verdict for the defendant. After the clerk announced the jury's verdict, the court directed

the jury to exit the courtroom, and the following exchange occurred between the court and the parties' counsel:

"[The Plaintiff's Counsel]: I do not believe those were the jury interrogatories we agreed upon.

"[The Defendant's Counsel]: I . . . don't know how they got them either, Your Honor, those were my proposed ones.

"The Court: I did ask for you both to check the materials that were being given to the jurors; I thought you both did.

"[The Defendant's Counsel]: We looked at the exhibits. And, no, we didn't look at the interrogatories. I just had the copy in front of me.

"The Court: What [does] counsel suggest we do now?

* * *

"[The Plaintiff's Counsel]: I think I move for a mistrial.

"The Court: On what ground?

"[The Plaintiff's Counsel]: On the grounds that [the jury was] given inaccurate jury interrogatories after we went through, at length, what they should have been, and they were given the improper interrogatories. They were confusing, and it was not what we agreed upon.

"[The Defendant's Counsel]: Your Honor, I certainly don't think there's a mistrial. If counsel is not accepting of that, they can be given the other ones.

"[The Plaintiff's Counsel]: I think, at this point, they've been poisoned by the . . . other questions.

"The Court: So, what were the questions that were included that were not supposed to be?

"[The Plaintiff's Counsel]: Basically, [we] went over [the] defendant's submission in the beginning. We went through and weeded them out.

"The Court: I remember asking for the exhibits, as well as the interrogatories, and the verdict forms to be checked by the parties before they were given to the jurors. I asked more than once. So, I'm not really sure what has happened here. It could be that it was one of the court exhibits that were given in.

"The Clerk: This is . . . what was given to me as a court exhibit.

"The Court: So, the grounds for a mistrial are what, that the questions were confusing.

"[The Plaintiff's Counsel]: They were improper, they were confusing, they were not what we agreed upon.

"The Court: Does that change the verdict form though? The verdict form was the same either way.

"[The Plaintiff's Counsel]: I think that how you get to the verdict is based on the jury interrogatories, and there were questions in there that really were confusing and should not have been submitted. We weeded them out, and they went to the jury anyway.

"The Court: So, your suggestion . . . is for them to be given the correct interrogatory.

"[The Defendant's Counsel]: Your Honor, I certainly don't think a mistrial is appropriate. They were—

"The Court: I'm asking you if I—

"[The Defendant's Counsel]: I—I would—

"The Court: —do not declare a mistrial, is your suggestion still—

"[The Defendant's Counsel]: To give them . . . the sheet we agreed on. There's . . . no harm.

"[The Plaintiff's Counsel]: I think there is harm. They've already reviewed and made up their mind based on the improper interrogatories, the improper instructions. They're not [going to] change their mind at this point.

"The Court: Right, but you want them to have the proper questions.

"[The Plaintiff's Counsel]: They sat down, and they deliberated based on the improper questions. They've made up their mind. I don't see how we can correct it by simply now giving them the correct questions.

"The Court: Okay. All right. So, I'm going to accept the verdict. I'm denying the motion for a mistrial, given that they have the option to have the other interrogatory for the questions to be given to them as you said they should be, and you don't want that option.

"[The Plaintiff's Counsel]: I believe it's probably worthless at this point.

"The Court: Okay. So, your motion for a mistrial is denied. . . . [L]et's take a brief recess."

After a brief recess, the court resumed its discussion of the interrogatories with the parties.

"The Court: All right . . . . I want to compare, if you will, the verdict form [the jurors were] given with the verdict form that they should have been given and ask you to articulate how you believe you've been harmed, how the plaintiff has been harmed. All right. So, we have the verdict form they were given and then the one that they should have been given . . . .

"[The Plaintiff's Counsel]: The jury interrogator[ies] that were provided, number 1 . . . 'Did the plaintiff

. . . prove by a preponderance of the evidence that the defendant . . . failed to use reasonable care to inspect and maintain the premises to make the premises . . . reasonably safe?' If we look at the continuation of this interrogatory, we skip down to interrogatory 4 (d).[3]

"The Court: But why do we get to [interrogatory] 4 (d) . . . if [the jury doesn't] have to do anything else?

"[The Plaintiff's Counsel]: . . . [T]his is confusing.

"The Court: . . . [W]hat's confusing? . . . I'm acknowledging that [the jury was] given the incorrect [interrogatories]; I'm acknowledging that. What I want to know is . . . how would things have been different, right? So, the one that I'm looking at from the one that we agreed to, or the one that court ordered that they should have, still [says], if you say, yes, you go to the next question. If you say no, you return a defendant's verdict.

"[The Plaintiff's Counsel]: And the one that they're answering . . . if we look at under [interrogatory] 4 . . . there's [a] series of questions that they could have answered 'yes' or 'no' to. Okay. But by putting it up in number 1, if you answer 'no' to that . . . we're done for the day.

"The Court: Either way, they were though. You agreed to that language.

"[The Plaintiff's Counsel]: No. What we agreed to, the first one should have been, did the defendant prove by a preponderance of the evidence that on March 27,

[3] Interrogatory 4 (d) provided in relevant part:

"Did the plaintiff . . . prove by a preponderance of the evidence, that the defendant breached its duty to the plaintiff in one or more of the following ways . . .

"(d) in that the defendant failed to inspect or performed inadequate inspections of the area for hazardous conditions despite having adequate time to discover the same;

"YES _____ NO _____"

2022, the defendant['s] premises was in the defective condition, loose uneven surface—

"The Court: Yes.

"[The Plaintiff's Counsel]: —and that . . . it was covered by leaves and debris. . . . [W]as the premises defective? That's the initial question.

"The Court: Right. And then below—

"[The Plaintiff's Counsel]: And . . . that's not what number 1 in the one that we gave . . .

"The Court: No, I . . . understand that. But underneath, the language on both of the number 1s, it [says], if 'yes,' continue. If 'no,' it's a defendant's verdict.

"[The Plaintiff's Counsel]: Correct. But that's like saying go to number 4, and I could not win this case unless they answered [interrogatory] 4 (d) 'yes,' but the options there were . . . (a) through (j). And you've limited me to one aspect of the case. When under . . . [interrogatory] 4, there's actually (a) through (j).

"The Court: . . . I just want to make sure I'm following. The jury interrogatories that you sent to me also did that. Because question 1, as you presented it to me [said], number 1: did the plaintiff prove by a preponderance of the evidence that on March 27, 2022, the defendant's premises were in a defective condition? I added, 'a loose uneven surface or defect that was covered with leaves and debris which obstructed the view of same,' options are 'yes' and 'no.' Underneath, the language you provided to the court, 'if the answer is yes, continue. If the answer is no, do not complete the rest of these interrogatories and return a defendant's verdict.' [The jurors] would never have got[ten] to that if they answered no on that question as well.

"[The Plaintiff's Counsel]: But that wasn't the first one they were presented with.

"The Court: Understood, understood.

"[The Plaintiff's Counsel]: And I think after they answer 'no' to the first one, and they didn't have to go any further, you lose interest. That's why we got to—a verdict in ten minutes.

"The Court: Okay. All right. Is there anything else you want to state for the record—

"[The Plaintiff's Counsel]: No, Your Honor.

"The Court: —as to what the harm is?

"[The Plaintiff's Counsel]: What harm?

"The Court: Yes.

"[The Plaintiff's Counsel]: I . . . believe we went through—

"The Court: Okay.

"[The Plaintiff's Counsel]: —the jury interrogatories. We agreed on what was fair and accurate and that was not presented to the jury.

"The Court: Okay. The court will state for the record that all of the documents that were presented to the jury were presented to counsel to review before they went into the jury room. Okay. Is there anything else?

Is there anything else?

"[The Defendant's Counsel]: No, Your Honor.

"The Court: Anything else?

"[The Plaintiff's Counsel]: No, Your Honor.

"The Court: You can bring the jury out, please." (Footnoted added.)

Thereafter, the court accepted the verdict for the defendant and discharged the jury. On February 22, 2024, the plaintiff filed a motion to set aside the jury's verdict "on the grounds that the jury interrogatories

presented to the jury were not the interrogatories that were approved by the parties and the court, and that the interrogatories that were in fact submitted were confusing and prejudicial to the plaintiff." Specifically, the plaintiff argued that, in order for her to succeed on her claim, she "needed to prove only one of her allegations contained in paragraph 8 [of her complaint]," but the interrogatories provided to the jury instructed the jury to stop and return a verdict for the defendant if it answered "no" to the first interrogatory, which prevented the jury from reviewing the nine other allegations of negligence that were set forth in paragraph 8 of the operative complaint.

On March 4, 2024, the defendant filed an objection to the plaintiff's motion to set aside the jury verdict in which it argued, inter alia, that, "[u]nder premises liability law, the plaintiff was first required to prove that her fall was caused by a defective or dangerous condition and that the defendant had actual or constructive notice of the defective condition *prior to* answering any interrogatory question as to whether the defendant was negligent." (Emphasis in original.) It contended that "there was obviously no dangerous or defective condition and certainly no actual or constructive notice of a dangerous or defective condition given that the jury opined that the premises was reasonably safe" when the jury answered "no" in response to the first interrogatory. Moreover, the defendant argued that, "[e]ven if the jury had answered the [modified] interrogatories [that the court proposed submitting to the jury], which the plaintiff's attorney refused to allow, the jury would have responded that the plaintiff failed to prove that the defendant's premises was in a defective condition; that being a loose, uneven surface or defect that was covered by leaves and debris which obstructed the plaintiff's view of same." In the plaintiff's reply in support of her motion to set aside the jury verdict, filed

on March 5, 2024, she further argued that "[t]he entire verdict is based on a finding that the defendant properly inspected the property. The jury was prevented from addressing whether the defendant's property contained a defect or whether the defect caused the plaintiff harm."

On March 7, 2024, the court heard argument on the plaintiff's motion to set aside the verdict. On March 19, 2024, the court denied the plaintiff's motion. In its memorandum of decision, the court concluded that, although it was undisputed that the incorrect set of interrogatories was submitted to the jury, the error did not cause any harm to the plaintiff. The court reasoned that "[t]he questions the plaintiff requested on the interrogatories were also of the same format in that, if the jurors answered 'no' to the first question, they would have returned a verdict for the defendant. In fact, the first question on the 'correct' interrogatories also referred to whether the plaintiff proved that the defendant's premises was defective. If the jurors answered 'no,' the same result would have been reached: a defense verdict." Moreover, the court noted that "the evidence presented in the case was more than adequate for the jury to have reached the conclusion it reached."[4] This appeal followed.

[4] The trial court further concluded that "any objection to the interrogatories has now been waived," because, before it accepted the verdict, it offered the parties' counsel the opportunity to have the jury complete the modified interrogatories and also, before the case went to the jury, it had instructed the parties to check all the materials that were being submitted to the jury. We view this conclusion as a second, independent ground in support of the court's decision to deny the plaintiff's motion to set aside the verdict. On appeal, although the plaintiff does not challenge this independent ground as a separate claim in her appellate briefs, the plaintiff's analysis of the claim that she did raise before this court nonetheless sufficiently challenges the court's conclusion that she waived any objection to the alleged improper submission of the interrogatories. Because we conclude herein that the unmodified interrogatories were consistent with the pleadings and the evidence adduced at trial and that the court's conclusion that their submission was harmless was correct, we need not consider this ground as a basis for affirmance. See, e.g., *State* v. *Jordan*, 314 Conn. 354, 369 n.7, 102 A.3d

On appeal, the plaintiff claims that the court abused its discretion by denying her motion to set aside the verdict because the interrogatories submitted to the jury did not follow the pleadings and precluded the jury from fully evaluating the allegations in the operative complaint and the evidence presented at trial. Counsel for the plaintiff conceded during oral argument before this court that each element of a premises liability claim was incorporated into the unmodified interrogatories that had been submitted to the jury but contended that the jury did not review and answer all of the interrogatories that corresponded with each element of the cause of action. The plaintiff argues that the verdict was based on a single interrogatory that did not address whether there was a specific defect that caused her injuries and, because the jury was directed to disregard the other interrogatories and enter a verdict for the defendant if the jury answered "no" to that first interrogatory, that directive "cause[d] the jury to ignore the core elements of the premises liability claim as alleged and the allegations of how the defendant's negligence caused the plaintiff's injuries." In response, the defendant argues that the court acted within its discretion in denying the plaintiff's motion to set aside the verdict. We agree with the defendant.[5]

1 (2014) (declining to reach alternative ground for affirmance in light of conclusion that alleged prosecutorial improprieties were harmless).

[5] The plaintiff additionally claims that the first interrogatory in the unmodified interrogatories was improper because it constituted a compound question. As such, the plaintiff contends that this interrogatory did not require the jury to make a distinct finding of fact and, thus, could not assist in testing the correctness of the verdict entered. The defendant argues this claim is unpreserved as the plaintiff did not raise it before the trial court. We agree with the defendant that, although this claim is related to the propriety of the interrogatories provided to the jury, it raises an entirely new legal issue and cannot be considered as part of the claim raised before the trial court, namely, that the interrogatories precluded the jury from considering all of the essential elements of the cause of action. "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.) *White* v. *Mazda Motor of America, Inc.*,

Before turning to the merits of the plaintiff's claim, we briefly set forth our standard of review and applicable principles of law. "The proper appellate standard of review when considering the action of a trial court in granting or denying a motion to set aside a verdict is the abuse of discretion standard. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done. . . . [T]he role of the trial court on a motion to set aside the jury's verdict is not to sit as [an added] juror . . . but, rather, to decide whether, viewing the evidence in the light most favorable to the prevailing party, the jury could reasonably have reached the verdict that it did." (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 414, 78 A.3d 76 (2013).

"The power of the trial court to submit proper interrogatories to the jury, to be answered when returning

313 Conn. 610, 619–20, 99 A.3d 1079 (2014). Accordingly, we decline to review this claim.

The plaintiff also argues that the first interrogatory in the unmodified interrogatories was improper because it called for a finding of fact not relevant in this matter in that it asked whether the premises was reasonably safe, as opposed to whether there was a specific defect, and because it was not clear whether the jury's answer addressed the condition of the property in general or the specific area at issue. The defendant contends that these arguments also amount to unpreserved claims of error that we should not consider. We disagree with the defendant. "[O]rdinarily, [a reviewing court] will decline to address only a *claim* that is raised for the first time on appeal. . . . [A] claim is an entirely new legal issue, whereas, [g]enerally speaking, an argument is a point or line of reasoning made in support of or in opposition to a particular claim. . . . Because [o]ur rules of preservation apply to claims . . . [and not] to legal arguments . . . [w]e may . . . review legal arguments that differ from those raised below if they are subsumed within or intertwined with arguments related to the legal claim before the court." (Emphasis in original; internal quotation marks omitted.) *Curley* v. *Phoenix Ins. Co.*, 220 Conn. App. 732, 744–45, 299 A.3d 1133, cert. denied, 348 Conn. 914, 303 A.3d 260 (2023). We conclude that these arguments are intertwined with the plaintiff's claim that the interrogatories submitted to the jury did not follow the pleadings and precluded the jury from evaluating all of the

[its] verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment, it is within the reasonable discretion of the presiding judge to require or to refuse to require the jury to answer pertinent interrogatories, as the proper administration of justice may require. . . . The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content. . . . Moreover, [i]n order to establish reversible error, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . .

"We further note that jury interrogatories must be consistent with the pleadings and the evidence adduced at trial, so as not to mislead the jury. . . . The function of jury interrogatories is to provide a guide for the jury's reasoning, and a written chronicle of that reasoning. . . . The purpose of jury interrogatories is to elicit a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Wilkins* v. *Connecticut Childbirth & Women's Center*, 176 Conn. App. 420, 430–31, 171 A.3d 88 (2017).

"[A] premises liability claim is a negligence cause of action. . . . The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . A business owner owes its invitees a duty to keep its premises in a reasonably safe condition." (Citation omitted; internal quotation marks omitted.) *Walencewicz* v. *Jealous Monk, LLC*, 228 Conn. App. 349, 363, 325 A.3d 271, cert. denied, 350 Conn. 927, 326 A.3d 249 (2024). "To hold the defendant liable for her personal injuries, the plaintiff must prove (1) the existence of a defect, (2) that

allegations in the operative complaint and the evidence presented at trial. Accordingly, we address both arguments within our analysis in this opinion.

the defendant knew or in the exercise of reasonable care should have known about the defect and (3) that such defect had existed for such a length of time that the [defendant] should, in the exercise of reasonable care, have discovered it in time to remedy it." (Internal quotation marks omitted.) *Martin* v. *Stop & Shop Supermarket Cos.*, 70 Conn. App. 250, 251, 796 A.2d 1277 (2002).

In the present case, although it is undisputed that the unmodified interrogatories submitted to the jury were not those agreed upon by counsel, we conclude that their erroneous submission was nonetheless harmless because the unmodified interrogatories were proper. See, e.g., *Earlington* v. *Anastasi*, 293 Conn. 194, 201–202, 976 A.2d 689 (2009) (concluding that, although court erred in submitting set of interrogatories to jury, which included interrogatories that parties had previously agreed to omit and another they agreed to modify, submission did not affect outcome and was harmless). After reviewing the unmodified interrogatories, it is clear that they were consistent with the pleadings and the evidence adduced at trial. The unmodified interrogatories submitted to the jury properly directed the jury's attention to each element of the plaintiff's premises liability claim and each of the ten specific allegations of negligence set forth in the operative complaint, and required the jury to make such findings, as necessary. Rather, the plaintiff's claim rests entirely upon the alleged impropriety of the first interrogatory.

The first question in the unmodified interrogatories asked whether the defendant "failed to use reasonable care to inspect and maintain the premises and to make the premises reasonably safe." The plaintiff asserts that this interrogatory called for an irrelevant factual finding because, "[i]n a premises liability case, the issue is not whether the property in general was well maintained and kept reasonably safe, but rather whether there was

a specific defect that caused the plaintiff to be injured." We disagree. The law is clear that a business owner has a duty to invitees to keep its premises in a reasonably safe condition. See *Walencewicz* v. *Jealous Monk, LLC*, supra, 228 Conn. App. 363. Thus, the first interrogatory properly articulated an essential element of a premises liability claim: breach of duty. See id. ("[t]he essential elements of a cause of action in negligence are well established: duty; *breach of that duty*; causation; and actual injury" (emphasis added; internal quotation marks omitted)). It was also consistent with the pleadings as paragraph 8 of the operative complaint sets forth several allegations concerning the condition of the premises and the failure of the defendant to maintain that premises. As this was an essential element of a premises liability action, it was properly dispositive of the plaintiff's claim. See, e.g., *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 256, 9 A.3d 364 (2010) (determining that "the issue of breach was essential to the case, as it was wholly dispositive of the outcome," when jury answered first interrogatory addressing breach of duty in negative, disregarded other interrogatories, and immediately entered verdict for defendant); see also Practice Book § 16-18 ("[t]he judicial authority will not accept a verdict until the interrogatories which are *essential* to the verdict have been answered" (emphasis added)).

The plaintiff argues that this first interrogatory, unlike the first interrogatory in the modified interrogatories, failed to address whether there was a specific defect and precluded the jury from reaching the other elements of her claim. We first note, again, that the unmodified interrogatories were consistent with the pleadings and the evidence adduced at trial. In fact, the second question in the unmodified interrogatories submitted to the jury asked whether there was a specific defect on the premises in a very similar fashion to the

first interrogatory in the modified interrogatories. These subsequent interrogatories were not reached by the jury, as its answer to the first was dispositive of the plaintiff's claim. Moreover, the plaintiff overlooks that a finding by the jury that the premises was reasonably safe necessarily precludes a finding that the premises was in a defective condition. See *Palmieri* v. *Stop & Shop Cos.*, 103 Conn. App. 121, 123–24, 927 A.2d 371 (2007). Thus, an interrogatory that asks whether the premises was not reasonably safe and an interrogatory that asks whether the premises was in a defective condition each address the same issue of breach of duty; the former stated in the negative, the latter stated in the affirmative.

To the extent that the plaintiff argues that the first interrogatory was improper because of the directive following it, we observe that both sets of interrogatories contained a directive following each interrogatory, instructing the jury that if it answered "no," to not complete the rest of the interrogatories and enter a verdict for the defendant. A similar directive was also included in each rendition of the proposed interrogatories before the court, including those submitted by the plaintiff. The plaintiff, who agreed to the modified interrogatories, thus cannot be heard to complain that she was harmed by the directive in the unmodified interrogatories that were submitted to the jury. "It is well established that a party who induces an error cannot be heard to later complain about that error." *State* v. *Cruz*, 269 Conn. 97, 105, 848 A.2d 445 (2004); see, e.g., id., 105–107 (declining to review defendant's claim challenging jury instruction that he requested from trial court).[6] We also note that, even if the jury had been

[6] "An induced error, or invited error, is [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the erroneous ruling." (Internal quotation marks omitted.) *State* v. *Cruz*, supra, 269 Conn. 105 n.8.

asked to complete the modified interrogatories, those interrogatories similarly would not have required the jury to reach the subsequent questions addressing the other elements of a premises liability action and the allegations set forth in the complaint, had the jury answered no to the first interrogatory. In sum, given our conclusion that the unmodified interrogatories properly followed the evidence adduced at trial and were consistent with the pleadings, we agree with the court's conclusion that the erroneous submission of the unmodified interrogatories to the jury was harmless. Accordingly, the plaintiff's claim that the trial court abused its discretion in denying her motion to set aside the jury's verdict must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* PAUL E. SYKES
(AC 47359)

Cradle, C. J., and Alvord and Clark, Js.

Syllabus

The defendant appealed from the judgment of the trial court finding him in violation of probation and revoking his probation. He claimed, inter alia, that there was insufficient evidence that he violated a condition of his probation. *Held*:

The trial court did not err in denying the defendant's motion to suppress certain evidence seized by his probation officer and other members of the Office of Adult Probation during a search of his apartment, as the defendant failed to sustain his burden of proving that the exclusionary rule, which does not ordinarily apply in revocation of probation proceedings, was applicable under the circumstances of this case.

There was sufficient evidence to support the trial court's conclusion that the defendant possessed sexually explicit materials in violation of a condition of his probation.

There was sufficient evidence to support the trial court's conclusion that the defendant violated the condition of his probation requiring that he use only those computers that had been approved by his probation officer.

The trial court erred in determining that the defendant violated the condition of his probation requiring him to take polygraph examinations, as there was insufficient evidence that his refusal to take a different examination violated this condition and, accordingly, because this court could not conclude that the trial court's erroneous factual finding did not impact the sentence it imposed, the judgment was reversed with respect to the defendant's sentence and the case was remanded with direction to resentence the defendant.

Argued March 18—officially released May 27, 2025

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *McShane*, *J.*, denied the defendant's motion to suppress; thereafter, the case was tried to the court, *McShane*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Reversed in part*; *further proceedings*.

Judie Lynn Marshall, assigned counsel, for the appellant (defendant).

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Joseph Corradino*, state's attorney, and *Tiffany M. Lockshier*, supervisory assistant state's attorney, for the appellee (state).

Opinion

CLARK, J. The defendant, Paul E. Sykes, appeals from the judgment of the trial court finding him in violation of, and revoking, his probation under General Statutes § 53a-32. On appeal, the defendant claims that (1) the court erred in denying his motion to suppress and (2) there was insufficient evidence that he violated his probation. We disagree with these claims. However, because we conclude that one of the three grounds on which the court found the defendant in violation of his

probation was not supported by sufficient evidence, and because we cannot be confident that the court's erroneous factual finding in connection with that ground did not impact the sentence it imposed, we set aside the defendant's sentence and remand the matter for resentencing.[1]

The following facts, which the court reasonably could have found, and procedural history are relevant to this appeal. On February 14, 2007, the defendant pleaded guilty under the *Alford* doctrine[2] to two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A), two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and one count of possession of child sexual abuse material in the second degree in violation of General Statutes § 53a-196e. On April 13, 2007, the court, *Comerford, J.*, imposed a total effective sentence of twenty years of incarceration, execution suspended after twelve years, followed by thirty-five years of probation. In 2016, the defendant was released from incarceration and began serving his term of probation. The defendant subsequently pleaded guilty to violating the terms of his probation on December 10, 2018, and was sentenced by the court, *Devlin, J.*, to eight years of incarceration, execution fully suspended, with 390 months of probation.

On February 19, 2019, the defendant signed conditions of probation as well as a computer access agreement, which he was required to sign as a component of those conditions. The defendant's conditions of probation and computer access agreement required, inter

[1] The defendant also claims on appeal that the court abused its discretion in revoking his probation and ordering him to serve the full unexecuted portion of his sentence. In light of our disposition, we do not reach the merits of this claim. See, e.g., *State* v. *Johnson*, 75 Conn. App. 643, 658, 817 A.2d 708 (2003).

[2] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

alia, that he possess no weapons, ammunition, or weapon components; submit to a search of his person, possessions, vehicle, or residence when a probation officer had reasonable suspicion to conduct such a search; attend sex offender treatment; take polygraph examinations administered by a Court Support Services Division approved, specially trained polygraph examiner for treatment purposes and level of supervision; neither possess nor subscribe to any sexually explicit or sexually stimulating material deemed inappropriate by a probation officer; use only the computers that he was authorized to use by his probation officer; consent to having his computer examined and/or searched at any time to verify compliance with the terms of his probation; agree to have software installed to monitor his computer use; provide probation with a list of all equipment used in conjunction with his authorized computer(s), including backup systems and disks; and not possess any sexually explicit or sexually stimulating material in a disk, computer hard drive, or any other electronic storage medium. The computer access agreement further provided that the defendant was "responsible for all material and all information on [his] computer, on any computer [he has] been authorized to use by [his] [p]robation [o]fficer, and for the contents of any electronic storage medium under [his] control." The computer access agreement defined "computer" as "any device capable of accessing the Internet and/or any web-based applications, including any cell phones, smart TVs, tablets, mP3 players, USB plug in devices, gaming systems, etc." The defendant was approved to have three electronic devices in his residence, all of which were monitored by the Office of Adult Probation.

The defendant began weekly sex offender treatment at The Connection Center for the Treatment of Problem Sexual Behavior (The Connection). The defendant's probation officer, Julian Betancourt, received weekly

updates from The Connection on the defendant's progress in treatment. At some point, The Connection informed Betancourt that the defendant had refused to take an "EyeDetect" examination, which The Connection was using in lieu of a polygraph examination in light of the public health concerns posed by the COVID-19 pandemic. The Connection issued the defendant a warning regarding his refusal to engage in the EyeDetect examination. Betancourt spoke to the defendant about his refusal, and the defendant admitted to Betancourt that he had refused the EyeDetect examination, stating that he had done so because he did not want the company that owned the examination to have his information. The defendant further stated that he would be willing to take a polygraph examination.

In March, 2021, Betancourt learned from the monitoring software installed on the defendant's devices that the defendant had observed two images on his phone pertaining to the assembly of homemade firearms. Betancourt subsequently met with his supervisor in the Office of Adult Probation and, during that meeting, it was decided that a search of the defendant's apartment in Bridgeport would be conducted. On May 13, 2021, during an appointment with the defendant, Betancourt told him that he would be searching his apartment and presented him with a voluntary agreement to search form that specified the places to be searched as the defendant's apartment and vehicle. The defendant signed the form in the presence of Betancourt and another probation officer. The form instructed the person filling it out to check one of two boxes, indicating either that (1) the probation officer had explained to the probationer that if he did not agree to the search, the search would not occur and his refusal to the search would not be in violation of his conditions of probation, or (2) the probation officer had explained to the probationer that if he did not agree to the search, the search

would not occur but his refusal might violate a condition of his probation. Neither box on the form that the defendant signed was checked.

That same day, Betancourt, accompanied by four other members of the Office of Adult Probation, two officers from the state police, and between one and five officers from the Bridgeport Police Department, conducted a search of the defendant's apartment and vehicle. The defendant waited in a car outside his residence with a probation officer while the search was conducted. No weapons, machines to make weapons, or weapon materials were recovered in the course of the search. The search of the defendant's residence did, however, yield approximately thirty-five electronic devices, including laptops, hard drives, and cell phones—a quantity well in excess of the three devices that the defendant was authorized to possess. The seized items were transported to the state police forensic laboratory (laboratory) for analysis.

Steven DiPietro, a computer forensic examiner with the laboratory, made copies of the hard drives and other media recovered from the search, and performed data extractions on the cell phones. DiPietro found, inter alia, that a laptop included among the seized devices contained 54 unique and 14 duplicate images of suspected child pornography; 344 unique and 34 duplicate images classified as "child exploitation/age indeterminate"; and 2 videos classified as "child exploitation/age indeterminate," which were located in a folder on the laptop's drive titled "UserssykespDesktopmlk convert." This folder was housed within a user created folder that was generated when someone with administrative rights on the laptop created a user account under the username "sykesp."

DiPietro transmitted the images of suspected child pornography to the National Center for Missing and

Exploited Children, which identified twelve of them as depicting victims who had previously been identified by law enforcement as missing and exploited children. DiPietro's analysis also disclosed on certain of the seized devices various other still images and videos classified as "pornographic/sexually stimulating," as well as PDF files and still images pertaining to weapons and explosives. In addition, DiPietro discovered other materials on the seized devices, including receipts from Maine, where the defendant had resided for a period of time following his release from incarceration in 2016; medical documentation bearing the defendant's address; a file under the name "Monica Sykes"; and a copy of *United States* v. *Johnson*, 446 F.3d 272 (2d Cir.), cert. denied, 549 U.S. 953, 127 S. Ct. 425, 166 L. Ed. 2d 270 (2006), a case in which the United States Court of Appeals for the Second Circuit considered, inter alia, the propriety of requiring a person on federal supervised release to submit to polygraph testing.

Betancourt thereafter sought a warrant for the defendant's arrest. In the supporting affidavit accompanying the warrant application, Betancourt alleged that the defendant had violated the following conditions of his probation: "You will participate in polygraph examinations administered by a [Court Support Services Division] approved, specially trained polygraph examiner for treatment purposes and level of supervision"; "You will not possess, or subscribe to, any sexually explicit or sexually stimulating material deemed inappropriate by a [p]robation [o]fficer . . . [nor will you] patronize any adult book or adult video store, strip club, or adult entertainment club or similar establishment"; "I will notify my [p]robation [o]fficer in writing of any changes to the original written explanation for my use of the computer(s)"; "I will use only the computer(s) that I am authorized to use by my [p]robation [o]fficer"; "I will not access any site that contains sexually explicit

or sexually stimulating material and any other site that my [p]robation [o]fficer has instructed me not to access"; and "I will not possess any sexually explicit or sexually stimulating material in any manner on disk, in computer hard drive, or any other electronic storage medium that can hold this type of material."

The defendant was arrested and charged with violation of probation under § 53a-32.[3] The court, *McShane, J.*, held a revocation of probation hearing over two days on November 16 and 17, 2023. On November 15, 2023, the eve of the hearing, the defendant filed a motion to suppress all items seized during the May 13, 2021 search pursuant to the first, fourth, fifth, and fourteenth amendments to the United States constitution, article first, §§ 7 and 8, of the Connecticut constitution, and § 53a-32. In his motion to suppress, the defendant argued that the Office of Adult Probation had lacked reasonable suspicion both that he was violating a condition of his probation and to search the thirty-five electronic devices seized from his apartment. The defendant further claimed that the Office of Adult Probation was "not only acting as an arm of the judiciary but also [as] law enforcement" when it seized those devices and submitted them to the laboratory for analysis. At the start of the hearing on November 16, 2023, the court stated that it would hear evidence pertaining both to the violation of probation and to the motion to suppress in the course of the adjudicatory phase of the hearing. The court then proceeded to take evidence. Betancourt and DiPietro testified on behalf of the state; the defendant did not testify and called no witnesses.

On November 17, 2023, following the presentation of evidence and oral argument by the parties, the court

[3] Apart from the warrant application, the record does not reflect that the state filed a long form information or any other charging document that enumerated the specific conditions of probation that the defendant was alleged to have violated.

denied the motion to suppress in an oral ruling. The court found Betancourt's testimony to have been credible. It concluded that the Office of Adult Probation had reasonable suspicion to search the defendant's residence and vehicle, as well as the electronic devices recovered in the search, and noted that the defendant had agreed to the search. The court also concluded that the exclusionary rule did not apply, in any event, under the circumstances of the present case because the defendant had presented no evidence of "egregious, shocking or harassing police misconduct," and the record indicated that "there was no duress, no coercion, no trickery, no overbearing conduct on the part of probation in order to effectuate this search." The court further found that the Office of Adult Probation was "the one who instigated or started this search process," that Betancourt was "carrying out his responsibilities as a probation officer, not as a police officer" during the search process, and that the police "were [not] involved to the point that they were the one[s] pushing or looking for the contents of these computer devices."

The court then found that the defendant had violated his conditions of probation by (1) possessing sexually explicit materials, some of which involved children, (2) failing "to participate in the Office of Adult Probation order of polygraph and its equivalent, EyeDetect," and (3) using computers that had not previously been approved by the Office of Adult Probation. The court revoked the defendant's probation and imposed the full unexecuted portion of his sentence, i.e., eight years of incarceration.[4] The court based its dispositional determination on several factors, including the seriousness

[4] The defendant was also charged in a separate information with one count of possession of child sexual abuse material in the first degree in violation of General Statutes § 53a-196d (a) (1). On May 23, 2024, following a jury trial, the defendant was convicted of that charge. *State* v. *Sykes*, Superior Court, judicial district of Fairfield, Docket No. CR-22-0346705-T. On August 1, 2024, the court, *Richards*, *J.*, sentenced the defendant to twenty years of incarceration. The defendant's appeal from that conviction is

of the defendant's original crimes of conviction, the similarity of the conduct underlying the instant violation to that for which he was originally charged, the fact that the defendant had previously been found to have violated his probation on the basis of what the court concluded was similar conduct,[5] and its conclusion that the defendant had been "researching" *United States* v. *Johnson*, supra, 446 F.3d 272, which the court surmised was an attempt by the defendant to "[build] a defense" for his refusal to take an EyeDetect examination. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the trial court erred in denying his motion to suppress. Although he acknowledges that the exclusionary rule ordinarily does not apply in revocation of probation proceedings, the defendant argues that application of the exclusionary rule is warranted in the present case. He further argues that the court should have suppressed the fruits of the May 13, 2021 search because the search of his residence was not supported by reasonable suspicion, his consent to search was defective, in that he was not properly advised of the consequences of refusing consent, and the search was unreasonably expansive in scope. We conclude that the exclusionary rule does not apply in

currently pending before this court. See generally *State* v. *Sykes*, Connecticut Appellate Court, Docket No. 48055 (appeal filed September 25, 2024). Because the defendant's appeal from that conviction remains pending, no portion of his challenge to the court's finding in the present case that he violated his probation is moot. See, e.g., *State* v. *Milner*, 130 Conn. App. 19, 26, 21 A.3d 907 (2011), appeal dismissed, 309 Conn. 744, 72 A.3d 1068 (2013).

[5] In the affidavit supporting his application for a warrant to arrest the defendant in connection with this case, Betancourt stated that the defendant's 2018 violation of probation was predicated on his having been terminated from sex offender treatment, engaging in an undisclosed sexual relationship with an individual who was also on probation, and using the Internet without permission.

the present case, and we therefore reject the defendant's claim on that basis.

The following legal principles are relevant to our review of the defendant's claim. "[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [When] 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 court's [ruling] . . . ." (Internal quotation marks omitted.) *State* v. *Jones*, 281 Conn. 613, 654, 916 A.2d 17, cert. denied, 522 U.S. 868, 128 S. Ct. 164, 169 L. Ed. 2d 112 (2007). It is similarly well established that, "[i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . It is the privilege of the trial court to adopt whatever testimony it reasonably believes to be credible, and it is not the function of this court to retry the facts or pass on the credibility of a witness." (Citations omitted; internal quotation marks omitted.) *Hallock* v. *Hallock*, 228 Conn. App. 81, 104, 324 A.3d 193 (2024).

"[U]nlike criminal trials, in which the exclusionary rule typically applies, in probation revocation hearings, the exclusionary rule typically does not apply. . . . Thus, a probationer has the burden of persuading us that the exclusionary rule should nonetheless apply." (Citation omitted.) *State* v. *Jacobs*, 229 Conn. 385, 392, 641 A.2d 1351 (1994); see also *Payne* v. *Robinson*, 207 Conn. 565, 571, 541 A.2d 504 (explaining that "[t]he purpose of probation revocation proceedings is to determine whether a probationer is complying with the conditions of his probation" and that, "[i]n such proceedings, the government has an interest in accurate

fact-finding that is likely to be impaired when otherwise reliable and relevant evidence is excluded"), cert. denied, 488 U.S. 898, 109 S. Ct. 242, 102 L. Ed. 2d 230 (1988). "Our bar on the application of the exclusionary rule to probation revocation proceedings is not absolute . . . as egregious, shocking or harassing police misconduct would warrant our application of the rule to such probation proceedings." (Internal quotation marks omitted.) *State* v. *Maietta*, 320 Conn. 678, 686–87, 134 A.3d 572 (2016).[6] This court previously has held the exclusionary rule to be inapplicable, however, when the challenged search was organized under the auspices of probation, rather than the police. See, e.g., *State* v. *Moore*, 112 Conn. App. 569, 578, 963 A.2d 1019 (exclusionary rule was inapplicable in revocation of probation case where "primary search" of defendant's apartment was performed by probation officers, even though police were eventually present and arrested defendant),

[6] The state argues that this statement from *Maietta* is "nonbinding dictum" that is derived from stale precedent. We disagree. "Dictum includes those discussions that are merely passing commentary . . . those that go beyond the facts at issue . . . and those that are unnecessary to the holding in the case. . . . [I]t is not dictum [however] [if] a court . . . intentionally takes up, discusses, and decides a question *germane to*, though not necessarily decisive of, the controversy. . . . Rather, such action constitutes an act of the court [that] it will thereafter recognize as a binding decision." (Emphasis in original; internal quotation marks omitted.) *Healey* v. *Mantell*, 216 Conn. App. 514, 526, 285 A.3d 823 (2022). Our Supreme Court's statement in *Maietta* that "egregious, shocking or harassing police misconduct" would warrant the application of the exclusionary rule in a revocation of probation proceeding cannot fairly be characterized as mere passing commentary. (Internal quotation marks omitted.) *State* v. *Maietta*, supra, 320 Conn. 687. To the contrary, as we discuss herein, the court in *Maietta* analyzed whether the record supported the application of the exclusionary rule by considering whether it disclosed evidence of egregious, harassing or shocking police misconduct, reviewing the relevant factual findings, and concluding, on the basis of its review, that such evidence was wanting. See id., 687–88. "[T]here is nothing in [the] opinion . . . to suggest that [this] conclusion was less carefully reasoned than it might otherwise have been." *Rosenthal Law Firm, LLC* v. *Cohen*, 190 Conn. App. 284, 294, 210 A.3d 579 (2019). We therefore afford this statement from *Maietta* the weight it is due as binding precedent of our Supreme Court.

cert. denied, 291 Conn. 905, 967 A.2d 1221 (2009); *State* v. *Fuessenich*, 50 Conn. App. 187, 198, 717 A.2d 801 (1998) (court in revocation of probation case improperly applied exclusionary rule to suppress urinalysis results where probation officer, rather than police, required defendant to submit urine sample, as "[t]here was no police participation in requiring the defendant to submit to urinalysis, and the probation officer was acting in accordance with conditions to which the defendant had agreed"), cert. denied, 247 Conn. 956, 723 A.2d 813, cert. denied, 527 U.S. 1004, 119 S. Ct. 2339, 144 L. Ed. 2d 236 (1999). As this court explained in *Fuessenich*, "when a probation officer demands a probationer's compliance with a condition of probation, he or she is acting as a representative of the [J]udicial [B]ranch and not as a police officer. Applying the exclusionary rule to probation revocation hearings would make it more difficult for probation officers to perform properly their job of helping to ensure the rehabilitation of offenders." Id., 199.

The most recent case in which our Supreme Court has discussed the applicability of the exclusionary rule in a revocation of probation proceeding is *State* v. *Maietta*, supra, 320 Conn. 678. In *Maietta*, the defendant's probation officer sought and received approval from his superiors to search the defendant's garage after receiving information indicating that the defendant was in possession of firearms. Id., 682–83. With the assistance of three other probation officers, two inspectors employed by the Office of the Chief State's Attorney, members of the Greater New Britain Shooting Task Force, and an officer with the Berlin Police Department (collectively, search team), the probation officer traveled to the defendant's apartment, encountered the defendant, and obtained the defendant's consent to search his garage. Id., 683–84. The defendant traveled with the search team to his garage and allowed the

members of the search team inside. Id., 684. He identified a dresser in the garage as containing a firearm. Id. The probation officers opened the dresser and recovered a firearm. Id. The defendant was subsequently charged with violating the conditions of his probation and moved to suppress the firearm as well as his statements to his probation officer and other members of the search team. Id., 684–85. The trial court denied the motion to suppress, concluding in part that the exclusionary rule was inapplicable. Id., 685. The defendant was subsequently found to have violated the conditions of his probation, and he appealed, challenging, inter alia, the denial of his motion to suppress. Id.

On appeal, our Supreme Court concluded that the defendant had "offer[ed] no compelling reasons as to why the exclusionary rule should apply under the circumstances of his case." Id., 687. In particular, the court rejected the defendant's claim that the search of his garage was a "thinly veiled law enforcement search orchestrated by the police." Id. The court explained that, according to the trial court's findings, the defendant's probation officer was acting in his capacity as a probation officer when he conducted the searches and questioned the defendant; and the searches were conducted by probation officers, not the law enforcement personnel who were present. Id. The court further concluded that "nothing in the underlying record indicates that [the probation officers] were conducting the searches at the behest of the police or for reasons other than to ensure that the defendant was in compliance with the terms of his probation." Id. The court also determined that there was no evidence of "egregious, shocking or harassing police misconduct" that would merit the application of the exclusionary rule, noting that the trial court had found "no evidence that the defendant was restrained in any way . . . [or] that force was used," "no evidence of overbearing conduct,

[coercion] or duress of any kind," and that "[t]here was no pushing, arguing, or harassing the defendant." (Internal quotation marks omitted.) Id., 687–88. To the contrary, the court concluded, "the record show[ed] that the defendant voluntarily allowed [his probation officer] and his search team into his apartment and the garage and cooperated with the searches." Id., 688. The court accordingly concluded that the exclusionary rule was inapplicable. Id.

The circumstances of the present case cannot meaningfully be distinguished from those of *Maietta*. The trial court found—and the defendant does not contest—that, although the police were present for, and may have participated in,[7] the search, the search was initiated by and organized under the auspices of the Office of Adult Probation. This conclusion is well supported by the record. According to Betancourt's testimony, which the court credited, the decision to search the defendant's apartment was made during a meeting between Betancourt and his supervisor. Betancourt was also the person who secured the defendant's signature on the voluntary agreement to search form, and the form was signed in the presence of another probation officer. There is no indication from the record that Betancourt was acting in anything other than his capacity as a probation officer, or for any purpose other than to verify the defendant's compliance with the conditions of his probation, when he decided to search the defendant's residence and presented him with the consent form.

Moreover, as the court found, the record discloses no egregious, shocking or harassing police misconduct in connection with the search. Although the defendant claims that "[t]he sheer number of police officers is shocking and egregious under the circumstances," he

[7] The precise extent of the police's involvement in the search is not clear from the record.

has cited no authority for the proposition that the presence of an allegedly excessive number of officers during a search, without more, amounts to egregious police misconduct. There is a dearth of evidence to suggest that any of the officers used force against the defendant, harassed or argued with him, or engaged in any other unduly coercive behavior in connection with the search. As such, the defendant has not met his burden to show that the exclusionary rule should apply. We therefore need not and do not reach the merits of the defendant's arguments pertaining to the existence of reasonable suspicion, the validity of his consent, or the scope of the search.[8] Because the exclusionary rule does not apply under the circumstances of the present case, the trial court did not err in denying the defendant's motion to suppress.

II

The defendant next claims that there was insufficient evidence that he violated his probation. We disagree with this claim because, of the three grounds articulated by the court for finding the defendant in violation of his probation, two are supported by sufficient evidence. However, because the evidence does not support the court's conclusion that the defendant violated the condition of his probation requiring him to take a polygraph examination, and because we cannot be confident that the court's clearly erroneous factual finding in connection with this conclusion did not impact the sentence

[8] In his reply brief, the defendant asserts these arguments as further justification for his claim that the exclusionary rule should apply. These arguments bear on whether suppression would be warranted in a context in which the exclusionary rule applied but not on whether the exclusionary rule should apply in the first instance. See, e.g., *State* v. *Maietta*, supra, 320 Conn. 688 n.2 (declining to consider defendant's arguments that he did not consent to search and that he was in custody for purposes of *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), in light of conclusion that exclusionary rule was inapplicable).

it imposed, we set aside the defendant's sentence and remand the matter for resentencing.

The following principles are relevant to our review of the defendant's claim. "The law governing the standard of proof for a violation of probation is well settled. . . . [A]ll that is required in a probation violation proceeding is enough to satisfy the court within its sound judicial discretion that the probationer has not met the terms of his probation." (Internal quotation marks omitted.) *State* v. *Eric L.*, 218 Conn. App. 302, 308, 291 A.3d 621 (2023), rev'd in part on other grounds, 350 Conn. 798, 326 A.3d 225 (2024). "[E]vidence is not insufficient [merely] because it is conflicting or inconsistent. [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject. . . .

"A challenge to the sufficiency of the evidence is based on the court's factual findings. The proper standard of review is whether the court's findings were clearly erroneous based on the evidence. . . . A court's finding of fact is clearly erroneous and its conclusions drawn from that finding lack sufficient evidence 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. . . . [A] trial court may not find a violation of probation unless it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence at the hearing—that is, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its

factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence." (Citations omitted; internal quotation marks omitted.) *State* v. *Santos*, 108 Conn. App. 250, 253–54, 947 A.2d 414 (2008). "This court has observed that to support a judgment of revocation of probation, [o]ur law does not require the state to prove that all conditions alleged were violated; it is sufficient to prove that one was violated." (Internal quotation marks omitted.) *State* v. *Wells*, 112 Conn. App. 147, 156, 962 A.2d 810 (2009).

As we previously have explained, the trial court found that the defendant had violated the conditions of his probation in three ways: (1) possessing sexually explicit materials, some of which involved children; (2) failing "to participate in the Office of Adult Probation order of polygraph and its equivalent, EyeDetect"; and (3) using computers that had not previously been approved by the Office of Adult Probation. The defendant challenges each finding. We conclude that there is sufficient evidence to support the first and third findings, but not the second.[9]

A

With respect to the trial court's finding that the defendant possessed sexually explicit materials, the defendant argues that "there was insufficient evidence to connect [him] to the images in question" because "there was nothing presented at the violation of probation proceeding to indicate when the images were put on the device, when they were last accessed, or who accessed them." He further points out that, during the revocation of probation hearing, DiPietro acknowledged on cross-examination that the data reflecting when the materials recovered from the seized devices were created and accessed could be manipulated and that anyone with

[9] In the following analysis, we address the grounds found by the court in a different order than that in which they were set forth in its oral ruling.

administrative rights could have created the folder labeled "sykesp" on the computer from which many of the images were recovered. We are not persuaded.

"The term [p]ossess [under General Statutes § 53a-3 (2)] means to have physical possession or otherwise to exercise dominion or control over tangible property . . . . [C]onstructive possession is possession without direct physical contact. . . . It can mean an appreciable ability to guide the destiny of the [contraband] . . . and contemplates a continuing relationship between the controlling entity and the object being controlled. . . . To establish constructive possession, the control must be exercised intentionally and with knowledge of the character of the controlled object." (Citations omitted; internal quotation marks omitted.) *State* v. *Dawson*, 340 Conn. 136, 147–48, 263 A.3d 779 (2021). "To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband. . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Internal quotation marks omitted.) *State* v. *Spence*, 165 Conn. App. 110, 124, 138 A.3d 1048, cert. denied, 321 Conn. 927, 138 A.3d 287 (2016).

In the present case, there was sufficient evidence in the record to support the trial court's conclusion that the defendant possessed sexually explicit materials, some of which involved children. The devices containing those materials were recovered from a search of the defendant's residence. See, e.g., *State* v. *Smith*, 94 Conn. App. 188, 193, 891 A.2d 974 ("[o]ne factor that

may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found" (internal quotation marks omitted)), cert. denied, 278 Conn. 906, 897 A.2d 100 (2006). The defendant also had signed a computer access agreement in which he assumed responsibility for the contents of any electronic storage medium under his control. Furthermore, suspected child pornography and child exploitation material was found on a seized laptop with a user account named "sykesp"—the defendant's last name and first initial. The seized devices also contained other materials linking them to the defendant, including receipts from the defendant's prior place of residence and medical documentation bearing the defendant's address. The court was entitled logically to infer, on the basis of all of this evidence, that the defendant was in possession of the offending materials, and the court was not required to credit the defendant's speculative suggestions that someone else might have accessed those materials, put them on the device, and/or created a user account in his name. The defendant's challenge to the court's finding therefore fails.

B

With respect to the court's finding that the defendant utilized unapproved computers, the defendant claims that the evidence shows that he worked in the information technology field and that he was permitted to work on electronic devices from home for the purposes of employment. He further claims that there is no evidence that the seized devices were not devices that he was working on for his job. We are not persuaded.

The following additional procedural history is relevant to this claim. Betancourt testified in the revocation of probation hearing that, of the thirty-five devices that

were seized from the defendant's residence, the defendant was approved by probation to possess only three. Betancourt's subsequent testimony explaining and elaborating on this conclusion, elicited through multiple rounds of recross and redirect examination as well as questioning by the court, was admittedly not a model of clarity. He acknowledged that the defendant worked in the information technology field. He testified at one point that, if the seized devices were for the purposes of the defendant's employment, "I believe [he would be permitted to possess them]. Yeah. It's—there probably should have been a list of different things, right, as far as those devices. We have no—at that point we had no—they were not authorized in our eyes." He then testified that, whether or not the seized devices were being used for the defendant's employment, they still had to be approved by the Office of Adult Probation, and he had no documentation or memory of the defendant ever having sought that approval. He then testified that, "based on the conditions," i.e., under the computer access agreement, the Office of Adult Probation should have been provided with a list of the devices that the defendant was working on for his employment. He then testified that the defendant had previously provided a list of devices in his possession to another probation officer and that he "[didn't] believe" that any of the items on that list corresponded to items seized during the May 13, 2021 search, "but [he would] have to see the list again." He stated that he had not brought a copy of the list with him.

Notwithstanding the imprecision of this testimony, the court reasonably could have concluded that, even if the defendant generally was authorized to work on computers for purposes of employment, he nonetheless was required to seek approval from the Office of Adult Probation to use the specific devices on which he was working. See, e.g., *State* v. *Santos*, supra, 108 Conn.

App. 253 (evidence is not insufficient merely because it is conflicting or inconsistent). The court further reasonably could have found, as Betancourt testified, that the vast majority of the devices seized from the defendant's residence had not been so approved. These conclusions are supported by evidence in the record, and we are not left with a definite and firm conviction that a mistake has been committed. The evidence was sufficient for the court to conclude that the defendant violated the condition of his probation requiring that he use only those computers approved by his probation officer.

C

Finally, the defendant claims that the evidence was insufficient to support the court's conclusion that he violated the condition of his probation requiring him to take polygraph examinations. We agree.

In concluding that the defendant had violated this condition, the court stated that the defendant had "failed to participate in the Office of Adult Probation order of polygraph and its equivalent, EyeDetect." As the defendant correctly points out—and as Betancourt acknowledged in his testimony—the condition of probation requiring the defendant to take polygraph examinations did not require him to take a polygraph examination "[or] its equivalent, EyeDetect." It simply required him to take polygraph examinations. In finding that the defendant's refusal to take an EyeDetect examination violated this condition, the court therefore was required to conclude that an EyeDetect examination amounted to a type of polygraph examination and/or was sufficiently similar to a polygraph such that the condition requiring the defendant to take polygraph examinations afforded him fair notice that refusal to take an EyeDetect examination would violate that condition. See, e.g., *State* v. *Boseman*, 87 Conn. App. 9, 22–23, 863 A.2d 704 (2004) (assessing whether, in absence of modification

of condition or new condition imposed by probation officer, probation condition imposed by court could reasonably be interpreted to prohibit defendant's behavior, in light of due process requirement of fair notice), cert. denied, 272 Conn. 923, 867 A.2d 838 (2005). Indeed, the court's description of EyeDetect as the "equivalent" of a polygraph examination indicates that it did make such a finding.[10]

The record, however, is devoid of evidence that would support such a conclusion. It is not at all clear

[10] In finding the defendant in violation of probation, the court stated that the defendant had "failed to participate in the *Office of Adult Probation order* of polygraph and its equivalent, EyeDetect." (Emphasis added.) To the extent that the court concluded that compliance with the EyeDetect examination was a valid condition imposed on the defendant by the Office of Adult Probation pursuant to its authority under General Statutes § 53a-30 (b) to "require that the defendant comply with any or all conditions which the court could have imposed . . . which are not inconsistent with any condition actually imposed by the court," we disagree. There was no evidence before the court that Betancourt actually imposed such a condition on the defendant. See, e.g., *State* v. *Boseman*, supra, 87 Conn. App. 22 (where "the specific condition the court found the defendant to have violated could not be interpreted reasonably to prohibit his behavior, and [the defendant's probation officer] did not provide a written modification of that condition or a new condition, we conclude that the defendant was not afforded actual, fair and sufficient notice" that conduct would constitute violation). Betancourt testified that he and the defendant had a conversation regarding the defendant's refusal to take the EyeDetect examination but did not testify that he issued the defendant any clear warnings that his refusal could constitute a violation of his conditions of probation. Cf. *State* v. *Reilly*, 60 Conn. App. 716, 732–33, 760 A.2d 1001 (2000) ("[i]n revocation hearings where the alleged violative behavior is noncriminal, we hold that where the specific condition did not explicitly proscribe the defendant's conduct and could not be reasonably interpreted to proscribe the defendant's conduct, the defendant must receive actual notice that the continuation of the conduct could result in a charge of a violation of a condition of probation"). The record does reflect that *The Connection* issued the defendant a warning letter following his refusal to take the EyeDetect examination, but the state identifies no authority, and we are aware of none, that would permit a third-party treatment provider—rather than the court or the Office of Adult Probation—unilaterally to modify a defendant's conditions of probation. Moreover, as discussed further herein, we emphasize that the arrest warrant did not allege that the defendant violated a condition of his probation on the basis of his failure to comply with treatment.

from the record what an EyeDetect examination is, how it functions, or the extent to which it is similar to a, and/or can be classified as a type of, polygraph examination. Betancourt testified that The Connection was using EyeDetect examinations in place of polygraph examinations in light of the COVID-19 pandemic but characterized an EyeDetect examination and a polygraph examination as "two different things." Neither Betancourt's nor DiPietro's testimony elaborated any further on the nature of an EyeDetect examination. Nor does the state, in its brief, direct our attention to anything else in the record that would shed light on this critical factual question.[11] Of course, because this court is not a fact-finding tribunal, in conducting our sufficiency analysis we may not draw our own conclusions, on the basis of extrarecord evidence, about the similarities and/or differences between an EyeDetect examination and a polygraph examination. See, e.g., *Williams* v. *Commissioner of Correction*, 177 Conn. App. 321, 331–32, 175 A.3d 565 ("[I]t is not the function of this court . . . to make factual findings . . . . Conclusions of fact may be drawn on appeal only where the subordinate facts found [by the trial court] make such a conclusion inevitable as a matter of law . . . or where the undisputed facts or uncontroverted evidence and testimony in the record make the factual conclusion so obvious as to be inherent in the trial court's decision." (Emphasis omitted; internal quotation marks omitted.), cert. denied, 327 Conn. 990, 175 A.3d 563 (2017). We therefore conclude that the court's factual finding that an EyeDetect examination was the "equivalent" of a polygraph

[11] We note that the polygraph condition also required that the defendant's polygraph examinations be administered by a "[Court Support Services Division] approved, specially trained" examiner. There is no evidence in the record regarding the qualifications of the individual responsible for administering the EyeDetect examination to the defendant or indicating whether that individual had been approved to do so by the Court Support Services Division.

examination—a finding necessary to its determination that the defendant violated the condition of his probation requiring him to take polygraph examinations—was clearly erroneous because there was no evidence in the record to support it.

The state attempts to circumvent this evidentiary deficiency by arguing that the defendant's conditions of probation also required him to submit to any and all conditions of his sex offender treatment, as well as to medical and/or psychological examinations and/or counseling sessions, and that compliance with these conditions required submitting to the EyeDetect examination—which was administered by the defendant's sex offender treatment provider. Betancourt's application for an arrest warrant, however, did not allege a violation of probation based on the defendant's failure to comply with the conditions of his probation requiring sex offender treatment, counseling, and/or medical or psychological examinations. Due process requires that the defendant have notice of the conditions of probation that he is alleged to have violated. See, e.g., *State* v. *Orr*, 199 Conn. App. 427, 450–51, 237 A.3d 15 (2020) (disregarding court's findings, in revocation of probation case, that defendant had violated criminal statutes that were not enumerated in arrest warrant application); *State* v. *Carey*, 30 Conn. App. 346, 349, 620 A.2d 201 (1993) ("a defendant cannot be found in violation of probation on grounds other than those with which he is charged"), rev'd on other grounds, 228 Conn. 487, 636 A.2d 840 (1994). We therefore reject the state's argument.

In sum, because a key factual finding underpinning the court's determination that the defendant violated the condition of his probation requiring him to take polygraph examinations—namely, that an EyeDetect

examination is the "equivalent" of a polygraph examination—is not supported by the record, there was insufficient evidence that the defendant violated this condition of his probation.

D

We now turn to the scope of our remand. There was sufficient evidence from which the court reasonably could have concluded that the defendant violated two of the three conditions of his probation that it found him to have violated, and, therefore, there was sufficient evidence that the defendant violated the conditions of his probation. See, e.g., *State* v. *Lanagan*, 119 Conn. App. 53, 62, 986 A.2d 1113 (2010); *State* v. *Wells*, supra, 112 Conn. App. 156. We conclude, however, that, under the circumstances of this case, because there was insufficient evidence to support the court's conclusion that the defendant violated his polygraph condition, the appropriate course is to set aside the defendant's sentence and remand for resentencing.

We are guided by our Supreme Court's decision in *State* v. *Benjamin*, 299 Conn. 223, 9 A.3d 338 (2010). In *Benjamin*, our Supreme Court considered the appeal of a defendant who had been found in violation of his probation on two grounds: that he had assaulted an elderly person and that he had possessed narcotics. Id., 225. On appeal to this court, the defendant did not challenge the latter finding but argued that the former was predicated on improperly admitted and otherwise insufficient evidence; he further claimed that the trial court had abused its discretion by imposing a four year term of incarceration that was based, in part, on its conclusion that he had assaulted an elderly person. Id., 226. This court concluded that it was unnecessary to review the defendant's challenges to the trial court's finding that he had assaulted an elderly person because the trial court's unchallenged finding that the defendant

had possessed narcotics constituted a legally sufficient basis for revoking his probation. Id. Our Supreme Court disagreed. The court explained that this court had "failed to recognize that the defendant's briefing . . . also addressed the *dispositional* phase of the probation proceeding. . . . Presumably, in the dispositional phase, the question of whether, in addition to possessing narcotics, the defendant also had committed the assault would have had some bearing on which disposition the court ordered and, if the court ordered the defendant to serve some portion of his suspended sentence as to that disposition, what that sentence would be." (Citation omitted; emphasis in original; footnote omitted.) Id., 231–32. The court went on to conclude that there had been sufficient evidence that the defendant was guilty of assaulting an elderly person, noting that that determination "obviate[d] the need for this court to direct the Appellate Court to remand the case to the trial court for a new dispositional phase . . . to consider whether the sentence based solely on the defendant's possession of narcotics was appropriate or whether to reduce the sentence in the absence of sufficient evidence of assault." Id., 234 n.6.

In the present case, the record indicates that the court's dispositional determination *may* have been impacted by its conclusion that the defendant had violated his polygraph condition. In particular, the court's comments that the defendant had been "researching" *United States* v. *Johnson*, supra, 446 F.3d 272, in a possible attempt to "[build] a defense" for refusing to take the EyeDetect examination, suggest that it may have viewed the defendant's refusal to "take a polygraph examination [or] its equivalent" as bad faith misconduct warranting the imposition of a more severe sentence than he might otherwise have received. At the very least, we cannot be confident that the court would

not have exercised its discretion differently in the dispositional phase had it sentenced the defendant only on the basis of the two grounds for finding the defendant in violation of his probation that were sufficiently supported by the record. See also, e.g., *State* v. *Johnson*, 75 Conn. App. 643, 660, 817 A.2d 708 (2003) (remanding revocation of probation case for resentencing where trial court, in imposing sentence, considered defendant's refusal to sign forms that he was under no obligation to sign, and explaining that "we have no way of determining whether the court, in exercising its discretion, would have imposed the same sentence if . . . [the forms] were not an issue in the proceeding").

We therefore conclude that a remand for resentencing is appropriate in light of our conclusion that the evidence was insufficient to support the court's finding that the defendant violated the condition of his probation requiring him to take polygraph examinations. In remanding the matter for resentencing, we express no view as to the appropriate sentence, and we commit that determination to the sound discretion of the trial court. See, e.g., *Miller* v. *Commissioner of Correction*, 29 Conn. App. 773, 780, 617 A.2d 933 (1992) ("[t]he imposition of an appropriate sentence is the function of the trial court, and not our function"). On remand, the court may, "[o]n the basis of its consideration of the whole record . . . continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion. . . . In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society. . . . The important interests in the probationer's liberty and rehabilitation must be balanced,

however, against the need to protect the public." (Internal quotation marks omitted.) *State* v. *Mapp*, 118 Conn. App. 470, 478, 984 A.2d 108 (2009), cert. denied, 295 Conn. 903, 988 A.2d 879 (2010).

The judgment is reversed only as to the sentence imposed and the case is remanded with direction to resentence the defendant; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

CITY OF NORWICH *v.* THE GHT TRUST ET AL.

CITY OF NORWICH *v.* THE REBNER LAND TRUST

CITY OF NORWICH *v.* RLS TRUST

(AC 47240)

Alvord, Seeley and Flynn, Js.

Syllabus

The defendants in three actions to foreclose municipal tax liens appealed from the trial court's judgments denying their motions to open after the court rendered judgments of foreclosure for the plaintiff city. The defendants claimed that the court improperly failed to determine whether it lacked personal jurisdiction over the defendants due to insufficient service of process. *Held*:

The trial court improperly failed to make a factual and legal determination regarding personal jurisdiction over each of the defendants, as the defendants clearly raised the issue of insufficient service of process as the basis for opening the judgments in their motions to open, which implicated personal jurisdiction, and, accordingly, the judgments denying the motions to open were reversed and the cases were remanded to the trial court to hold a hearing and to determine whether personal jurisdiction existed.

Argued December 10, 2024—officially released May 27, 2025

Procedural History

Action, in each case, to foreclose a municipal tax lien on certain real property owned by the named defendant, brought to the Superior Court in the judicial district of New London, where the defendants were defaulted for

failure to appear; thereafter, the court, *K. Murphy, J.*, rendered judgment, in the first case, of foreclosure by sale and rendered judgments, in the second and third cases, of strict foreclosure; subsequently, the court, *Spallone, J.*, denied, in each case, the named defendant's motion to open, from which the named defendant in each case appealed to this court. *Reversed*; *further proceedings*.

Edward E. Bona, for the appellants (named defendant in each case).

Aimee L. Siefert, for the appellee (plaintiff in each case).

Opinion

FLYNN, J. This consolidated appeal involves three separate actions brought by the plaintiff in each action, the city of Norwich (city), seeking to foreclose municipal tax liens on three properties, each of which was held by a different trust. The defendants in the respective actions, The GHT Trust,[1] The Rebner Land Trust, and RLS Trust, appeal from the judgments of the trial court, *Spallone, J.*, denying their motions to open after the trial court, *K. Murphy, J.*, rendered judgments of foreclosure in favor of the city and title had vested in others.[2] On appeal, the defendants claim, inter alia, that the court failed to decide whether it lacked personal juris-

[1] Danjon Capital, Inc., a junior lienholder that had redeemed, also was named as a defendant in the case involving The GHT Trust. Although Danjon Capital, Inc., was listed as an appellee in the present appeal, it did not file a brief or otherwise participate in this appeal. Accordingly, all references in this opinion to the defendants are to The GHT Trust, The Rebner Land Trust, and RLS Trust only.

[2] Although the defendants indicated on their appeal form that they also sought to appeal from the court's denials of their motions for reconsideration, the defendants have not raised or briefed any claim of error as to those rulings. See *Johnson* v. *Vita Built, LLC*, 217 Conn. App. 71, 74 n.1, 287 A.3d 197 (2022) (although plaintiffs indicated on appeal form that they sought to appeal from court's denial of application for prejudgment remedy, they did not raise or brief any claim of error as to that aspect of court's ruling and, thus, abandoned any such claim).

diction over the defendants due to insufficient service of process.[3] We agree and, accordingly, reverse the judgments denying the motions to open and remand the cases to the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The city commenced the first action, *Norwich* v. *Rebner Land Trust*, Superior Court, judicial district of New London, Docket No. CV-22-6058560-S (Rebner Land Trust action), in September, 2022, to collect payment of outstanding real estate taxes levied on property owned by The Rebner Land Trust on Newton Street (Rebner Land Trust property). The city commenced the second action, *Norwich* v. *GHT Trust*, Superior Court, judicial district of New London, Docket No. CV-22-6058980-S (GHT Trust action), in October, 2022, to collect payment of outstanding real estate taxes levied on property owned by The GHT Trust on Summit Street (GHT Trust property). The city commenced the third action, *Norwich* v. *RLS Trust*, Superior Court, judicial district of New London, Docket No. CV-23-6060691-S (RLS Trust action), in March, 2023, to collect payment of outstanding real estate taxes levied on property owned by RLS Trust on Talman Street (RLS Trust property).

[3] The defendants also claim that "[t]he record . . . yields the inescapable conclusion that no service was made, that service could have been made and that the [city] decided, intentionally, to make no attempt at it," and, therefore the court never acquired any personal jurisdiction over the defendants. As explained subsequently in this opinion, the record does not yield such a conclusion, as service by publication was made and there remains a disputed issue pertaining to whether personal jurisdiction was established by it. The defendants' counsel did not appear at the scheduled hearing on their respective motions. Accordingly, we do not make any determination as to whether the court's rulings on the motions to open were proper and conclude that a remand is necessary because the court did not determine whether there was personal jurisdiction.

In addition, the defendants claim that the court violated their due process rights by failing to hold an evidentiary hearing to establish personal jurisdiction. Because the court must hold a hearing in accordance with our remand order, we do not separately address this claim.

In each action, the city filed a motion for first order of notice, and the court found that the addresses of the defendants were "unknown and that reasonable efforts to find the defendant(s) have failed . . . ." Accordingly, the court ordered the city to publish notice of each foreclosure action on the Judicial Branch legal notices website. See General Statutes § 52-68.[4] The city subsequently filed the Judicial Branch form titled "Affidavit of Online Publication of Legal Notice After Court Order," form JD-CL-161, and a motion for a finding of actual notice and/or that further notice was unnecessary in each case. The city's motion in the Rebner Land Trust action noted that "[t]he subject property is vacant land; therefore, service on the property address would not . . . yield any results." The city's motions in the GHT Trust action and the RLS Trust action did not provide additional information about the properties at issue in those cases.

The court, *K. Murphy, J.*, granted the city's motions for a finding that further notice was unnecessary. In the Rebner Land Trust action, the court initially ruled that additional notice was required, as "[n]otice to the owner of the property should be provided to [the Rebner Land Trust property] by causing some proper officer to serve [the complaint and related documents] on the

[4] General Statutes § 52-68 provides: "(a) The Superior Court, and the judges, clerks and assistant clerks thereof, may, except where it is otherwise specially provided by law, make such order as is deemed reasonable, in regard to the notice which shall be given of the institution or pendency of all complaints, writs of error and appeals from probate, which may be brought to or pending in the Superior Court, when the adverse party, or any persons so interested therein that they ought to be made parties thereto, reside out of the state, or when the names or residences of any such persons in interest are unknown to the party instituting the proceeding.

"(b) Such notice, having been given and proved by the affidavit of the officer who served the notice or by other competent evidence, shall be deemed sufficient service and notice, and the court may proceed to a hearing, unless otherwise provided by law, or may order further notice as it deems reasonable."

defendant in the manner prescribed by law . . . .'' The city filed a motion for clarification ''on exactly where the court would like the [city] to have the defendant served'' because, ''as mentioned in the Motion for Finding Further Notice Unnecessary, the [Rebner Land Trust property] is vacant land.'' The court subsequently ordered that, ''[i]n light of the information provided in the [city's] motion for clarification, the court's previous order requiring additional notice is vacated and the [city's] motion for finding further notice unnecessary is granted.'' The court also ruled that, ''[i]n light of the court's recent ruling in granting the [city's] motion finding further notice unnecessary, no further clarification is needed.'' In the GHT Trust action, the court granted the city's motion outright. In the RLS Trust action, similar to the Rebner Land Trust action, the court initially ruled that additional notice was required, with ''[s]ervice of trust with unknown address to be made at the address of the [RLS Trust property].'' The city filed a motion for clarification ''on exactly where the court would like the defendant served,'' as ''the [RLS Trust property] is an abandoned building.'' The court subsequently granted the city's motion for a finding that further notice was unnecessary and ordered that ''no further notice is necessary due to compliance with publication notice,'' then ruled that no further clarification was needed.

The defendants were subsequently defaulted for failure to appear.[5] On March 1, 2023, the court rendered

[5] In the Rebner Land Trust action, the judicial notice of order indicating that The Rebner Land Trust was defaulted for failure to appear was sent to the Newton Street address and returned to the court with a stamp that stated ''no such number'' and ''unable to forward.'' The returned mail was filed with the court on February 15, 2023. In the GHT Trust action, the judicial notice of order indicating that The GHT Trust was defaulted for failure to appear was sent to the Summit Street address and returned to the court with a stamp that stated ''vacant'' and ''unable to forward.'' The returned mail was filed with the court on March 3, 2023. No returned mail was filed in the RLS Trust action.

a judgment of foreclosure by sale in the Rebner Land Trust action, setting a sale date of May 6, 2023. The city was the highest bidder at the foreclosure sale, and the court granted the committee's motion to approve the sale to the city on June 12, 2023. Title to the Rebner Land Trust property passed to the city on that same date, when the committee filed the deed of sale with the court. See *U.S. Bank, National Assn.* v. *Fitzpatrick*, 206 Conn. App. 509, 515, 260 A.3d 1240 (2021) (title to property passed to plaintiff when committee filed deed of sale with court).

On May 31, 2023, the court rendered a judgment of strict foreclosure in the GHT Trust action and set the law days to commence on June 27, 2023. Danjon Capital, Inc., a junior lienholder, exercised its right to redemption on its law day, June 28, 2023, and became the owner of the GHT Trust property.[6] The city filed a satisfaction of judgment on June 29, 2023.

[6] Attorney Stephanie B. Nickse filed an appearance in the GHT Trust action on behalf of Danjon Capital, Inc., on February 27, 2023. The court defaulted Danjon Capital, Inc., on May 15, 2023, for failure to disclose a defense. Danjon Capital, Inc., subsequently filed an affidavit of debt, dated May 30, 2023, in which it requested that the court grant the city's motion for a judgment of strict foreclosure. As explained previously in this opinion, the court rendered a judgment of strict foreclosure, and Danjon Capital, Inc., exercised its right to redemption on its law day. The motion to open filed by The GHT Trust, which is described subsequently in this opinion and is at issue in the present appeal, was filed on September 5, 2023, after title to the GHT Trust property had vested in Danjon Capital, Inc.

Our review of the trial court file reflects that Attorney Nickse, as counsel for Danjon Capital, Inc., was listed on the certificates of service attached to the motion to open and the subsequent motion to reconsider the denial of that motion, certifying that the defendants' counsel sent notice of those motions to Attorney Nickse. In addition, Danjon Capital, Inc., was named as an appellee in the present appeal, and our review of the notices issued by the Office of the Appellate Clerk indicates that Attorney Nickse received notice of, inter alia, the filing of the defendants' brief, the deadline for its appellee brief, the marking of the case as "ready," and the assignment to the docket for oral argument. As set forth in footnote 1 of this opinion, however, Danjon Capital, Inc., did not file a brief or otherwise participate in the present appeal.

On July 12, 2023, the court rendered a judgment of strict foreclosure in the RLS Trust action and set the law days to commence on August 8, 2023. RLS Trust did not attempt to redeem the property prior to the running of the law days and, on August 9, 2023, title to the RLS Trust property passed to the city on its assigned law day.

On August 31, 2023, counsel for the defendants filed appearances in all three cases. On September 5, 2023, the defendants filed motions to open and vacate the judgments on the basis that there had been no service of process and, consequently, the court lacked personal jurisdiction over them when it rendered the judgments against them. In their motions, the defendants argued that "[n]o service was made or attempted" on them, and the city did not submit affidavits in support of its motions for a finding that further notice was unnecessary, aside from noting that the Rebner Land Trust property was vacant land, to explain why it could not serve the defendants by way of "normal means."

The motions to open stated that motions to dismiss were simultaneously being filed, "setting forth the basis and the means by which the defendant[s] could have been found and [were] easily locatable such that service could be effectuated." In their memoranda of law accompanying the motions to dismiss, the defendants argued, inter alia, that the defendants' addresses were not "unknown" to the city, as required for the court's order pursuant to § 52-68 for notice by publication, because the deeds to their respective properties, which had been filed with the city, listed certain post office boxes as the defendants' addresses. The defendants noted that the city did not submit affidavits in support of its motions for a finding that further notice was unnecessary and argued that "it cannot be said that the address of the defendant[s] [were] in fact unknown to the [city], who itself is in charge of the care of the very

land records it relied upon to issue and transmit to the defendant[s] both assessments and tax bills." Copies of the deeds were attached as exhibits to the defendants' motions to dismiss.

On September 14, 2023, the city filed objections to the defendants' motions to open. In all three actions, the city argued that service was proper because the names and residences of the defendants were unknown to the city and, thus, it instituted the actions by providing notice by publication pursuant to the court's orders of notice, which were obtained in accordance with § 52-68. The city claimed that the properties were owned by trusts and, "[a]t the time the property was transferred into the trust[s], there was no indication on the deed of a trustee or a physical mailing address." The city also argued that in all of the foreclosure actions, the land was either vacant or, in the case of the RLS Trust property, improved with an abandoned house,[7] which "limit[ed] the [city's] ability to serve the complaint" on any person at the subject properties.

In addition, with respect to the judgments of strict foreclosure against The GHT Trust and RLS Trust, the city argued that the court lacked jurisdiction to consider the defendants' motions to open pursuant to General Statutes § 49-15 (a) (1) because they were filed after the passage of the law days,[8] and the motions did not

[7] The city stated that "the subject property has an abandoned house on it per the appraisal that is on file with the court." The appraisal report states that "the subject property gives the appearance of being abandoned."

[8] General Statutes § 49-15 (a) (1) provides: "Any judgment foreclosing the title to real estate by strict foreclosure may, at the discretion of the court rendering the judgment, upon the written motion of any person having an interest in the judgment and for cause shown, be opened and modified, notwithstanding the limitation imposed by section 52-212a, upon such terms as to costs as the court deems reasonable, provided no such judgment shall be opened after the title has become absolute in any encumbrancer except as provided in subdivision (2) of this subsection."

"In Connecticut, the passage of the law days in an action for strict foreclosure extinguishes a mortgagor's equitable right of redemption and vests

allege "rare and exceptional" circumstances such as "fraud, accident, mistake, and surprise" that would invoke the court's continuing equitable jurisdiction pursuant to *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 379, 260 A.3d 1187 (2021). The city made a similar argument in its objection to the motion to open the judgment of foreclosure by sale of the Rebner Land Trust property. The city referenced § 49-15 (a) (1) but acknowledged that it applied only to judgments of strict foreclosure. Nevertheless, relying on *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, 112 Conn. App. 750, 752 n.3, 966 A.2d 239 (2009), the city argued that The Rebner Land Trust failed to file the motion to open (1) within the four month limitation set forth in General Statutes § 52-212a,[9] and (2) before the court's approval of the committee sale.

Also on September 14, 2023, the court issued orders notifying the parties that the matter would be scheduled for a remote hearing at a later date. On September 22, 2023, the court issued notices to the parties that it would hold the remote hearing on October 11, 2023. The defendants' counsel did not attend the hearing.[10]

On October 12, 2023, the court, *Spallone, J.*, issued orders denying the defendants' motions to open and vacate the judgments. It did so on the ground that title had vested. The court made no determination on the manner of service made on any defendant or whether there was personal jurisdiction. We therefore have no

absolute title in the encumbrancer." *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 375, 260 A.3d 1187 (2021).

[9] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. . . ."

[10] The parties have not provided this court with a transcript of the hearing on October 11, 2023.

factual or legal determination on that jurisdictional issue.

The court's order in the Rebner Land Trust action stated: "This motion to open and vacate judgment was on the remote foreclosure calendar on October 11, 2023. Counsel for the [city] appeared and presented oral argument. Counsel for the defendant did not appear. The court finds that the [city's] argument in its objection is persuasive. The [city] argues that the defendant's motion is precluded because it was not filed before title vested in the [city] on July 17, 2023. The [city] made an analogy to . . . § 49-15 (a) (1) but conceded that it applies to strict foreclosures. However, the [city] noted that case law has developed in this field regarding foreclosure by sale, citing *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, [supra, 112 Conn. App. 752 n.3]. The court finds the case (and authority cited therein) cited by the [city] to be persuasive, and the motion to open and vacate is denied."

With respect to the motion to open the foreclosure judgment in the GHT Trust action, the court ruled: "This motion to open and vacate judgment was on the remote foreclosure calendar on October 11, 2023. Counsel for the [city] appeared and presented oral argument. Counsel for the defendant did not appear. The court finds that the [city's] argument in its objection is persuasive. The [city] argues that the defendant's motion is precluded because it was not filed before title vested in [Danjon Capital, Inc.] on [June] 28, 2023, as required by . . . § 49-15 (a) (1) absent any rare or exceptional circumstances. No such circumstances are raised here, and the motion is denied." The court issued a nearly identical order concerning the motion to open in the RLS Trust action, noting that title had vested in the city in that case on August 9, 2023.

On October 16, 2023, the defendants filed motions for reconsideration. The motions did not address counsel's

failure to attend the hearing on October 11, 2023. The defendants claimed that, in denying their motions to open, the court overlooked *Highgate Condominium Assn., Inc.* v. *Miller*, 129 Conn. App. 429, 21 A.3d 853 (2011), which they were citing for the first time, and failed to make a finding of personal jurisdiction. The defendants argued that, pursuant to *Highgate Condominium Assn., Inc.*, "where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Internal quotation marks omitted.) Id., 436. In addition, the defendants argued that *Highgate Condominium Assn., Inc.*, "also requires that the court 'make a definitive factual and legal finding regarding the issue of its personal jurisdiction over the defendant[s]'; [id.]; which it did not in its ruling." The defendants, accordingly, requested that the court reconsider its decisions denying their motions to open (1) to take into account *Highgate Condominium Assn., Inc.*, and (2) to make a finding as to personal jurisdiction over the defendants.

The city filed objections to the motions for reconsideration that included motions for sanctions. The city argued that the defendants' motions should be denied because the defendants failed to appear at the hearing on the motions to open and, in their motions for reconsideration, they did not provide an explanation for their failure to attend. The city argued that their "failure to prosecute [their] own motion[s] should not be [their] chance to have another bite at the apple." As to its requests for sanctions, the city argued that "[t]he [defendants'] counsel's procedural tactics are simply done to delay and cause the [city] to spend additional money

on attorney's fees. . . . The individual behind the defendant trust[s] and the [defendants'] counsel have a long history of filing dilatory motions and objections which are a waste of judicial resources."

The court summarily denied the defendants' motions for reconsideration on December 14, 2023, and sustained the city's objections thereto.[11] This consolidated appeal followed.

Once raised, the issue of the court's jurisdiction must be addressed. See *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 576, 953 A.2d 868 (2008); see also *Bateson* v. *Weddle*, 306 Conn. 1, 7, 48 A.3d 652 (2012). The court in the present case did not do so.

"Motions to open judgments of strict foreclosure are governed by . . . § 49-15 (a) (1). Under § 49-15 (a) (1), courts *generally* cannot open a judgment of strict foreclosure after the passage of the law days because such an event vests absolute title in the encumbrancer." (Emphasis in original.) *U.S. Bank National Assn.* v. *Booker*, 220 Conn. App. 783, 793, 299 A.3d 1215, cert. denied, 348 Conn. 927, 304 A.3d 860 (2023); see footnote 8 of this opinion.

Both this court and our Supreme Court have identified limited circumstances under which a court may open a judgment of strict foreclosure. In *U.S. Bank National Assn.* v. *Rothermel*, supra, 339 Conn. 366, our Supreme Court concluded that "there is a limited exercise of jurisdiction over a narrow class of equitable claims raised in postvesting motions to open, despite the general prohibition of such jurisdiction by . . . § 49-15 (a) (1). . . . The category of claims that fall within this class of cases sound in [f]raud, accident,

[11] The defendants filed motions for articulation of the court's denial of their motions for reconsideration, which the court denied. The defendants subsequently filed a motion for review with this court, which granted review but denied the relief requested therein.

mistake, and surprise . . . . These are rare exceptions, applicable only in unusual circumstances." (Citations omitted; footnote omitted; internal quotation marks omitted.) *DXR Finance Parent, LLC* v. *Theraplant, LLC*, 223 Conn. App. 362, 374–75, 309 A.3d 347, cert. denied, 348 Conn. 957, 310 A.3d 380 (2024).

In addition to the circumstances set forth in *Rothermel*, a court may also open a judgment of strict foreclosure on the basis that the court lacked personal jurisdiction at the time the judgment was rendered. "Once the question of lack of jurisdiction of a court is raised . . . [t]he court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Bateson* v. *Weddle*, supra, 306 Conn. 7. "It is axiomatic that a court cannot render a judgment without first obtaining personal jurisdiction over the parties. No principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment, whenever and wherever declared upon as a source of a right, may always be challenged. . . . Furthermore, [a] defect in process . . . implicates personal jurisdiction . . . . [W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire jurisdiction. . . . The jurisdiction that is found lacking . . . is jurisdiction over the person . . . . [A]lthough . . . a judgment of strict foreclosure ordinarily cannot be opened after the law day has passed, the judgment can be attacked on the ground that the court lacked jurisdiction over the party challenging it." (Citations omitted; internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576; see also *Highgate Condominium Assn., Inc.* v. *Miller*, supra, 129 Conn. App. 435 ("Once title has vested, no practical relief is available [*p*]*rovided*

that this vesting has occurred pursuant to an authorized exercise of jurisdiction by the trial court . . . . A natural corollary of this principle is that a judgment of strict foreclosure may be opened . . . upon a finding that the court lacked jurisdiction over either the person or the case at the time the judgment of strict foreclosure was entered." (Citation omitted; emphasis in original; internal quotation marks omitted.)).

A trial court's authority to open a judgment of foreclosure by sale similarly is limited. "A motion to open a judgment of foreclosure by sale is typically subject to two restrictions. . . . First, a motion to open a judgment of foreclosure by sale must be filed within the four month restriction of . . . § 52-212a. . . . [T]he second restriction on a motion to open a judgment of foreclosure by sale is that it must be filed before absolute title left the property owner, which [in the case in which the motion is filed by the holder of the equity of redemption] means before the committee sale was approved." (Internal quotation marks omitted.) *Quicken Loans, Inc.* v. *Rodriguez*, 227 Conn. App. 806, 825, 324 A.3d 167 (2024), cert. denied, 351 Conn. 905, 330 A.3d 133 (2025); see also *First Connecticut Capital, LLC* v. *Homes of Westport, LLC*, supra, 112 Conn. App. 752 n.3. As with a judgment of strict foreclosure, however, a claim that the court lacked personal jurisdiction may serve as the basis for a motion to open a judgment of foreclosure by sale. See *People's United Bank, National Assn.* v. *Purcell*, 187 Conn. App. 523, 525–27, 202 A.3d 1112 (2019) (considering, in context of motion to open judgment of foreclosure by sale, whether court lacked personal jurisdiction over defendant).

In the present case, the defendants contend that, in denying their motions to open the judgments, the trial court failed to make a definitive factual and legal finding regarding the issue of personal jurisdiction, as required by *Highgate Condominium Assn., Inc.* v. *Miller*, supra,

129 Conn. App. 436, and, accordingly, this court must remand the matter to the trial court to make such a finding. In response, the city argues that the defendants did not cite any "rare or exceptional circumstances" that would have permitted the trial court to invoke its continuing equitable authority to open the judgments under *Rothermel*. In addition, the city argues that the defendants failed to cite *Highgate Condominium Assn., Inc.*, in their motions to open and did not attend the hearing scheduled on those motions, and, therefore, "the defendants' failure to prosecute [their] motions should not be rewarded by overturning a decision that was not erroneous."[12]

We conclude that, because the court never decided whether it had personal jurisdiction—although possibly because the defendants' counsel never appeared at the time of the hearing to cite any authorities or offer any necessary evidence—we must remand the present case to the court to make a factual and legal determination regarding personal jurisdiction, hearing argument from the parties and taking such evidence and making such findings as may be necessary to that determination.[13] See *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576.

In the present case, the defendants filed their motions to open the judgments of foreclosure on the basis that

[12] The city does not claim that notice by publication provided sufficient service of process to the defendants or otherwise address the issue of personal jurisdiction.

[13] On April 1, 2025, this court, sua sponte, ordered the parties "to file supplemental memoranda on or before April 21, 2025, of no more than 1500 words addressing whether the defendants have waived any objection to the court's exercise of personal jurisdiction, including, but not limited to, by the defendants' counsel not appearing at the hearing on the motions to dismiss and to open. See *Commissioner of Environmental Protection* v. *Connecticut Building Wrecking Co.*, 227 Conn. 175, 195–96, 629 A.2d 1116 (1993)." We have reviewed the parties' memoranda but conclude that the record is inadequate for this court to address the issue of waiver.

the court lacked personal jurisdiction over them at the time that it rendered the judgments. The court, however, denied the defendants' motions to open on another basis, namely, that title to the subject properties had already passed and the defendants failed to raise any "rare or exceptional circumstances." The court, however, did not address the defendants' claim that the court lacked personal jurisdiction.

As set forth previously in this opinion, lack of personal jurisdiction provides a separate basis for opening the judgments of foreclosure, independent from the rare exceptions set forth in *Rothermel*. See, e.g., *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576; *Highgate Condominium Assn., Inc.* v. *Miller*, supra, 129 Conn. App. 435; see also *Deutsche Bank National Trust Co.* v. *McKeith*, 156 Conn. App. 36, 42, 111 A.3d 545 (2015). Even if the court's failure to address the defendants' claim that it lacked personal jurisdiction could have been avoided if the defendants had referenced *Highgate Condominium Assn., Inc.*, in their motions to open rather than for the first time in their motions for reconsideration, or if the defendants' counsel had attended the hearing scheduled on those motions and offered evidence,[14] the defendants clearly raised the issue of insufficient service of process as the basis for opening the judgments in their motions to open, which implicated personal jurisdiction.

Accordingly, the judgments denying the motions to open cannot stand, and we remand the cases to the trial court to hold a hearing and to address whether personal jurisdiction exists. See *Highgate Condominium Assn., Inc.* v. *Miller*, supra, 129 Conn. App. 437

[14] The court did not determine that the failure of the defendants' counsel to attend the hearing constituted a "failure to prosecute" their motions to open, as the city argues. Instead, although the court acknowledged counsel's failure to attend the hearing, it still considered the motions on the papers.

(remanding matter to trial court to hold hearing and to make findings as to personal jurisdiction).

The judgments are reversed and the cases are remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

LARRY ALLEN MOORE *v.* STEVEN G. FERGUSON (AC 47481)

Seeley, Westbrook and Wilson, Js.

Syllabus

The plaintiff appealed from the judgment of the Superior Court denying his motion to open the judgment dismissing his appeal from a Probate Court decree that determined ownership interests in a decedent's limited liability company. He claimed, inter alia, that the Superior Court improperly dismissed his appeal on the ground that he lacked standing to challenge the Probate Court's decree. *Held*:

This court concluded that, because the plaintiff failed either to appeal the judgment of dismissal or to file his motion to open the judgment within twenty days after the Superior Court dismissed his probate appeal, he could not challenge, on appeal to this court, the merits of the Superior Court's judgment of dismissal, namely, his lack of standing.

The Superior Court did not abuse its discretion in denying the plaintiff's untimely motion to open the judgment, as the court reasonably could have concluded that the plaintiff failed to meet his burden of showing that the judgment of dismissal was obtained by fraud on the court.

The Superior Court did not abuse its discretion in denying the plaintiff's request for an evidentiary hearing on his motion to open the judgment, as the court reasonably could have concluded that there was no basis to hold such a hearing to allow the plaintiff to present testimony regarding his claim that the limited liability company's operating agreement was fraudulent, the operating agreement having had no bearing on the court's decision to dismiss the plaintiff's probate appeal for lack of standing.

Argued March 17–officially released May 27, 2025

Procedural History

Appeal from the decree of the Probate Court for the district of Norwalk-Wilton granting the defendant's

petition to determine ownership interests in the decedent's limited liability company, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Edward T. Krumeich*, judge trial referee, granted the defendant's motion to dismiss and rendered judgment thereon; thereafter, the court denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Affirmed.*

John T. Irick, pro hac vice, with whom was *Herbert I. Mendelsohn*, for the appellant (plaintiff).

Colin B. Connor, for the appellee (defendant).

Opinion

WESTBROOK, J. The plaintiff, Larry Allen Moore, appeals from the trial court's denial of his motion to open the judgment of the Superior Court dismissing his probate appeal for lack of subject matter jurisdiction. He claims that the trial court improperly (1) dismissed his appeal on the ground that he lacked standing to challenge the Probate Court's decree, (2) denied his motion to open the judgment of dismissal on the grounds that his motion was untimely and failed to demonstrate fraud on the court, and (3) denied his request for an evidentiary hearing with respect to his motion to open the judgment.[1] We affirm the judgment of the trial court.

The following facts, as found by the Probate Court, and procedural history are relevant to our resolution of this appeal. This dispute concerns the ownership of 40 Wall Street, LLC (company). After the decedent, Clifton Dewayne Bryant, died, his will was admitted to probate. The will devised his interest in the company to his wife. Thereafter, the defendant, Steven G. Ferguson,

[1] In his principal appellate brief, the plaintiff sets forth four claims. For ease of discussion, we address certain claims raised by him together.

who is the decedent's former business partner, petitioned the Probate Court to determine the ownership interests of the company.

The decedent's will provides in relevant part: "I hereby give, devise and bequeath my real property located and known as 107A William Street, Bridgeport, Connecticut, to my cousin [the plaintiff]. . . . I hereby give, devise and bequeath all the rest residue and remainder [of] my worldly possessions, my property, both real and personal of every nature and wheresoever situated, including . . . any and all of my interest in the [company] to my wife, Chelsea Bryant, or if she does not survive me, I give and bequeath the same equally to my daughters, Chloe Bryant and Cailyn Bryant. The business affairs of the [company] shall be managed by [the plaintiff]. The devise bequeathed to Chloe Bryant and Cailyn Bryant if she is a minor, shall be in trust to my hereinafter Trustee . . . ." The decedent, in his will, appointed the plaintiff as executor and as trustee of any trust created by the will.

The Probate Court held an evidentiary hearing on the defendant's petition to determine the ownership interests of the company. It subsequently issued a decree (probate decree) in which it determined that, on the basis of the company's operating agreement dated March 3, 2017 (operating agreement), the defendant and the decedent's estate were equal owners of the company, each holding a 50 percent interest.

Thereafter, the plaintiff, in his individual capacity and proceeding as a self-represented litigant, appealed the Probate Court's ruling to the Superior Court. In his appeal to the Superior Court, the plaintiff claimed that the defendant procured the probate decree by falsification of documents, forgery, and fraud. Specifically, he alleged that the decedent "was a sole member and manager" of the company after "removing [the defendant]

in 2016," and that the operating agreement listing the defendant as a member is fraudulent.

In response, the defendant filed a motion to dismiss the plaintiff's probate appeal for lack of subject matter jurisdiction. Specifically, the defendant argued that the plaintiff lacked standing to pursue the appeal because he had no beneficiary interest in the company that is the subject of the probate decree. As such, the defendant argued, "the plaintiff has not been aggrieved by the Probate Court's determination of the ownership interests [in the company] because the plaintiff has no legally protected interest in the estate's ownership interest in [the company] which could be adversely affected."

The plaintiff filed an objection to the defendant's motion to dismiss, arguing that he "has made substantial financial investments in the real property [located at 40 Wall Street in Norwalk] and that the defendant illegally forged [the decedent's] signature on the operating agreement." The plaintiff also submitted his own affidavit in which he averred, inter alia, that the defendant "is using his access to [the decedent's] financial information he received as [an employee of the bank] . . . as well as one of [the decedent's] former business associates in his effort to steal an ownership interest in [the company]." The plaintiff additionally alleged that he has operated a barbershop business from the company's property for fifteen years and has invested "finances, energy, time and efforts" into the company. Therefore, the plaintiff argued, he is aggrieved by the probate decree determining that the defendant owns 50 percent of the company.

On May 1, 2023, the court, *Hon. Edward T. Krumeich*, judge trial referee, conducted a hearing on the defendant's motion to dismiss. At the hearing, the plaintiff's

counsel[2] stated: "I would agree with [the defendant's] counsel's argument that [the plaintiff] would not have any interest [in the company] under the facts that are currently being presented by the court." Rather, the plaintiff's counsel argued that the plaintiff had filed with the Probate Court a motion to open and vacate the admission of the decedent's will and that the court in the present matter should stay the proceedings on the motion to dismiss pending resolution of his motion in the Probate Court. In response, the court stated: "[T]he other approach could very well be to dismiss this appeal, and if he succeeds . . . or if he fails in the Probate Court, then you appeal from that decree. In this matter . . . the court is limited to the decree appealed from."

Later that same day, the court issued an order granting the defendant's motion to dismiss and rendered a judgment of dismissal of the plaintiff's probate appeal. The court's order provided: "The plaintiff lacks standing to appeal the decree that recognized the decedent's [wife's] interest in [50] percent . . . of the subject limited liability company pursuant to the bequest in the will admitted to probate."

More than seven months later, on December 13, 2023, the plaintiff filed a motion to open the judgment, stating: "I, [the plaintiff] in my capacity as trustee for the estate of [the decedent] hereby move that this court open the judgment entered in this case on May 1, 2023." The plaintiff, in his motion, made the following allegations of fraud: (1) the defendant and his attorney presented a fraudulent operating agreement to the Probate Court to induce a determination that the defendant owns 50 percent of the company, (2) the operating agreement

[2] Attorney Andre Cayo filed a limited appearance for the purpose of, inter alia, representing the plaintiff at the hearing on the defendant's motion to dismiss.

was filed with the town clerk after the decedent died, (3) the decedent's signature on the operating agreement does not match his signature on mortgage loan documents, (4) the town clerk told the plaintiff that he believed that the operating agreement is fraudulent, and (5) the defendant's coworker notarized the operating agreement.

The defendant filed an objection to the plaintiff's motion, arguing that the plaintiff's motion was untimely because it was filed more than four months after the court rendered the judgment of dismissal. The plaintiff subsequently filed a reply and an additional reply to the defendant's objection, arguing that the court should open the judgment because, although his motion was untimely, the defendant and the defendant's counsel committed fraud on the Probate Court by falsifying the operating agreement. The plaintiff also filed a request for argument on his motion to open the judgment.

The court held a hearing on the plaintiff's motion to open the judgment. At the hearing, the plaintiff argued that the four month rule set forth in General Statutes § 52-212a[3] and Practice Book § 17-43[4] should not apply to him because the defendant had committed fraud. Specifically, the plaintiff alleged that the decedent did

[3] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent. . . ."

[4] Practice Book § 17-43 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket . . . upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. . . ."

not have the mental capacity to sign the operating agreement, and that Richard McQuaid, the town clerk, told him that the operating agreement was fraudulent. The plaintiff thereafter requested that the court grant him an additional hearing to subpoena the town clerk, the decedent's doctor, and the defendant. The defendant's counsel countered that, even if everything the plaintiff said was true, there was no fraud on the trial court with respect to the standing issue and, therefore, the four month rule applies. The court took the matter under advisement.

Later that same day, the court issued an order denying the plaintiff's motion to open the judgment. In its order, the court stated: "This motion was made more than four months after entry of judgment and is untimely. See Practice Book § 17-4 and General Statutes § 52-212a. The movant has not demonstrated his standing to appeal the probate decree or that the court was defrauded when it granted the motion to dismiss for lack of standing." This appeal followed.

I

The plaintiff first claims that the court improperly granted the defendant's motion to dismiss on the ground that he lacked standing to appeal from the probate decree.[5] The defendant, in opposition, argues that the plaintiff cannot challenge the merits of the court's decision to dismiss his probate appeal because he failed to appeal from the judgment of dismissal or to file a motion

[5] The plaintiff asserts a variety of arguments to support this claim including, inter alia, that (1) he is an aggrieved party because he is a beneficiary of the decedent's estate, and a trustee and fiduciary of the company, and (2) the court improperly limited the scope of his appeal from the decree of the Probate Court, failed to provide him with a trial de novo as to the ownership interests in the company, and considered the decedent's wife's beneficiary interest in the company. In light of our conclusion that the plaintiff cannot challenge the merits of the court's decision to dismiss his probate appeal, we do not reach these arguments.

to open the judgment within twenty days. We agree with the defendant.

"The denial of a motion to open is an appealable final judgment. . . . Although a motion to open can be filed within four months of a judgment . . . the filing of such a motion does not extend the appeal period for challenging the merits of the underlying judgment unless filed within the [twenty day period provided by Practice Book § 63-1].[6] . . . When a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused [its] discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment." (Footnote in original; internal quotation marks omitted.) *Searles* v. *Schulman*, 58 Conn. App. 373, 376, 753 A.2d 420, cert. denied, 254 Conn. 930, 761 A.2d 755 (2000). "This is so because otherwise the same issues that could have been resolved if timely raised would nevertheless be resolved, which would, in effect, extend the time to appeal." (Internal quotation marks omitted.) *Worth* v. *Korta*, 132 Conn. App. 154, 159, 31 A.3d 804 (2011), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

In the present case, the court rendered a judgment of dismissal on May 1, 2023, and the plaintiff filed the motion to open the judgment on December 13, 2023, more than seven months later. Because the plaintiff failed either to appeal the judgment of dismissal or to file his motion to open the judgment within twenty days after the court dismissed his probate appeal, he cannot challenge the merits of the court's judgment of dismissal on appeal to this court. See *Searles* v. *Schulman*, supra, 58 Conn. App. 376 ("plaintiff is not able to attack the

[6] "Practice Book § 63-1 (a) provides in relevant part that 'an appeal must be filed within twenty days of the date notice of the judgment . . . is given. . . .' " *Searles* v. *Schulman*, 58 Conn. App. 373, 376 n.8, 753 A.2d 420, cert. denied, 254 Conn. 930, 761 A.2d 755 (2000).

trial court's decision dismissing her complaint because she failed to file an appeal within twenty days after her complaint was dismissed . . . and the motion to open the judgment was also not filed within the twenty day period"); *Charbonneau* v. *Charbonneau*, 51 Conn. App. 311, 312, 721 A.2d 565 (1998) (precluding party from appealing merits of case because neither motion to open nor appeal from underlying judgment was filed within twenty day appeal period), cert. denied, 247 Conn. 964, 724 A.2d 1125 (1999). Thus, the only issue properly before us is whether the court abused its discretion in denying the plaintiff's motion to open the judgment. See *Searles* v. *Schulman*, supra, 376.

II

We now turn to the issue of whether the court abused its discretion in denying the plaintiff's motion to open the judgment on the grounds that his motion was untimely and that he failed to demonstrate fraud on the court. The plaintiff does not dispute that his motion was untimely pursuant to § 52-212a and Practice Book § 17-43. Rather, he argues that the timeliness rule does not apply to him because the defendant committed fraud. We are not persuaded.

Section 52-212a and Practice Book § 17-43 provide that a party must file a motion to open the judgment within four months following the date on which notice of the judgment was sent. "[T]o prevail on a motion to open filed outside [the four month] window, a movant must establish that *the judgment* was obtained by fraud, duress or mutual mistake or, under certain circumstances, where newly discovered evidence exists to challenge the judgment . . . ." (Emphasis added; internal quotation marks omitted.) *Mercedes-Benz Financial* v. *1188 Stratford Avenue, LLC*, 348 Conn. 796, 805, 312 A.3d 16 (2024). A party that files an untimely motion

to open based on fraud must show that fraudulent conduct induced the court to render the underlying judgment. See *Hebrand* v. *Hebrand*, 216 Conn. App. 210, 221, 284 A.3d 702 (2022).

"Our review of a court's denial of a motion to open [based on fraud] is well settled. We do not undertake a plenary review of the merits of a decision of the trial court to grant or . . . deny a motion to open a judgment. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion." (Internal quotation marks omitted.) *Tyler E. Lyman, Inc.* v. *Lodrini*, 78 Conn. App. 684, 687, 828 A.2d 681, cert. denied, 266 Conn. 917, 833 A.2d 468 (2003). "In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Karen* v. *Loftus*, 228 Conn. App. 163, 193, 324 A.3d 793, cert. denied, 350 Conn. 924, 325 A.3d 1094 (2024).

In the present case, the plaintiff has alleged, both in his motion to open and on appeal, that the defendant engaged in fraudulent conduct by falsifying the operating agreement and that such fraud induced the Probate Court to conclude that the defendant and the decedent's estate own equal shares of the company. The plaintiff has failed, however, to allege facts sufficient to demonstrate that the alleged fraud was committed on the *trial court* to induce its determination that the plaintiff, in his individual capacity, lacks *standing*. The court determined that the plaintiff, in his individual capacity, lacks standing to appeal from the probate decree concerning the company because he has no ownership interest or beneficiary interest in the company. Even if the plaintiff's allegations of fraud on the Probate

Court were true and the decedent's estate, therefore, owned 100 percent of the company, this fact would not lead to the conclusion that the plaintiff, *in his individual capacity*, had an ownership interest or a beneficiary interest in the company. Accordingly, even if we assume the truth of the plaintiff's allegations as set forth in his motion to open, the plaintiff has failed to allege facts sufficient to demonstrate that the alleged fraud impacted the court's judgment.

The court reasonably concluded that the plaintiff failed to meet his burden of showing that the judgment of dismissal was obtained by fraud on the trial court. Thus, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to open the judgment.

III

The plaintiff next claims that the court improperly denied his request for an evidentiary hearing with respect to his motion to open the judgment. In particular, he argues that the court's denial of the motion to open without an evidentiary hearing deprived him of an opportunity to prove that the defendant committed fraud by falsifying the operating agreement. We disagree.

"When a court's exercise of discretion [in deciding a motion to open] depends on disputed factual issues, such as the existence of fraud, due process requires an evidentiary hearing." (Internal quotation marks omitted.) *Tyler E. Lyman, Inc.* v. *Lodrini*, supra, 78 Conn. App. 687. A party is not entitled to an evidentiary hearing, however, when the allegations in the motion to open itself are "insufficient to constitute the necessary threshold showing" that grounds for opening the underlying judgment exist. (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Tarzia*, 186 Conn. App.

800, 809, 201 A.3d 511 (2019). The issue before us, therefore, is "whether the court abused its discretion in refusing to open the judgment without holding an evidentiary hearing on the factual question raised" by the plaintiff, namely, whether the defendant falsified the operating agreement to procure the probate decree. *Tyler E. Lyman, Inc.* v. *Lodrini*, supra, 688.

In the present case, we conclude that the court did not abuse its discretion in denying the plaintiff's request for an evidentiary hearing. The plaintiff requested, and the court granted, oral argument on the motion to open the judgment. During oral argument, the plaintiff requested an *additional* hearing to present testimony from the town clerk and the defendant concerning whether the defendant forged the company's operating agreement and from the decedent's doctor concerning the decedent's mental capacity at the time the operating agreement was signed. The court reasonably could have concluded that the resolution of the motion to open did not depend on the validity of the operating agreement and, therefore, there was no basis to hold an evidentiary hearing. As we discussed in part II of this opinion, even if the plaintiff proved that the operating agreement was fraudulent, the operating agreement had no bearing on the court's decision to dismiss the plaintiff's probate appeal for lack of standing. See *Conroy* v. *Idlibi*, 343 Conn. 201, 207–208, 272 A.3d 1121 (2022) (trial court reasonably concluded that "additional evidence . . . was unlikely to have altered the [court's judgment]"); *Wells Fargo Bank, N.A.* v. *Tarzia*, supra, 186 Conn. App. 809 (trial court did not abuse its discretion in denying motion to open without evidentiary hearing because "the information included in the motion . . . itself was insufficient to constitute the necessary 'threshold showing' to entitle him to one"). Accordingly, we conclude that the court did not abuse its discretion

in denying the plaintiff's request for an evidentiary hearing on his motion to open the judgment.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DAVON HAMILTON (AC 47239)

Cradle, C. J., and Clark and Seeley, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere, of criminal possession of a pistol or revolver, the defendant appealed. He claimed that the trial court improperly denied his motion to suppress certain evidence that had been seized from his apartment following the execution of a search warrant. *Held*:

The trial court properly denied the defendant's motion to suppress as, applying the totality of the circumstances test, the search warrant application contained sufficient information from which the court reasonably could have inferred that there was a fair probability that contraband or evidence of a crime would be found at the defendant's apartment.

Argued March 7—officially released May 27, 2025

Procedural History

Information charging the defendant with two counts of the crime of criminal possession of a pistol or revolver, two counts of the crime of carrying a pistol without a permit, and one count each of the crimes of possession of a controlled substance, risk of injury to a child, criminal possession of a large capacity magazine, and improper storage of a firearm, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, where the court, *B. Fischer, J.*, denied the defendant's motion to suppress certain evidence; thereafter, the defendant was presented to the court, *Hon. Patrick J. Clifford*, judge trial referee, on a conditional plea of nolo contendere to the charge of criminal possession of a pistol or revolver;

subsequently, the state entered a nolle prosequi as to the remaining charges; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Raynald A. Carre, deputy assistant state's attorney, with whom, on the brief, were *John P. Doyle*, state's attorney, and *Sarah Jones*, assistant state's attorney, for the appellee (state).

Opinion

SEELEY, J. Following his conditional plea of nolo contendere, entered pursuant to General Statutes § 54-94a,[1] the defendant, Davon Hamilton, appeals from the judgment of conviction of criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2021) § 53a-217c.[2] The defendant entered his conditional plea after the court denied his motion to suppress

[1] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress . . . the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress . . . would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the court to have denied the motion to suppress . . . . A plea of nolo contendere by a defendant under this section shall not constitute a waiver by the defendant of nonjurisdictional defects in the criminal prosecution."

[2] General Statutes (Rev. to 2021) § 53a-217c provides in relevant part: "(a) A person is guilty of criminal possession of a pistol or revolver when such person possesses a pistol or revolver, as defined in section 29-27, and (1) has been convicted of a felony committed prior to, on or after October 1, 2013, or of a violation of section 21a-279, 53a-58, 53a-61, 53a-61a, 53a-62, 53a-63, 53a-96, 53a-175, 53a-176, 53a-178 or 53a-181d committed on or after October 1, 1994 . . . .

(b) Criminal possession of a pistol or revolver is a class C felony, for which two years of the sentence imposed may not be suspended or reduced by the court, and five thousand dollars of the fine imposed may not be remitted or reduced by the court unless the court states on the record its reasons for remitting or reducing such fine."

All references herein to § 53a-217c are to the 2021 revision of the statute.

evidence seized following the execution of a search warrant at an apartment in which he resided. On appeal, the defendant claims that the court improperly denied his motion to suppress because the search warrant application and affidavit failed to establish probable cause for the search of his apartment and the seizure of property therein. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On June 8, 2021, Detective Elizabeth White and Officer Frank Grillo of the New Haven Police Department applied for a warrant to search the premises located at 320 Quinnipiac Avenue, apartment 3-E, in New Haven (premises) and to seize, inter alia, any firearms, ammunition and firearm related items found therein. They submitted an affidavit and application for a search and seizure warrant to the court, *Calistro*, *J.*, and the court issued the warrant the same day. The affidavit in support of the application consists of six paragraphs, only the third, fourth, and fifth of which are pertinent to the issue of probable cause.[3] Those paragraphs provide: "(3) During the week ending June 12, 2021 [White] and [Grillo] spoke to a [c]onfidential [i]nformant . . . regarding an individual in possession of a firearm. The [confidential informant] is familiar with firearms and knows the difference between facsimile firearms and actual firearms. The [confidential informant] has provided information in the past that has been corroborated by law enforcement and deemed to be reliable and credible.

[3] The first paragraph of the affidavit introduces White and Grillo, the second paragraph describes their training, experience and assignments, and the sixth paragraph avers that the information in the prior paragraphs establishes probable cause to believe that the defendant resides at the premises, is subject to an active warrant and is in illegal possession of a firearm.

"(4) According to the [confidential informant], during the week ending June 5, 2021, he/she observed a firearm within [the premises]. The [confidential informant] stated [that] the individual in possession of this firearm was a [B]lack male who resides at this location and who is on parole. A single photograph of this individual from social media was sent by the [confidential informant] to [White and Grillo]. [White] identified the individual in the photograph as [the defendant] . . . . White knows [that the defendant] is on [state] [p]arole for [a]ssault [in the first degree]. . . . White confirmed through Connecticut Parole that [the defendant] resides at [the premises].

"(5) A records check, through [the records division of the] New Haven Police [Department] . . . confirmed [that] [the defendant] . . . is a convicted felon, which prohibits him from lawfully possessing firearms. This records check also revealed [that] [the defendant] has an active . . . warrant out of New Haven for [t]hreatening in the [first] [d]egree, [a]ssault in the [third] [d]egree, and [b]reach of [the] [p]eace in the [second] [d]egree—stemming from a domestic violence incident where a black firearm was displayed."

The police executed the warrant on June 10, 2021, and seized two firearms,[4] several rounds of ammunition, four firearm magazines, ten "baggies containing a white, rock-like substance," and $1.60 in change from the premises. The defendant, who was present during the execution of the search warrant, was arrested and charged in an information with two counts of criminal possession of a pistol or revolver in violation of § 53a-217c, two counts of carrying a pistol without a permit in violation of General Statutes § 29-35 (a), possession

[4] Specifically, the two firearms seized from the premises were described as semiautomatic handguns manufactured by Glock and Smith and Wesson.

of a controlled substance in violation of General Statutes § 21a-279 (a) (1), risk of injury to a child[5] in violation of General Statutes § 53-21, criminal possession of a large capacity magazine in violation of General Statutes (Rev. to 2021) § 53-202w (c), and improper storage of a firearm in violation of General Statutes (Rev. to 2021) § 29-37i.

On August 1, 2022, the defendant filed a motion to suppress the evidence seized from the premises, arguing, inter alia, that the search warrant application "[did] not contain information sufficient to support [a] . . . finding of probable cause . . . ." The state filed a memorandum of law in opposition to the defendant's motion to suppress. The court, *B. Fischer*, *J.*, held an evidentiary hearing and heard oral argument on the motion to suppress on January 12, 2023.[6] On February 17, 2023, the court issued a memorandum of decision denying the motion to suppress, finding that "[t]he information the [confidential informant] gave to the police was sufficient to establish probable cause for the search of [the premises]."

Following the denial of the motion to suppress, the defendant entered a written, conditional plea of nolo

[5] Two women and two children were also present at the premises when the search warrant was executed.

[6] At the January 12, 2023 hearing, the prosecutor indicated that defense counsel had filed a motion for a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) (holding that when defendant makes substantial preliminary showing that false statement knowingly and intentionally, or with reckless disregard for truth, was included by affiant in warrant affidavit, and, if allegedly false statement is necessary to finding of probable cause, fourth amendment requires that hearing be held at defendant's request), and argued that the defendant was not entitled to a *Franks* hearing. After the court inquired, however, defense counsel clarified that she was not pursuing a *Franks* motion at that time. The court acknowledged this and informed defense counsel that the motion for a *Franks* hearing could be renewed at a later date if so desired, but there is no indication in the record that the defendant subsequently pursued a *Franks* motion. Indeed, at oral argument before this court, defense counsel conceded that a *Franks* motion was never pursued.

contendere to one count of criminal possession of a pistol or revolver in violation of § 53a-217c, conditioned on his right to appeal the denial of his motion to suppress. In accordance with the plea agreement, he was sentenced to a total effective sentence of four years and six months of incarceration, two years of which were a statutory mandatory minimum, followed by four years of special parole. This appeal followed.

The defendant's sole claim on appeal is that the court improperly denied his motion to suppress because the information provided in the search warrant affidavit was insufficient to establish probable cause. Specifically, he argues that "the warrant suffers from deficiencies as to both the reliability and credibility of the [confidential informant] [because] [t]he search was predicated entirely on a single unsworn, uncorroborated and undetailed statement allegedly given to [White and Grillo] by an unnamed [confidential informant] whose reliability was only indirectly vouched for" and that "[t]his information falls far short of the information needed to justify a lawful search."[7] The state counters that "[t]he court properly denied the defendant's motion to suppress because there was ample evidence establishing probable cause that he possessed at least one handgun in violation of his special parole." We agree with the state.[8]

[7] The defendant argues that this is true because the information in the search warrant affidavit was insufficient (1) to establish the credibility of the confidential informant in that it contained only "the bald and indirect statement that the [confidential informant] 'had provided information in the past that has been corroborated by law enforcement and deemed to be reliable and credible,' " (2) to establish the basis for the confidential informant's knowledge because it "has no convincing details to support the [confidential informant's] knowledge about the defendant or his 'possession' of a firearm," and (3) to confirm that the information provided by the confidential informant was reliable, as "[t]he only step that appears to have been taken by the police [to corroborate the information provided by the confidential informant] was to confirm that the defendant resided at that location, was on parole and was a convicted felon."

[8] We also observe that, at the January 12, 2023 hearing, the state argued that the defendant was not "entitled to [present] testimony" and that the hearing should "be limited solely to arguments by counsel, given that this

We begin by setting forth the standard of review and legal principles that govern our resolution of this claim. "When reviewing the trial court's denial of a motion to suppress, the standard of review to be applied depends on whether the challenge asserted on appeal is to the factual basis of the trial court's decision or to its legal conclusions. . . . Where . . . 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. . . . Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . Accordingly, [o]ur review of the question of whether an affidavit in support of an application for a search [and seizure] warrant provides probable cause for the issuance of the warrant is plenary. . . . Because this issue implicates a defendant's constitutional rights . . . we engage in a careful examination of the record to ensure that the court's decision was supported by substantial evidence. . . .

"Both the fourth amendment to the United States constitution[9] and article first, § 7, of the Connecticut

is a motion to suppress based on a search warrant, and the defendant is limited to asking any questions related to the four corners of the affidavit . . . [which] would be sufficient in this case . . . [because] [t]here would be nothing further to elicit since all of the information contained in the [warrant] affidavit is sufficient for Your Honor to make a determination [of] whether there was probable cause for the search here." We agree that the only relevant consideration to the court's probable cause determination was the information contained in the warrant affidavit, as it is well established that our review "may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom." (Internal quotation marks omitted.) *State* v. *Joseph E.*, 231 Conn. App. 556, 564, 333 A.3d 522, cert. denied, 351 Conn. 927, A.3d (2025). Thus, to the extent that the defendant argues that certain questions asked by defense counsel at the January 12, 2023 hearing support the conclusion that the court's probable cause determination was improper, we do not consider this argument.

[9] The fourth amendment to the United States constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

constitution[10] prescribe that a search warrant shall issue only upon a showing of probable cause.[11] Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing [judge] assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . The determination of probable cause is reached by applying a totality of the circumstances test. . . .

"[Our Supreme Court] has recognized that because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . *we*

[w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[10] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

[11] "[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." (Internal quotation marks omitted.) *State* v. *Holley*, 324 Conn. 344, 354, 152 A.3d 532 (2016).

evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding. . . . We therefore review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw. . . . In evaluating whether the warrant was predicated on probable cause, a reviewing court may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom." (Citations omitted; emphasis in original; footnotes added; internal quotation marks omitted.) *State* v. *Joseph E.*, 231 Conn. App. 556, 562–64, 333 A.3d 522, cert. denied, 351 Conn. 927, A.3d (2025); see *State* v. *Smith*, 344 Conn. 229, 243–45, 278 A.3d 481 (2022); see also *State* v. *Griffin*, 339 Conn. 631, 646–47, 262 A.3d 44 (2021) (acknowledging that our appellate courts "will uphold the validity of [a] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the [issuing judge's] conclusion that probable cause existed" and "will not invalidate a warrant . . . merely because [the reviewing court] might, in the first instance, have reasonably declined to draw the inferences that were necessary" (internal quotation marks omitted)), cert. denied, U.S. , 142 S. Ct. 873, 211 L. Ed. 2d 575 (2022).

"If a search warrant affidavit is based on information provided to the police by a confidential informant, the issuing judge should examine the affidavit to determine whether it adequately describes both the factual basis of the informant's knowledge and the basis on which the police have determined that the information is reliable. If the warrant affidavit fails to state in specific terms how the informant gained his knowledge or why the police believe the information to be trustworthy, however, the [judge] can also consider all the circumstances set forth in the affidavit to determine whether,

despite these deficiencies, other objective indicia of reliability reasonably establish that probable cause to search exists. In making this determination, the [judge] is entitled to draw reasonable inferences from the facts presented. . . . Therefore, although no single factor is dispositive, the veracity or reliability and basis of knowledge of [the informant] are highly relevant in the issuing judge's analysis of the totality of the circumstances."[12] (Citation omitted; internal quotation marks omitted.) *State* v. *Griffin*, supra, 339 Conn. 645–46.

In the present case, the defendant's challenge to the adequacy of the warrant affidavit is based on his assertion that it does not contain sufficient information to establish the confidential informant's credibility, to establish the basis for the confidential informant's knowledge, or to confirm the reliability of the information provided by the confidential informant. Consequently, we must apply the totality of the circumstances test to the four corners of the warrant affidavit to determine whether it established a substantial factual basis to justify the issuing judge's probable cause determination. See id.; *State* v. *Joseph E.*, supra, 231 Conn. App. 562–64.

Having reviewed the warrant affidavit in the light most favorable to upholding the issuing court's probable cause determination, we conclude that the affidavit established a substantial factual basis to justify the issuing judge's finding of probable cause. The warrant affidavit in this case sets forth information given to law enforcement by a confidential informant that provides substantial evidence from which the issuing judge could have determined, on the basis of the totality of the

[12] "[A]n informant's reliability and basis of knowledge are no longer independent requirements for a finding of probable cause; rather, a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 339 Conn. 652–53.

circumstances, that a finding of probable cause was warranted.

As our Supreme Court has recognized with respect to the reliability of a confidential informant, although "unsupported" statements about the track record of an informant "[are] entitled only to slight weight in the probable cause analysis"; *State* v. *Griffin*, supra, 339 Conn. 649; such statements "[provide] at least some information about the informant's past performance" because "[t]he issuing judge reasonably could have inferred from [such an] assertion that the informant had provided information to the police in connection with at least one prior criminal matter that proved to be true and reliable." Id., 648. The warrant affidavit prepared by White and Grillo states: "The [confidential informant] has provided information in the past that has been corroborated by law enforcement and deemed to be reliable and credible." Thus, because this statement provided "some information about the informant's past performance"; *State* v. *Griffin*, supra, 648; it, at least nominally, supported the confidential informant's reliability.

Moreover, other aspects of the warrant affidavit further established the confidential informant's reliability. For one, it is evident from the warrant affidavit that the confidential informant's identity was known to the police. "[A]s [our Supreme] [C]ourt has repeatedly recognized, [t]he fact that an informant's identity is known . . . is significant because the informant could expect adverse consequences if the information that he provided was erroneous. Those consequences might range from a loss of confidence or indulgence by the police to prosecution for . . . falsely reporting an incident under General Statutes § 53a-180 [c], had the information supplied proved to be a fabrication." (Internal quotation marks omitted.) Id., 650; see also *State* v. *Flores*,

319 Conn. 218, 228, 125 A.3d 157 (2015) (fact that informant "could have expected adverse consequences for relaying false information" provided "indicia of reliability"), cert. denied, 578 U.S. 912, 136 S. Ct. 1529, 194 L. Ed. 2d 615 (2016); *State* v. *Johnson*, 286 Conn. 427, 438, 944 A.2d 297 ("[t]he first factor supporting an inference of the informant's reliability or veracity [in this case] is the fact that the informant was not anonymous"), cert. denied, 555 U.S. 883, 129 S. Ct. 236, 172 L. Ed. 2d 144 (2008). In the present case, the warrant affidavit does not assert that the information was the product of an anonymous tip; rather, it states that the information was provided by a confidential informant whom the police had used in the past. Given that the information provided to the police was not from an anonymous source, but from a confidential informant known to the police, it follows that the informant "could [have] expect[ed] adverse consequences" if the information he or she provided to the police was untruthful. (Internal quotation marks omitted.) *State* v. *Griffin*, supra, 339 Conn. 650. Thus, it was reasonable for the issuing judge to infer that the information provided by the confidential informant—that he or she had observed at the premises a Black male, who was on parole and resided there, to be in possession of a firearm—was not fabricated. See id.

Second, the issuing judge also would have been able to consider that, as recounted in the warrant affidavit, when White conducted a records check with the New Haven Police Department regarding the defendant, she learned that he was a convicted felon who was lawfully prohibited from having firearms and had an active warrant out for his arrest in relation to a domestic violence incident in which a "black firearm" allegedly had been displayed. This investigation by White not only further established the reliability of the information given by the confidential informant to the police by revealing

that the suspect had engaged in past criminal behavior; see *State* v. *Griffin*, supra, 339 Conn. 647 n.9 (recognizing that "the reputation and past criminal behavior of the suspect" is one "of the most common factors used to evaluate the reliability of an informant's tip" (internal quotation marks omitted)); it also provided the issuing judge with an additional indicia of reliability that justified the finding of probable cause. See id., 652–53 (acknowledging that, "in determining the overall reliability of a tip," deficiency in "an informant's reliability [or] basis of knowledge . . . may be compensated for . . . by *some other indicia of reliability*" (emphasis added; internal quotation marks omitted)); *State* v. *Rodriguez*, 27 Conn. App. 307, 315, 606 A.2d 22 (1992) (characterizing "results of independent police investigation" as potential "indicia of trustworthiness"); see also *United States* v. *May*, 399 F.3d 817, 824 (6th Cir. 2005) ("[t]he additional evidence substantiating an informant's reliability . . . may be any set of facts that support the accuracy of the information supplied by the informant").

Third, and perhaps most significant to the issue of the confidential informant's reliability, the warrant affidavit indicates that the police corroborated certain information provided by the informant. "Partial corroboration of an informant's report by facts developed by [the] police, as the [United States Supreme] [C]ourt emphasized in *Illinois* v. *Gates*, [462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)], is another way to establish the reliability of an . . . informant's tip . . . . [S]ee *United States* v. *Greenburg*, 410 F.3d 63, 69 (1st Cir. 2005) ([c]orroboration of apparently innocent activity can establish the reliability of the informant because the activity might come to appear suspicious in light of the initial tip); *State* v. *Hunter*, 27 Conn. App. 128, 134, 604 A.2d 832 (1992) (reliability of untested informant verified and probable cause present under totality of

circumstances after independent police investigation corroborated large portion of informant's tip)." (Citations omitted; internal quotation marks omitted.) *State* v. *Johnson*, supra, 286 Conn. 439–40. "It is enough, for purposes of assessing probable cause, that [corroboration] through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the [informant's assertion]." (Internal quotation marks omitted.) *United States* v. *McKenzie*, 13 F.4th 223, 238 (2d Cir. 2021), cert. denied, U.S. , 142 S. Ct. 2766, 213 L. Ed. 2d 1005 (2022); see *State* v. *Smith*, 257 Conn. 216, 226, 777 A.2d 182 (2001) ("police investigation confirming details of [an] informant's report may establish that the informant obtained the information in a reliable way").

"[S]tatements made by an informant are entitled to greater weight if corroborated by evidence independently gathered by the police. . . . The theory of corroboration is that a statement which has been shown true in some respects is reasonably likely to be true in the remaining respects." (Citation omitted; internal quotation marks omitted.) *State* v. *DiMeco*, 128 Conn. App. 198, 205, 15 A.3d 1204, cert. denied, 301 Conn. 928, 22 A.3d 1275, cert. denied, 565 U.S. 1015, 132 S. Ct. 559, 181 L. Ed. 2d 398 (2011). Thus, "[i]f, through corroboration, it is shown that the informant has provided reliable information, the issuing judge may credit other information provided by the informant." *State* v. *Holley*, 324 Conn. 344, 357, 152 A.3d 532 (2016).

In this case, the warrant affidavit describes how White partially corroborated the confidential informant's assertion that the informant had observed at the premises a Black male, who was on parole and resided there, to be in possession of a firearm. In particular, the warrant affidavit states that, after recognizing the defendant from the photograph sent to White and Grillo

by the confidential informant, White was able to confirm that the defendant was on state parole and that the address of the premises was the same one listed as the defendant's address with "Connecticut Parole."[13] White therefore was able to successfully corroborate the confidential informant's assertion that a Black male parolee resided at the premises. See *State* v. *Griffin*, supra, 339 Conn. 647 n.9 (recognizing that "corroboration of the information by [the] police" is one "of the most common factors used to evaluate the reliability of an informant's tip" (internal quotation marks omitted)). This partial corroboration of the information provided by the confidential informant entitled the issuing judge to credit the other information provided by the informant; see *State* v. *Holley*, supra, 324 Conn. 357; and "to give greater weight to the informant's claim" that he or she had observed a Black male, who was on parole, in possession of a firearm at the premises where the Black male resided. *State* v. *Griffin*, supra, 652.[14] We conclude that this corroboration by the police, taken together with the aforementioned factors, provided strong evidence of the informant's reliability. See id., 651–52.

[13] The issuing judge could have reasonably inferred that the reference to "Connecticut Parole" in the warrant affidavit referred to the Board of Pardons and Paroles. See *State* v. *Griffin*, supra, 339 Conn. 645–46.

[14] See *State* v. *DeFusco*, 224 Conn. 627, 644, 620 A.2d 746 (1993) (recognizing that "corroboration would be a proper ground on which to base an inference of reliability"); *State* v. *Rodriguez*, 223 Conn. 127, 137, 613 A.2d 211 (1992) (statement in warrant affidavit that confidential informant saw defendant carrying revolver before shooting was entitled to reliability because it was corroborated); see also *State* v. *Toth*, 29 Conn. App. 843, 856, 618 A.2d 536 ("[a]lthough the confidential informant was not specifically shown to be reliable or trustworthy, the information derived from all sources and corroborated by police surveillance [and investigation] reasonably allowed the issuing authority to conclude that the information supplied by the informants presented a substantial factual basis on which to find that probable cause existed" (internal quotation marks omitted)), cert. denied, 225 Conn. 908, 621 A.2d 291 (1993), and cert. denied, 225 Conn. 908, 621 A.2d 291 (1993).

Finally, the warrant affidavit also contains a "clear showing of the informant's basis of knowledge," which mitigates any remaining doubts concerning the confidential informant's reliability. Id., 652. "[O]ur Supreme Court has assigned great weight to knowledge provided to law enforcement by known informants who have '[firsthand] information' of a crime"; *State* v. *Freeman*, 132 Conn. App. 438, 450, 33 A.3d 256 (2011), aff'd, 310 Conn. 370, 77 A.3d 745 (2013); and "stated that 'the surest way to establish a basis of knowledge is by a showing that the informant is passing on what is to him [firsthand] information . . . .' " *State* v. *Johnson*, supra, 286 Conn. 440. As to the basis of knowledge for the information provided by the confidential informant in the present case, the warrant affidavit states that the informant "is familiar with firearms and knows the difference between facsimile firearms and actual firearms" and that he or she "observed a firearm within [the premises]" that was possessed by "a [B]lack male who resides at this location and who is on parole." It further states that the confidential informant provided the police with a photograph of this individual that was taken from social media. Given that the warrant affidavit provided information that described the alleged wrongdoing, along with "a statement that the event was observed firsthand" by the confidential informant, we conclude that the issuing judge reasonably could have determined that the informant's basis of knowledge "entitle[d] his [or her] tip to greater weight than might otherwise be the case"; (internal quotation marks omitted) *State* v. *Griffin*, supra, 339 Conn. 653; and mitigated any doubts regarding the informant's reliability. See id. (concluding "that the issuing judge could rely on th[e] [confidential informant's] particularized knowledge to overcome uncertainty as to the informant's reliability or veracity" when warrant affidavit alleged, inter alia, "that the informant personally observed

[a black, rifle type firearm] and ammunition inside the defendant's residence"); *State* v. *Morrill*, 205 Conn. 560, 566, 534 A.2d 1165 (1987) ("The affidavit states that the informant personally observed the defendant sell [marijuana] and [that] he heard the defendant state that he had ten pounds to sell. From these statements the [issuing judge] could reasonably have inferred that the defendant was engaged in the ongoing criminal activity of selling [marijuana].").

Accordingly, applying the totality of the circumstances test, we conclude that the search warrant application contained sufficient information from which the court reasonably could have inferred that there was a fair probability that contraband or evidence of a crime would be found at the premises. For that reason, the court properly denied the defendant's motion to suppress.

The judgment is affirmed.

In this opinion the other judges concurred.

JOSE LOPEZ *v.* COMMISSIONER OF CORRECTION (AC 46744)

Moll, Clark and Lavine, Js.

Syllabus

The petitioner, who previously had been convicted of murder, appealed following the denial of his petition for certification to appeal from the habeas court's judgment denying his habeas petition. This court, in a previous decision, held that the habeas court abused its discretion in denying the petitioner's petition for certification to appeal and erred in concluding that the petitioner's trial counsel, C, did not render deficient performance by failing to investigate and present the testimony of J, the petitioner's son, at the petitioner's criminal trial. This court retained jurisdiction over the appeal and remanded the case to the habeas court to resolve the factual question of whether there was a reasonable probability that J's testimony exculpating the petitioner would have been credited by the jury if he had testified at the petitioner's criminal trial. On remand, the habeas court found that J's

testimony was credible and, therefore, there was a reasonable probability that the jury would have found that testimony credible. *Held*:

The habeas court erred in rejecting the petitioner's claim that C rendered ineffective assistance of counsel in failing to investigate J's testimony, and, accordingly, the judgment of the habeas court was reversed and the case was remanded with direction to grant the petition for a writ of habeas corpus, to vacate the petitioner's conviction of murder and to order a new trial.

Submitted on briefs May 6—officially released May 27, 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, *Bhatt*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court, *Moll*, *Clark* and *Lavine*, *Js.*, which remanded the case to the habeas court to make an additional factual finding; subsequently, on remand, the court, *Bhatt*, *J.*, issued a decision making the requested factual finding. *Reversed*; *judgment directed.*

James E. Mortimer, assigned counsel, filed a brief for the appellant (petitioner).

Timothy F. Costello, supervisory assistant state's attorney, filed a brief for the appellee (respondent).

Opinion

PER CURIAM. This habeas appeal returns to us following our decision in *Lopez* v. *Commissioner of Correction*, 230 Conn. App. 437, 483, 330 A.3d 933 (2025), in which we remanded this case to the habeas court, *Bhatt*, *J.*, in order to make a finding as to whether, had Jose Lopez III, the son of the petitioner, Jose Lopez, testified at the petitioner's criminal trial, there is a reasonable probability that his testimony exculpating the petitioner would have been credited by the jury. We presume the parties' familiarity with our analysis in *Lopez*, as well as with the facts and procedural history

set forth therein, to which we refer only as necessary in order to explain our decision.

On April 11, 2025, pursuant to our remand order, the habeas court issued a memorandum of decision in which it "explicitly state[d]," "solely on the basis of the existing record and [its] prior opportunity to observe Lopez III testify . . . that it found Lopez III credible and, by extension, there is a reasonable probability that the jury would have found him credible." (Citation omitted; internal quotation marks omitted.) The habeas court further stated that it "[could] only make such an assessment based on its own credibility determination of Lopez III." On April 22, 2025, we sua sponte issued an order inviting the parties to submit supplemental briefs addressing the question of whether, in light of the habeas court's April 11, 2025 memorandum of decision, we should reverse the judgment of the habeas court with direction to grant the writ of habeas corpus, to vacate the petitioner's conviction of murder, and to order a new trial. The parties filed supplemental briefs in accordance with this order on May 6, 2025.

In *Lopez*, we concluded that the petitioner's trial counsel, Paul Carty, had rendered deficient performance when he failed to conduct any investigation into the potential testimony of Lopez III. *Lopez* v. *Commissioner of Correction*, supra, 230 Conn. App. 444. With respect to the prejudice prong, we further concluded that, had Lopez III's testimony exculpating the petitioner been credited by the jury, there was a reasonable probability that the result of the petitioner's criminal trial would have been different. Id. The habeas court, exercising its authority as "the trier of facts . . . [and] the sole arbiter of the credibility of witnesses and the weight to be given to their testimony"; (internal quotation marks omitted) *Johnson* v. *Commissioner of Correction*, 228 Conn. App. 701, 715, 324 A.3d 837, cert. denied, 350 Conn. 929, 326 A.3d 250 (2024); has now

concluded—relying solely on the existing record and its opportunity to observe Lopez III testify—that Lopez III was credible, and, on that basis, has found that there is a reasonable probability that the jury would have credited his testimony exculpating the petitioner. It is well established that "[a] pure credibility determination made by a habeas court is *unassailable*." (Emphasis in original; internal quotation marks omitted.) Id.; see also, e.g., *Fields* v. *Commissioner of Correction*, 179 Conn. App. 567, 569, 180 A.3d 638 (2018) ("[i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court" (internal quotation marks omitted)). We thus will not disturb the habeas court's finding.[1]

Accordingly, in light of our analysis in *Lopez* and the habeas court's April 11, 2025 memorandum of decision,

[1] In his supplemental brief, the respondent, the Commissioner of Correction, contends that "[t]he habeas court's credibility analysis on remand was flawed and, therefore, provides no basis to find that the petitioner established prejudice . . . ." The respondent bases this argument on the following language from the habeas court's memorandum of decision: "To be sure, there are many factors playing a role in the determination of Lopez III's credibility. . . . Also of importance is the fact that he testified that he had repeatedly asked his attorney at the time the cases were pending if he could testify at his father's trial. These are all factors for the jury to consider and for this court to consider." The respondent argues that, "[b]y considering that Lopez III had asked his attorney if he could testify, the habeas court considered evidence that likely would not have been before the jury. That Lopez III may have questioned his attorney about the possibility of testifying was relevant to rehabilitating his credibility at the habeas trial as to whether he would have testified if called at the criminal trial, but it could not inform whether his criminal trial testimony would have been credited by a jury. His queries of counsel simply would not have been raised at trial, or they may have been privileged."

Apart from an allusion to attorney-client privilege, the respondent provides no support for his conclusory assertion that, had Lopez III been called as a witness by the petitioner during his criminal trial, Lopez III would not or could not have testified about his conversations with his counsel regarding his desire to testify on the petitioner's behalf. Indeed, the fact that Lopez III testified regarding those conversations at the habeas trial undercuts the respondent's argument. See, e.g., *Ghio* v. *Liberty Ins. Underwriters, Inc.*, 212 Conn. App. 754, 772, 276 A.3d 984 ("It is well established that voluntary disclosure of the content of a privileged communication constitutes waiver of the [attorney-client] privilege. . . . The privilege belongs to the client

we conclude that the petitioner has met his burden of establishing that Carty rendered ineffective assistance of counsel in failing to investigate the testimony of Lopez III and that the habeas court erred in rejecting that claim.[2]

The judgment of the habeas court is reversed and the case is remanded with direction to grant the petition for a writ of habeas corpus, to vacate the petitioner's conviction of murder, and to order a new trial.

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and may be waived only by the client or his attorney acting with the client's authority." (Citation omitted; internal quotation marks omitted.)), cert. denied, 345 Conn. 909, 283 A.3d 506 (2022); *Cox* v. *Burdick*, 98 Conn. App. 167, 172, 907 A.2d 1282 (explaining that holder of attorney-client privilege may waive privilege by "voluntarily testif[ying] regarding portions of the attorney-client communication" (emphasis omitted; internal quotation marks omitted)), cert. denied, 280 Conn. 951, 912 A.2d 482 (2006). Ultimately, the respondent asks us to second-guess the habeas court's credibility determination, solely on the basis of just one factor the court weighed in assessing Lopez III's credibility. This we may not do. We therefore reject the respondent's argument.

[2] The petitioner has also claimed on appeal that the habeas court improperly concluded that the petitioner was not prejudiced by Carty's failure to investigate and present the testimony of Zeequan Groves, a different witness, at his criminal trial. In *Lopez*, we stated that we would "leave [this] claim for another day." *Lopez* v. *Commissioner of Correction*, supra, 230 Conn. App. 438. In light of our decision to remand this case to the habeas court with direction to grant the petition for a writ of habeas corpus, to vacate the petitioner's murder conviction, and to order a new trial, we now conclude that we need not and do not reach the merits of this claim.