IN RE N. A.*
(AC 48224)

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

Syllabus

The respondent mother appealed from the trial court's judgment terminating her parental rights with respect to her minor child. The mother claimed that the court improperly determined that she had failed to achieve a sufficient degree of personal rehabilitation, pursuant to statute (§ 17a-112 (j) (3)

* 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.

(B) (i)), as would encourage the belief that she could assume a responsible position in the child's life within a reasonable period of time. *Held*:

The trial court properly found, by clear and convincing evidence, that the Department of Children and Families had made reasonable efforts to reunify the respondent mother with the child, the department having referred the mother for numerous services over the course of two years to address her alcohol use and history of intimate partner violence.

The evidence was sufficient to support the trial court's determination that the respondent mother had failed to achieve the requisite degree of personal rehabilitation pursuant to § 17a-112 (j) (3) (B) (i), as the court, in reaching its conclusion, did not improperly rely, as the mother contended, on messages she had sent to her incarcerated husband, who had assaulted her with a motor vehicle, that expressed her continued romantic commitment to him and referenced her continued alcohol use, and her claim that those messages undermined the testimony of the department's workers at trial constituted an improper request for this court to reweigh the evidence.

The trial court's conclusion that termination of the respondent mother's parental rights was in the child's best interest was not clearly erroneous, as the court made written findings regarding each of the factors enumerated in § 17a-112 (k), and, contrary to the respondent's claim, it did not misstate the law regarding the role of the minor child's attorney, as no party argued that the child's rights and best interest did not coincide or moved for the appointment of a guardian ad litem for the child.

Argued May 19—officially released June 24, 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 Hartford, Juvenile Matters, and tried to the court, *Anker*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

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

Nisa J. Khan, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and

** June 24, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Rafeena Bacchus Lee, assistant attorney general, for the appellee (petitioner).

Stein M. Helmrich, assigned counsel, for the minor child.

Opinion

ALVORD, J. The respondent mother, L. A., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor child, N. A.,[1] on the ground that the respondent had failed to achieve a sufficient degree of personal rehabilitation, pursuant to General Statutes § 17a-112 (j) (3) (B) (i). On appeal, the respondent claims that the court improperly determined that (1) the Department of Children and Families (department) made reasonable efforts to reunify her with the child, (2) she failed to rehabilitate sufficiently, and (3) termination of her parental rights was in the child's best interest.[2] We affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. The child was born in October, 2016. The department's most recent involvement with the respondent began in April, 2022,[3] when the respondent was arrested for driving under the influence while the child was in the vehicle. "When [department] investigator

[1] The respondent father, K. M., consented to the termination of his parental rights, and he is not participating in this appeal. Accordingly, all references to the respondent are to L. A. only.

[2] The attorney for the minor child filed a statement adopting the position of the petitioner.

[3] The department's previous involvement with the respondent dates back to 2016, due to concerns of substance use by the respondent and intimate partner violence against the respondent by the child's father, K. M. In 2018, the child was adjudicated neglected and was committed to the custody of the petitioner. In 2019, the child was reunified with the respondent under a period of protective supervision, which expired later in 2019.

Erin Wasicki spoke to [the respondent] the following day in court, [she] denied that she was under the influence at the time. She minimized the incident by characterizing it as 'hilarious,' and saying the judge was laughing and told her it was all a misunderstanding. However, the charges were not dropped. Indeed, the respondent . . . was eventually sentenced in January, 2024, to one year in jail, execution suspended after thirty days, with two years of probation. . . . Wasicki also spoke to family and friends who expressed concerns regarding the respondent's . . . alcohol use."

The department also learned of possible intimate partner violence against the respondent by her husband, J. G. When Wasicki went to the respondent's home in April, 2022, J. G. was upstairs. The respondent "claimed he was her boyfriend, he did not live with her, and he had nothing to do with [the department's] involvement. She refused to allow access to J. G. and provided two different birth dates for him in an apparent attempt to hide his true identity. A search of [department] records revealed that J. G. had been found by [the department] to be the perpetrator of interpersonal violence against three other partners, with the most recent incident occurring in 2020, and he had pending charges for narcotics, strangulation, and risk of injury to a minor."

On April 18, 2022, the department filed an ex parte request for an order of temporary custody and a neglect petition. The order of temporary custody was sustained on April 22, 2022.

"On June 5, 2022, two months into the most recent [department] involvement, there was an incident of interpersonal violence between the respondent . . . and J. G. They were both drinking, they had an argument, and J. G. attempted to leave in the [respondent's] car. When the respondent . . . tried to stop him from leaving, she was dragged by the car. This resulted in

severe injuries to the respondent . . . including a degloved hand,[4] broken fingers, and a left leg injury. When J. G. was arrested, he was found to be in possession of fentanyl. J. G. was incarcerated on June 25, 2022, after the incident with the car. The respondent . . . maintains to this day that this was an accident and it was all her fault." (Footnote in original.)

The child was adjudicated neglected and committed to the custody of the petitioner on July 21, 2022. The court provided the respondent with specific steps to facilitate her reunification with the child. "[The respondent] has made efforts over the past two years to comply with and complete them, although she has not been fully successful, as she has failed to gain sufficient insight into her alcoholism or exposure to intimate partner violence. She has also consistently refused to partner with [the department] for an assessment of her husband."

On August 3, 2023, the petitioner filed a petition to terminate the respondent's parental rights with respect to the child on the grounds that the child previously had been adjudicated neglected and that the respondent had failed to achieve a sufficient degree of rehabilitation pursuant to § 17a-112 (j) (3) (B). The court, *Anker*, *J.*, held a trial on the petition on July 25, 2024. The petitioner presented the testimony of Joshua Burns, an officer with the Department of Correction, who testified regarding messages between the respondent and J. G., transmitted while J. G. was incarcerated. Copies of the messages were admitted into evidence without objection, among other documentary evidence. The petitioner also presented the testimony of Wasicki; Tashawna Mitchell, an investigative social worker with the department; and Vanessa Lopez, a department social worker.

[4] "This is an injury where the top layer of skin is torn away from the underlying muscle."

The respondent testified and presented the testimony of Christina Ferrante, a licensed professional counselor.

On September 27, 2024, the court issued a memorandum of decision in which it terminated the respondent's parental rights. The court found by clear and convincing evidence that the department had made reasonable efforts to reunify the respondent with the child and that the respondent was unable to benefit from reunification efforts.[5]

The court also found that the respondent had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reason-

[5] On appeal, the respondent argues that the court did not make a finding that she was unable to benefit from services that the department offered. The respondent argues that "[t]he closest the trial court comes to such a conclusion is in the dispositional section [of its memorandum of decision] concerning [her] efforts to adjust her circumstances to make it in the best interest of the minor to be returned to the respondent . . . ." The petitioner responds that the court found by "clear and convincing evidence that, although [the department] made efforts to reunify with her, the respondent . . . has been unable to benefit from reunification efforts." The petitioner further maintains that it is inconsequential that the finding "appears outside of the trial court's section on reasonable efforts" in the memorandum of decision and cites the well established principle that "an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding." (Internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 453, 51 A.3d 334 (2012).

Because we conclude that the court properly found, on the basis of clear and convincing evidence, that the department made reasonable efforts to reunify the respondent and the child, we need not reach the merits of the respondent's claim that the court did not make a finding that she was unable to benefit from services. "Pursuant to § 17a-112 (j) (1), the petitioner must prove *either* that the department has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. . . . Section 17a-112 (j) clearly provides that the petitioner is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 808 n.7, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022); see id. (declining to address claim that court improperly determined that respondent was unable or unwilling to benefit from reunification efforts in light of determination that court properly found that department had made reasonable efforts to reunify respondent and child).

able time, she could assume a responsible position in the child's life. Finally, the court found by clear and convincing evidence that termination of the respondent's parental rights was in the child's best interest. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The respondent first argues that the court erred in concluding that the department made reasonable efforts to reunify her with the child.[6] We are not persuaded.

"[Section] 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and

[6] The respondent also challenges the constitutionality of General Statutes §§ 17a-111b and 17a-112 (j). Specifically, she contends that the statutory interplay between these sections "allows for an impermissible end run around the clear and convincing evidentiary standard required, as a matter of due process, in all termination hearings." According to the respondent, "the statutory scheme requires the department to prove it made reasonable efforts to reunify the respondent with [her] child by clear and convincing evidence unless the court has approved a permanency plan other than reunification. But at the permanency plan hearing, the department is merely required to satisfy its burden, including that it has made reasonable efforts to reunify the parent with the child . . . by a mere preponderance of the evidence."

In the present case, the court did not relieve the petitioner of her burden of proving that the department made reasonable efforts at reunification. Instead, the court found, by clear and convincing evidence, that, "although [the department] made efforts to reunify [the child] with her, the respondent . . . has been unable to benefit from reunification efforts." Because the court expressly found, on the basis of clear and convincing evidence, that the department made reasonable efforts to reunify the respondent and the child and we affirm that finding, we need not address the respondent's constitutional claim. See *In re Kyreese L.*, 220 Conn. App. 705, 714–15 n.6, 299 A.3d 296 (declining to address constitutional challenge to statutory scheme because court properly found, on basis of clear and convincing evidence, that department made reasonable efforts to reunify respondent and child), cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023); *In re Timothy B.*, 219 Conn. App. 823, 828 n.5, 296 A.3d 342 (noting that Connecticut courts "follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions" (internal quotation marks omitted)), cert. denied, 349 Conn. 919, 318 A.3d 439 (2023).

convincing evidence that the department has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts provided such finding is not required if the court has determined at a hearing . . . that such efforts are not appropriate . . . . Thus, the department may meet its burden concerning reunification in one of three ways: (1) by showing that it made such efforts, (2) by showing that the parent was unable or unwilling to benefit from reunification efforts or (3) by a previous judicial determination that such efforts were not appropriate. . . . [I]n determining whether the department has made reasonable efforts to reunify a parent and a child . . . the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . [T]he court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . .'' (Internal quotation marks omitted.) *In re Kyreese L.*, 220 Conn. App. 705, 715, 299 A.3d 296, cert. denied, 348 Conn. 901, 300 A.3d 1166 (2023).

''Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review. . . . Under this standard, the inquiry is whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . The court's subordinate findings made in support of its reasonable efforts determination are reviewed for clear error.'' (Citations omitted; internal quotation marks

omitted.) *In re Ryder M.*, 211 Conn. App. 793, 809, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

In the present case, the department determined that its main concerns regarding the respondent were her alcohol use and intimate partner violence history. The record in the present case demonstrates that the department made reasonable efforts to address these issues and to facilitate the respondent's reunification with the child. The court found that the department "referred [the respondent] to numerous services over the course of two years to address her substance use, mental health, and interpersonal violence in her relationships. . . . [I]t offered her parenting education services, supervised visitation with the child, substance use services, and services to educate her about interpersonal violence." The court also made the following detailed findings of facts regarding the services offered to the respondent. The respondent participated in individual therapy with Ferrante to address intimate partner violence concerns. However, "[t]he respondent . . . also consistently denied any interpersonal violence between herself and J. G. in her therapy sessions, so any therapy would have been unable to address this issue with any specificity." The department referred the respondent to the Village for Families and Children Quality Parenting Center for parenting coaching and supervised visitation, Circle of Security for further parenting services, Intensive Outpatient Treatment at Intercommunity for mental health and substance use, and the Parents Recovering from Opioid Use Disorder (PROUD) program for substance use.[7] Additionally, the respondent participated in Alcoholics Anonymous (AA). The court's findings as to these services amply support its reasonable

[7] The court noted in its memorandum of decision that the PROUD program can address alcohol use and that there was no evidence that the respondent had used opioids.

efforts determination. See *In re Ryder M.*, supra, 211 Conn. App. 811–12 (reasonable efforts included referrals to mental health and substance use service providers and parenting program).

In challenging the court's reasonable efforts determination, the respondent focuses on the fact that the department did not "require or request a hair test" or "seek to verify her attendance at AA meetings."[8] The respondent contends that testing would have allowed her "to demonstrate, unequivocally, that she was not using alcohol . . . ." We disagree with the respondent's argument that the department did not make reasonable efforts at reunification because it did not require or request hair testing or verify her attendance at AA meetings. First, it is axiomatic that "[r]easonable efforts means doing everything reasonable, not everything possible," and that "[o]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual case in deciding whether reasonable efforts have been made." (Internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 349–50, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023); see also *In re Charli M.*, 229 Conn. App. 72, 83, 326 A.3d 1123 ("[t]he question for this court is not whether some evidence would support a determination that the department should have referred the respondent to an [intimate partner violence] program but, rather, whether the totality of the evidence supports the trial court's finding that the department's reunification efforts, considered cumulatively, were reasonable"), cert. denied, 350 Conn. 935, 327 A.3d 384 (2024). Moreover, as the petitioner notes in her appellate brief, there was no evidence before the court that the respondent

[8] The respondent, in her appellate brief, "concedes there is nothing the department could do with regard to the trial court's concerns with the relationship between the respondent and J. G."

asked the department for a hair test, which she contends for the first time on appeal should have been provided to her.[9] See *In re Corey C.*, 198 Conn. App. 41, 64, 232 A.3d 1237 (respondent's failure to request services undermined argument that those services were part of what department should have provided as part of reasonable efforts to reunify him with his child), cert. denied, 335 Conn. 930, 236 A.3d 217 (2020). Finally, the department reasonably could have determined that intimate partner violence was the foremost impediment and tailored its reunification efforts toward this specific concern. See id., 65 (respondent's claim that department failed to provide him with specialized smoking cessation services ignored totality of services offered).

On the basis of our review of the record, we conclude that there is sufficient evidence to support the court's finding that the department made reasonable efforts to reunify the respondent with the child.

II

The respondent next claims that the court improperly determined that she had failed to rehabilitate sufficiently. The respondent primarily contends that the court improperly relied on messages she sent to J. G., in which she expressed continued romantic commitment to J. G. and referenced her continued use of alcohol. The respondent argues that the "messages do not meet the clear and convincing evidentiary standard because they are so completely undermined by the testimonial evidence, including the testimony of the department's own workers . . . ." We are not persuaded.

"Failure of a parent to achieve sufficient personal rehabilitation is one of [the] statutory grounds on which

[9] Aside from asking Lopez a single question as to whether the department requested a hair test, the respondent did not otherwise raise this issue before the trial court.

a court may terminate parental rights pursuant to § 17a-112. . . . Concerning the failure to achieve personal rehabilitation, § 17a-112 (j) (3) (B) (i) provides for the termination of parental rights when the minor child has been found to have been neglected, abused or uncared for in a prior proceeding and the parent of such child has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child.

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to [his] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his] ability to manage [his] own life, but rather whether [he] has gained the ability to care for the particular needs of the child at issue. . . . An inquiry regarding personal rehabilitation requires us to obtain a historical perspective of the respondent's child-caring and parenting abilities. . . . Although the standard is not full rehabilitation, the parent must show more than any rehabilitation. . . . Successful completion of the petitioner's expressly articulated expectations is not sufficient to defeat the petitioner's claim that the parent has not achieved sufficient rehabilitation. . . . [E]ven if a parent has made successful strides in [his] ability to manage [his] life and may have achieved a level of stability within [his] limitations, such improvements, although commendable, are not dispositive on the issue of whether, within a reasonable period of time, [he] could assume a responsible position in the life of [his child]. . . .

"[T]he appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom,

that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Citation omitted; internal quotation marks omitted.) *In re Mikhail M.*, 230 Conn. App. 86, 88–89, 328 A.3d 758, cert. denied, 351 Conn. 907, 330 A.3d 132 (2025).

Concerning the respondent, the court found: "Unfortunately, all the programs the respondent . . . has attended have not enabled her to understand, appreciate, or address the interpersonal violence in her relationship with J. G. Several programs in which she participated, e.g., Circle of Security and the Village for Families and Children, noted her limited insight into her relationship with J. G. In addition, as she has never admitted to her therapist that there is interpersonal violence between her and J. G., her individual therapy did not address this. She has also consistently denied having a problem with alcohol. Although she testified that she has severed her ties with J. G., the court does not view her testimony as credible. The respondent . . . continued to speak to J. G. on the phone when he was incarcerated, including during a concerning incident while she was at [the department's] offices in January, 2023. At that time, she put J. G. on speakerphone to prove that she was at [the department's office] and not cheating on him. She also communicated with J. G. through written messaging available through tablets offered to incarcerated people by the Department of Correction. These messages generally express love, passion, and an intent by the respondent . . . to continue their relationship for a long time. As J. G.'s release date approached, she spoke about preparations for J. G.'s return to her home by, among other things, buying him clothes and sneakers, washing bed linens, and cooking his favorite meals. On May 20, 2024, two days before

his release from prison, she told him, 'I'm your wife forever and I'm happy I'm your wife I'm so happy that [we're] married I love you baby' . . . . On May 22, 2024, the day of his release from prison, she stated, 'I can't wait to see you . . . I love you well [G]od bless on your way here [or] when are you coming [to get] here.' . . . There was also no testimony that divorce proceedings were initiated. The court, therefore, finds that the [respondent's] relationship with J. G. is ongoing and that he either is living in or will be returning to living in her house.

"The respondent . . . also testified that she has been sober for two years. However, this assertion is also belied by her messages to J. G. In these messages, she referenced the fact that she was drinking on several occasions within the last calendar year. On January 6, 2024, she said, 'I started drinking now just started' . . . On January 14, 2024, she said, 'yes I'll tell you I'm drinking . . .' and, on February 23, 2024, she said, 'I'm sorry that I bought a little bottle and drank that' . . . . The court, therefore, finds that the respondent . . . has continued to drink alcohol despite her participation in several substance use programs. It also finds her testimony that she has been sober for two years not to be credible." (Citations omitted; footnote omitted.)

As to the respondent's rehabilitation, the court found: "[T]he respondent . . . has not cooperated completely with all the court-ordered specific steps, several of which are key in this case. She has not signed releases to allow [the department] to access records from [Community Partners in Action's Alternative in the Community program]; this hampers [the department's] and the court's ability to determine whether she has been abusing substances and whether she has made progress toward addressing her use of alcohol. She has also not partnered with [the department] to assess her husband;

this is particularly concerning because he has a documented history of interpersonal violence, [the child] has been negatively affected by it, and it is clear that he will be an ongoing presence in the home.

"In addition, although she has completed several programs to address her alcoholism, her testimony that she has been sober for two years is not credible. In tablet messages, she discusses drinking on several occasions. Her representations, therefore, to her therapist and her programs and this court, appear to be designed to cover up the fact of a continuing problem rather than addressing it. Her consumption of alcohol led her to engage in dangerous conduct (driving while under the influence) that could have resulted in serious injury or death to her [child], who was in the backseat at the time. The fact that she is continuing to engage in drinking while covering it up to everyone except her husband leads to the conclusion that she has not modified her circumstances enough to give any assurance that [the child] would be safe in her care.

"Moreover, the [respondent's] testimony that she has ended her relationship with her husband, J. G., was not credible. Her tablet messages are filled with expressions of love and devotion and her intention that he will come back from incarceration to live with her. J. G. has a conviction history of intimate personal violence with other partners, was described by [the child] as hitting the respondent . . . and was incarcerated for seriously assaulting the respondent . . . with a motor vehicle. The [respondent's] service providers consistently expressed concern about her denial of intimate partner violence with J. G. and her lack of insight into that relationship and how she could keep [the child] safe."

On the basis of our review of the record, we conclude that the evidence was sufficient to support the court's

determination that the respondent failed to achieve sufficient rehabilitation that would encourage the belief that, within a reasonable time, she could assume a responsible position in the child's life. See *In re Mikhail M.*, supra, 230 Conn. App. 91. The respondent's claim on appeal that the messages, to which the respondent did not object at trial, were undermined by testimonial evidence constitutes an improper request for this court to reweigh the evidence. "This we will not do, as it is not the function of a court of review to retry the facts." (Internal quotation marks omitted.) *In re Jacqueline K.*, 229 Conn. App. 710, 728, 328 A.3d 253 (2024).

III

The respondent's final claim is that the court improperly determined that terminating her parental rights was in the child's best interest. We disagree.

We begin our analysis by setting forth the relevant legal principles and standard of review. "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for

the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Internal quotation marks omitted.) *In re Bianca K.*, 188 Conn. App. 259, 273, 203 A.3d 1280 (2019).

In the present case, in assessing the child's best interest, the court considered and made written findings as to each of the factors enumerated in § 17a-112 (k). The respondent makes only two brief arguments in support of her claim that the court improperly determined that termination of the respondent's parental rights was in the best interest of the child. First, she contends that the trial court's best interest determination was "based upon the same flawed weighing of the evidence" that supported the trial court's finding that the respondent had failed to rehabilitate. This contention is not persuasive because, as noted previously, we decline the respondent's invitation to reweigh the evidence. See *In re Aubrey K.*, 216 Conn. App. 632, 669, 285 A.3d 1153 (2022), cert. denied, 345 Conn. 972, 286 A.3d 907 (2023).

Second, the respondent argues that the court misstated the law in referring to the child's attorney as "charged with asserting [the child's] wishes and best interests . . . ." General Statutes § 46b-129a (2) (C) provides that "[t]he primary role of any counsel for the child shall be to advocate for the child in accordance with the Rules of Professional Conduct, except that if the child is incapable of expressing the child's wishes to the child's counsel because of age or other incapacity, the counsel for the child shall advocate for the best interests of the child." With respect to the assignment of a guardian ad litem, subdivision (2) (D) provides that, "[i]f the court, based on evidence before it, or counsel for the child, determines that the child cannot adequately act in his or her own best interests and the child's wishes, as determined by counsel, if followed,

could lead to substantial physical, financial or other harm to the child unless protective action is taken, counsel may request and the court may order that a separate guardian ad litem be assigned for the child, in which case the court shall either appoint a guardian ad litem to serve on a voluntary basis or notify the office of Chief Public Defender who shall assign a separate guardian ad litem for the child." General Statutes § 46b-129a (2) (D).

In the present case, no party argued that the child's rights and best interest did not coincide, nor did any party make a motion for the appointment of a guardian ad litem. Finally, the respondent makes no claim that the court required the input of a guardian ad litem to determine the best interest of the child. Thus, we reject the respondent's contention that the court misstated the law, and we conclude that the court's determination that termination of the respondent's parental rights was in the child's best interest was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE TIANNA M.-M.*
(AC 48194)

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

Syllabus

The respondent father appealed from the judgment of the trial court terminating his parental rights with respect to his minor child. The father claimed

* 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

that the court improperly concluded that the Department of Children and Families made reasonable efforts to reunify him with his child. *Held*:

The trial court's finding that the Department of Children and Families made reasonable efforts to reunify the respondent father with his minor child was supported by clear and convincing evidence, and this court could not conclude that the department's efforts, with respect to assisting the father in addressing his history of intimate partner violence, were unreasonable merely because the department did not refer him to a specialized program for that issue, as, although intimate partner violence was a significant barrier to the father's reunification with his child, it was not the only barrier.

Argued April 24—officially released June 25, 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 Hartford, Juvenile Matters, where the case was tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed*.

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

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

Opinion

CRADLE, C. J. The respondent father, Toraine M., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating his parental rights with

order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

** June 25, 2025, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

respect to his minor child, Tianna M.-M. (Tianna).[1] On appeal, the respondent claims that the court improperly concluded that the Department of Children and Families (department) made reasonable efforts to reunify him with Tianna.[2] We affirm the judgment of the trial court.[3]

The following facts, as set forth by the trial court, and procedural history are relevant to our resolution of the respondent's claim on appeal. Tianna was born in July, 2021. Beginning in January, 2022, Tianna's mother had been "the victim of numerous incidents of domestic violence committed by the [respondent] in which [he] had slapped, bitten, choked, [broken her] nose, and given her black eyes during incidents occurring in Tianna's presence." (Internal quotation marks omitted.) The respondent was "arrested several times for family violence crimes committed against [Tianna's mother] . . . ." (Footnote omitted.) On April 22, 2022, a criminal protective order entered against the respondent, which prohibited him from having any contact with Tianna's mother or Tianna (protective order).

[1] In the same proceeding, the court also terminated by consent the parental rights of Tianna's mother. Because she has not appealed from that judgment, we refer in this opinion to Toraine M. as the respondent.

[2] On appeal, the respondent also challenges the constitutionality of General Statutes § 17a-111b (a) (2). Specifically, he argues that § 17a-111b (a) (2) is unconstitutional because that statute relieves the department of its obligation to make reasonable efforts at reunification if the court previously has approved a permanency plan other than reunification, as happened in the present case. As the respondent's counsel conceded during oral argument before this court, however, because the trial court here expressly found that the department made reasonable efforts at reunification and we affirm those findings, we need not address the respondent's constitutional claim. "As a jurisprudential matter, Connecticut courts follow the recognized policy of self-restraint and the basic judicial duty to eschew unnecessary determinations of constitutional questions." (Internal quotation marks omitted.) *In re Timothy B.*, 219 Conn. App. 823, 828 n.5, 296 A.3d 342, cert. denied, 349 Conn. 919, 318 A.3d 439 (2023).

[3] The attorney for Tianna filed a statement adopting the brief of the petitioner.

In December, 2022, the probate court, at the request of Tianna's mother, awarded temporary guardianship of Tianna to her maternal aunt. On February 20, 2023, while Tianna was visiting her mother, police officers, and later the department, responded to the mother's home after receiving a report that the mother had been fighting with her boyfriend, Brandon F., in the presence of Tianna. Following that incident, Tianna's aunt notified the department that she wished to relinquish her temporary guardianship of Tianna.[4] On March 13, 2023, the court, *Westbrook*, *J.*, granted the petitioner's motion for an ex parte order of temporary custody of Tianna and issued preliminary specific steps for the respondent to facilitate his reunification with Tianna, which included, among other things, that he (1) engage in parenting and individual counseling, (2) attend and complete an appropriate domestic violence program, and (3) address intimate partner violence/domestic violence with a qualified therapist.[5]

On June 13, 2023, the court, *Dannehy*, *J.*, adjudicated Tianna neglected and committed her to the care of the petitioner and issued final specific steps for the respondent. The final specific steps were similar to the preliminary specific steps, with a few relevant additions, namely, that the respondent (1) "[p]articipate in a [mental health evaluation] in order to assess and determine [the] level of need for [mental health] service[s]"; (2) "[e]ngage in [an intimate partner violence]

[4] On March 6, 2023, the department met with Tianna's mother and some of her relatives but was unable to identify a maternal family member who was willing and suitable to care for Tianna. At that time, the department had been unable to locate the respondent, and, although the department obtained telephone numbers for the respondent two days later, it "called and texted those numbers without initially getting a response."

[5] On March 17, 2023, the respondent appeared before the court, *Nguyen-O'Dowd*, *J.*, and agreed to the sustaining of the order of temporary custody. On the same date, the court issued amended preliminary specific steps for the respondent, which were identical to the preliminary specific steps except for two additions that are not relevant to the issue on appeal.

program, component, or provider"; and (3) engage in supervised visitation, but "[o]nly after the protective order has been modified or no longer exists . . . ."

Judith Stewart, a department social worker, was assigned to the respondent's case in May, 2023. When Stewart met with the respondent shortly thereafter, the respondent stated that he was participating in mental health services at Wheeler Clinic and the Capitol Region Mental Health Center (Capitol Region). He further stated that he was receiving intimate partner violence services from Capitol Region. Stewart subsequently obtained a release from the respondent and attempted to contact those service providers to confirm the respondent's participation with the treatment providers. In addition, the department referred the respondent to Fatherhood Engagement Services (FES), and the respondent complied with those services, which included weekly parenting groups "working on structure, the importance of the role of a father, and the impact [that intimate partner violence] has on children." (Internal quotation marks omitted.) Furthermore, the department also encouraged the respondent to seek modification of the protective order so that it could begin offering the respondent visitation with Tianna. Although the respondent sought to modify the protective order in criminal court on two separate occasions, both requests were denied.

In November, 2023, the respondent was convicted of carrying a pistol without a permit, for which he received a sentence of five years of incarceration, execution suspended after one year of incarceration, followed by three years of probation. In December, 2023, Stewart finally received a response from Capitol Region, which informed her that it was not providing the respondent with intimate partner violence services and that it did not offer such services. After learning that the respondent, contrary to his earlier representations, had not

been engaged in those services, Stewart planned to refer him to the Intimate Partner Violence-Family Assessment Intervention Response (IPV-FAIR) program at Community Health Resources (CHR) but did not do so after learning of the respondent's impending incarceration.

On December 18, 2023, the petitioner submitted a permanency plan of termination of parental rights and adoption, which was approved by the court on January 23, 2024.[6] Thereafter, in February, 2024, the respondent began serving his sentence. On March 7, 2024, the petitioner filed a petition to terminate the respondent's parental rights alleging, inter alia, that the department had made reasonable efforts to reunify the respondent with Tianna, that the respondent had failed to achieve sufficient personal rehabilitation, and that there was no ongoing parent-child relationship.[7] The termination petition was tried before the court, *Hon. Stephen F. Frazzini*, judge trial referee, on August 22, 2024.

On September 19, 2024, the court rendered judgment terminating the respondent's parental rights pursuant to General Statutes § 17a-112 (j).[8] In its memorandum

[6] The respondent did not object to the permanency plan.

[7] See footnote 1 of this opinion.

[8] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (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 . . . in a prior proceeding . . . and the parent of such child . . . has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child; [or] . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the

of decision, the court first found that the petitioner had proven by clear and convincing evidence that the department made reasonable efforts to reunify the respondent with Tianna. Specifically, the court found that "[the department] had confirmed that [the respondent] was participating in mental health services at Wheeler Clinic and [Capitol Region]; sought confirmation from [Capitol Region] that he was, as he claimed, receiving [intimate partner violence] treatment services there; after learning that his services at [Capitol Region] did not address domestic violence issues made arrangements to refer him to [the IPV-FAIR] program at CHR but could not do so because of his imminent incarceration; and referred him to the FES program." The court then found that the petitioner had proven by clear and convincing evidence that the respondent had failed to achieve a sufficient degree of personal rehabilitation, there was no ongoing parent-child relationship, and that termination of his parental rights was in Tianna's best interest.[9]

On appeal, the respondent claims that the court improperly concluded that the department made reasonable efforts to reunify him with Tianna. We disagree.

The following legal principles and standard of review govern our resolution of the respondent's claim. "Section 17a-112 (j) (1) requires that before terminating parental rights, the court must find by clear and convincing evidence that the department has made reasonable efforts . . . to reunify the child with the parent

establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

[9] The respondent has not challenged the court's findings with respect to the statutory grounds for termination or the best interest determination. We further note that, in rendering judgment, the court denied the respondent's motion to transfer guardianship of Tianna to her paternal grandmother, which had been consolidated for trial with the termination petition. The respondent does not challenge that portion of the court's judgment on appeal.

. . . . This court has consistently held that the [trial] court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition . . . .'' (Internal quotation marks omitted.) *In re Caiden B.*, 220 Conn. App. 326, 348, 297 A.3d 1025, cert. denied, 348 Conn. 904, 301 A.3d 527 (2023).

''The word reasonable is the linchpin on which the department's efforts in a particular set of circumstances are to be adjudged, using the clear and convincing standard of proof. Neither the word reasonable nor the word efforts is, however, defined by our legislature or by the federal act from which the requirement was drawn. . . . [R]easonable efforts means doing everything reasonable, not everything possible. . . . [R]easonableness is an objective standard . . . and whether reasonable efforts have been proven depends on the careful consideration of the circumstances of each individual case. . . .

''Our review of the court's reasonable efforts determination is subject to the evidentiary sufficiency standard of review [which asks] whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . In so doing, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court and will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . .

''In reviewing the trial court's reasonable efforts determination, this court [does] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . In our review of the record for evidentiary sufficiency, we are mindful that, as a reviewing court, [w]e cannot

retry the facts or pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Citation omitted; internal quotation marks omitted.) *In re Charli M.*, 229 Conn. App. 72, 79–80, 326 A.3d 1123, cert. denied, 350 Conn. 935, 327 A.3d 384 (2024).

In challenging the court's reasonable efforts determination, the respondent primarily contends that "[the department] never referred [him] to any [intimate partner violence] services at any time," which he argues was not reasonable when "[intimate partner violence] was clearly a principal barrier to reunification in this case." As noted previously, however, the department referred the respondent to FES, and through those services, the respondent attended weekly group parenting sessions addressing, among other things, "the impact [intimate partner violence] has on children." Although the department did not refer the respondent to a specialized intimate partner violence program as it had initially intended, we reiterate that the respondent told the department that he already was receiving treatment for intimate partner violence at Capitol Region when he was not, in fact, receiving such treatment. The respondent had represented that he was already receiving treatment for intimate partner violence and, thus, there was no basis, at that time, for the department to refer the respondent to an additional program. Instead, Stewart promptly "attempted multiple times, beginning in July, 2023, to verify [that] information," as was necessary before the department could refer the respondent to an intimate partner violence program in order "to avoid a duplication of services." Because "it took a while for [Capitol Region] to get back to [Stewart]," the department did not learn that the respondent had not been receiving intimate partner violence services until

December, 2023.[10] At that point, the department sought to refer the respondent to the IPV-FAIR program at CHR but did not do so because it learned of the respondent's impending incarceration.[11] On the basis of the foregoing evidence, we conclude that the department's efforts, with respect to assisting the respondent in addressing his history of intimate partner violence, were not unreasonable merely because the department did not refer him to a specialized program for that issue.

Moreover, it is well established that "[o]ur courts are instructed to look to the totality of the facts and circumstances presented in each individual case in deciding

[10] The respondent argues that the department's "six month delay in verifying whether [Capitol Region] even provides [intimate partner violence] services" was not reasonable, particularly when, according to the respondent, "such information is readily available at a moment's notice on [Capitol Region's] website" as well as a corresponding link to its informational brochure. Specifically, the respondent asserts that both resources list the services offered by Capitol Region and that neither list includes intimate partner violence treatment among those services.

The respondent acknowledges, however, that Capitol Region's website and informational brochure were not admitted into evidence before the trial court. Accordingly, the respondent asks this court to take judicial notice of those resources in support of his argument that "[the department's] failure to . . . take [the] very simple, cost free step [of checking those resources] to obtain such essential information constitutes a breach of its duty to make reasonable efforts to reunify the [respondent] with his child." In other words, the respondent asks us to take judicial notice of those materials for the purpose of weighing evidence and inferring facts. We decline to do so. See *In re Corey C.*, 198 Conn. App. 41, 62 n.18, 232 A.3d 1237 ("[W]e cannot consider evidence not available to the trial court to find adjudicative facts for the first time on appeal. . . . It is well established that this court does not find facts." (Internal quotation marks omitted.)), cert. denied, 335 Conn. 930, 236 A.3d 217 (2020).

[11] In support of his claim on appeal, the respondent contends that the department still could have referred him to the IPV-FAIR program in December, 2023, so that he at least "could have received approximately two full months of services" prior to his February, 2024 incarceration. As the respondent acknowledges in his brief to this court, however, the trial court found that the department "*could not do so* because of his imminent incarceration . . . ." (Emphasis added.) The respondent has not challenged that factual finding by the court as clearly erroneous, and, even if he had, our review of the record leads us to conclude that the evidence, construed in the light most favorable to sustaining the judgment of the trial court, supports the court's finding.

whether reasonable efforts have been made." (Internal quotation marks omitted.) *In re Caiden B.*, supra, 220 Conn. App. 349–50. Thus, even if we were to assume that the respondent would have benefited from the department taking additional action to ensure that he was receiving intimate partner violence services, the department's failure to do so, by itself, would not defeat the court's reasonable efforts determination. See, e.g., *In re Ryder M.*, 211 Conn. App. 793, 812, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022); see also *In re Charli M.*, supra, 229 Conn. App. 83 ("the question [on appeal] is not whether some evidence would support a determination that the department should have referred the respondent to an [intimate partner violence] program but, rather, whether the totality of the evidence supports the trial court's finding that the department's reunification efforts, considered cumulatively, were reasonable").[12]

Although intimate partner violence was a significant barrier to the respondent's reunification with Tianna, as the court noted, it was not the only barrier.[13] In

[12] In *In re Charli M.*, supra, 229 Conn. App. 72, the respondent father's challenge to the trial court's reasonable efforts determination, much like the respondent's challenge in this case, "focuse[d] primarily on the fact that the department did not refer him to a specialized [intimate partner violence] program" when "[intimate partner violence] was the most significant issue preventing reunification." (Internal quotation marks omitted.) Id., 82. In that case, this court noted that the department had confirmed with the respondent's therapist that intimate partner violence was being addressed in therapy, and that to the extent that those issues were not being sufficiently addressed, "it was due to [the respondent's] failure consistently to engage with his therapist . . . ." Id. Moreover, this court, in *In re Charli M.*, concluded that the respondent's argument was unavailing because the department's cumulative efforts at reunification—which included referring the respondent for supervised visitation and to a housing assistance program, a reunification readiness assessment, and FES, as well as assisting the respondent with locating a therapist and following up with his therapist regarding treatment—were sufficient to support the trial court's reasonable efforts finding. See id., 80–84.

[13] In the department's social study in support of the termination petition, which was admitted into evidence at the termination trial, the reasons for seeking termination of the respondent's parental rights, in addition to

particular, the specific steps for the respondent reflect that unaddressed mental health concerns, which stemmed from the respondent's unresolved trauma and underlying mental health conditions,[14] presented another significant barrier to his reunification with Tianna.[15] The respondent's argument on appeal, that the department's efforts failed to sufficiently address the concerns with intimate partner violence solely because he was not referred to a specialized program to address that issue, overlooks the court's findings that the respondent's acts of intimate partner violence were symptomatic of unaddressed mental health concerns.[16] In assessing whether

"unresolved/unaddressed intimate partner violence," were "lack of sufficient parenting skills, unresolved/unaddressed mental health, and [the fact that] he is currently incarcerated." Indeed, the court found that "the most important steps [for the respondent's reunification with Tianna] . . . related to remedying the 'parenting deficiencies' of poor decision-making, lack of insight and accountability, episodes of violence, aggression and hostility manifest in the domestic violence incidents with Tianna's mother, and not understanding his child's needs . . . ."

[14] The respondent's mental health diagnoses included "oppositional defiant disorder, other specified trauma and stressor related disorder, attention deficit/hyperactivity disorder, predominantly hyperactive/impulsive presentation, cannabis use disorder, disruptive mood dysregulation disorder, and unspecified anxiety disorder."

[15] The final specific steps for the respondent included that he (1) take part in both parenting and individual counseling and make progress toward identified treatment goals, which included, inter alia, "[u]nderstand[ing] [the] impact that [mental health] . . . [has] on [a] child's development"; (2) "[p]articipate in a [mental health evaluation] in order to assess and determine [the] level of need for [mental health] service[s]"; and (3) "[t]ake part in individual counseling to gain knowledge of [mental health] diagnosis, unresolved trauma, and how it has [a] direct impact [on his] child."

[16] Specifically, the court found that "[t]he evidence . . . shows that [the respondent] has a long history of mental health issues that date back to his childhood and have repeatedly been manifest in aggressive and violent behavior." In addition, the court found that "[t]he principal barrier in [the respondent's] ability to assume a responsible position in Tianna's life at all times throughout this case has been his poor judgment and decision-making and his lack of self-control that resulted in him committing repeated acts of violence against Tianna's mother, sometimes in Tianna's presence." Finally, in concluding that termination of parental rights was in Tianna's best interest, the court found: "The respondent . . . has not addressed the underlying issues of aggression and violence that have characterized his

the department had made reasonable efforts at reunification, the court, therefore, properly considered the department's efforts related to providing the respondent with mental health services. Specifically, the court found that the department had confirmed with the respondent's individual providers that he was receiving such services, maintained communication with his clinicians to monitor his progress, and referred the respondent to FES to engage in additional mental health services. Notably, the mental health services provided to the respondent were addressing some of the underlying issues which the court found to result in the respondent committing acts of intimate partner violence.[17] In addition, the department provided the respondent with a substance abuse evaluation[18] and case management services, which included individual meetings with department social workers, participation at large team meetings, and attendance during administrative case reviews. The court also found, however, that the respondent had only "partially complied" with the department's efforts to assist him in addressing the underlying mental health issues that were causing him to commit acts of intimate partner violence. Specifically, the court found that the respondent had been "participating in weekly therapy

conduct for many years and prevent him from being a suitable caretaker for Tianna. . . . [I]t is impossible to ascertain whether [the respondent] will ever . . . learn how to control his anger or whatever other emotion leads him to erupt into intimate partner violence . . . ."

[17] See footnote 16 of this opinion. The respondent "was in treatment [at Capitol Region] for anxiety management" and "was also participating in weekly therapy at Wheeler Clinic to address his coping skills and anger management issues." (Internal quotation marks omitted.)

[18] The final specific steps for the respondent also included that he "[s]ubmit to a substance abuse evaluation and follow the recommendations about treatment" and that he participate in "[substance use] counseling to gain knowledge of addiction, unresolved trauma, and how it has a direct impact [on his] child . . . ." The record indicates that the respondent completed a substance abuse evaluation at Wheeler Clinic in April, 2023, and the department, after following up with the respondent's clinician, determined that further evaluation and treatment for substance use was not necessary.

at Wheeler Clinic . . . [but] stopped participating there . . . [in] June, 2023 . . . and was discharged . . . in September, 2023 [for] not attending regularly." The evidence indicated that "attempts were made to [re]engage [the respondent] in services [at Wheeler Clinic] to no avail," and, although the respondent was scheduled to be readmitted in November, 2023, he "did not follow through." The court also found that the respondent "originally had weekly therapy sessions [at Capitol Region], but because of his work schedule he had been unable [to meet] that regularly and was transferred to Capitol Region's maintenance program, in which he met monthly with a clinician . . . ."

Moreover, the court found that, with respect to "the most important steps [for the respondent's reunification with Tianna] . . . those related to remedying the 'parenting deficiencies' of poor decision-making, lack of insight and accountability, episodes of violence, aggression and hostility manifest in the domestic violence incidents with Tianna's mother, and not understanding his child's needs, [the respondent's] compliance has been abysmal." See *In re Nevaeh W.*, 154 Conn. App. 156, 165–66, 107 A.3d 539 (2014) (determination of whether department made reasonable efforts to reunify may be assessed in light of respondent's failure to engage in services), rev'd in part on other grounds, 317 Conn. 723, 120 A.3d 1177 (2015).

Finally, the court found that "the initial barrier to Tianna being returned to [the respondent's] custody at the time . . . [that the termination petition was filed] was the . . . protective order . . . that prohibited him from being in Tianna's presence." Indeed, the court recognized in its memorandum of decision that the respondent was "legally unable to reunite with [Tianna]" while the protective order was in place.[19] As we stated

[19] Because the respondent had been incarcerated since February, 2024, the court also noted in its memorandum of decision that, notwithstanding the protective order, "[the respondent's] current incarceration prevents reunification now . . . ."

previously, the department encouraged the respondent to seek modification of the protective order, but his requests for modification were denied by the criminal court.[20] Under such circumstances, we cannot conclude, and the respondent does not contend, that there was any additional action the department could have taken to assist the respondent in overcoming that significant barrier to reunification.

Accordingly, on the basis of our review of the record, we conclude that there is clear and convincing evidence to support the court's finding that the department made reasonable efforts to reunify the respondent with Tianna.

The judgment is affirmed.

In this opinion the other judges concurred.

GLORIA DRUMMER *v.* STATE OF CONNECTICUT ET AL.
(AC 47461)

Elgo, Moll and Flynn, Js.

Syllabus

The plaintiff, who had been involuntarily civilly committed to a psychiatric hospital pursuant to statute (§ 17a-498), appealed from the trial court's judgment for the defendants in her action seeking declaratory and injunctive relief in connection with her continued confinement. She claimed, inter alia, that the court improperly granted the defendants' motion for summary judgment. *Held*:

This court, having concluded that the plaintiff did not have a specific personal and legal interest that had been specially and injuriously affected in order to have standing to assert her claims for declaratory and injunctive relief, reversed the trial court's judgment and remanded the case with direction to dismiss the action.

[20] We note that the protective order was vacated in July, 2024, and the department subsequently arranged a visit between Tianna and the respondent the following month while he was incarcerated.

This court, having concluded that the plaintiff lacked individual standing to raise her claims in the underlying action, determined that she also lacked the requisite typicality to raise those same claims on behalf of a class as required by the rule of practice (§ 9-7) for class certification.

Argued March 10—officially released July 1, 2025

Procedural History

Action seeking, inter alia, permanent injunctive relief regarding the obligation of the state to conduct certain periodic reviews of individuals who have been involuntarily civilly committed, and other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Hon. Edward S. Domnarski*, judge trial referee, denied the plaintiff's motion for class certification; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, denied the plaintiff's motion for summary judgment, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed only as to form of judgment*; *judgment directed.*

Kirk W. Lowry, with whom were *Kathleen Flaherty* and *Karyl Lee Hall*, for the appellant (plaintiff).

Shawn L. Rutchick, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Michael K. Skold*, deputy solicitor general, for the appellees (defendants).

Opinion

FLYNN, J. In this action for a declaratory judgment and injunctive relief, the plaintiff, Gloria Drummer, appeals from the judgment of the trial court denying her motion for summary judgment and granting the motion for summary judgment filed by the defendants, the state of Connecticut, the Department of Mental Health and Addiction Services, Connecticut Valley Hospital, Whiting Forensic Hospital, Greater Bridgeport Community Mental Health Center, Connecticut Mental

Health Center, and Capital Region Mental Health Center. On appeal, the plaintiff claims that the court improperly (1) rendered summary judgment in favor of the defendants and (2) denied her motion for class certification. We do not reach the merits of these claims because, for reasons that follow, we conclude that the plaintiff lacked the requisite standing to assert her claims before the trial court. Accordingly, we reverse the judgment of the trial court only as to the form of the judgment and remand the case with direction to dismiss the action.

At the outset, we provide a brief overview of the statutory scheme governing civil commitment, which is set forth in General Statutes § 17a-495 et seq. Applications for civil commitment may be filed with the probate court for the district in which the potential committee resides. See General Statutes § 17a-497 (a); see also *State* v. *Long*, 268 Conn. 508, 529, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). After civil commitment proceedings are commenced, the individual who is the subject of the proceedings has a right to a hearing before the probate court. See General Statutes § 17a-498 (a). "If the court finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall make an order for his or her commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he or she is discharged or converted to voluntary status pursuant to section 17a-506 in due course of law. . . ." General Statutes § 17a-498 (c) (3).

Section 17a-498 (g) requires periodic review for patients who have been civilly committed. Specifically,

§ 17a-498 (g) provides in relevant part that "[t]he hospital shall notify each patient at least annually that such patient has a right to a further hearing pursuant to this section. . . . If the patient's last annual review did not result in a hearing, and in any event at least every two years, the Probate Court shall, within fifteen business days, proceed with a hearing in the manner provided in subsections (a), (b), (c) and (f) of this section. . . ." The review process set forth in § 17a-498 (g) addresses the concerns articulated by our Supreme Court in *Fasulo* v. *Arafeh*, 173 Conn. 473, 378 A.2d 553 (1977). In *Fasulo*, our Supreme Court considered the procedural due process claims of two individuals committed indefinitely to a state hospital and who had been confined, respectively, for periods of twenty-six years and thirteen years. Id., 477. The court held that the due process clause in article first, § 8, of the Connecticut constitution "mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement" and that the state must bear the burden of proof with respect to the necessity of recommitment under our constitution.[1] Id., 479–81.

[1] Article first, § 8, of the Connecticut constitution provides in relevant part: "No person shall be . . . deprived of life, liberty or property without due process of law . . . ."

Fasulo held that "[t]here can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty which the [s]tate cannot accomplish without due process of law." (Internal quotation marks omitted.) *Fasulo* v. *Arafeh*, supra, 173 Conn. 476. "Once the purpose of the commitment no longer exists, there is no constitutional basis for the state to continue to deprive the individual of his liberty. . . . To satisfy due process, the procedure for releasing a civilly committed patient must be adequate to assure release of those who may no longer constitutionally be confined." (Citation omitted.) Id., 476–77.

In *State* v. *Long*, supra, 268 Conn. 508, our Supreme Court explained that the "[d]ue process analysis requires balancing the government's interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures." (Internal quotation marks omitted.) Id., 524; see also *Fasulo* v. *Arafeh*, supra, 173 Conn. 477 ("the thoroughness

In the present case, the trial court set out the following relevant undisputed facts in its memorandum of decision. The plaintiff was involuntarily civilly committed to Connecticut Valley Hospital by the Middletown Probate Court on October 14, 2016.[2] The medical team at Connecticut Valley Hospital deemed her clinically "discharge ready" on August 2, 2017. See footnote 11 of this opinion. Less than two months later, on September 26, 2017, the plaintiff's social worker was informed by staff at Capital Region Mental Health Center that staff had not yet discussed an alternative placement for the plaintiff if she were to be discharged. On October 13, 2017, less than three weeks later, the Middletown Probate Court conducted an annual commitment review hearing of the plaintiff's case, issued an order that the plaintiff still met the standard for civil commitment, and continued the hearing until February 2, 2018. On November 21, 2017, approximately five weeks after the Probate Court's continuance order, the plaintiff's social worker wrote in her chart that Capital Region Mental Health Center staff had indicated that there was no appropriate residential placement available in the community at that time to meet the plaintiff's continuing clinical needs.[3]

of the procedure by which [a] deprivation is effected must be balanced against the gravity of the potential loss and the interests at stake" (internal quotation marks omitted)). The court also explained that "a validly enacted statute carries with it a strong presumption of constitutionality, [and] . . . those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Long*, supra, 521.

[2] The plaintiff was civilly committed pursuant to § 17a-498 (c) after she was found not competent to stand trial and not restorable for certain criminal charges in the Superior Court.

[3] As set forth previously in this opinion, § 17a-498 (c) (3) requires the probate court to consider whether or not a less restrictive placement is available. Pursuant to § 17a-498 (c) (1), the court shall require certificates from at least two physicians that include, inter alia, information about "whether or not less restrictive placement is recommended and available and whether or not the respondent is incapable of understanding the need to accept the recommended treatment on a voluntary basis."

On or about January 25, 2018, the plaintiff commenced this action by serving a summons and complaint on the Attorney General. In her complaint, the plaintiff alleged, inter alia, that she had not been given a periodic review required by *Fasulo* v. *Arafeh*, supra, 173 Conn. 473, she no longer met commitment standards, and she was unnecessarily institutionalized in a state operated inpatient psychiatric facility because of a lack of community supports and services, including supportive housing.

In her complaint, the plaintiff sought declaratory and injunctive relief. Specifically, the plaintiff requested, inter alia, that the court: (1) enter a declaratory judgment that the periodic review provided by § 17a-498 (g), which mandates review of a patient's commitment at least every two years, violates the Connecticut constitution because it does "not meet the minimum due process requirements laid out in *Fasulo*"; (2) "[e]nter a declaratory judgment that the state's failure to establish and maintain a mental health system that provides adequate community supports and services so that patients in state operated inpatient psychiatric facilities may be discharged within a reasonable time of no longer meeting commitment standards violates the Connecticut Patients' Bill of Rights";[4] (3) "[o]rder that the defendants discharge [the plaintiff] to the most integrated setting, presuming that supportive housing is the most

[4] The Connecticut Patients' Bill of Rights provides in relevant part that "[n]o patient hospitalized or treated in any public or private facility for the treatment of persons with psychiatric disabilities shall be deprived of any personal, property or civil rights, including the right to vote, hold or convey property, and enter into contracts, except in accordance with due process of law, and unless such patient has been declared incapable pursuant to sections 45a-644 to 45a-662, inclusive. Any finding of incapability shall specifically state which civil or personal rights the patient is incapable of exercising"; General Statutes § 17a-541; and "[e]very patient treated in any facility for treatment of persons with psychiatric disabilities shall receive humane and dignified treatment at all times, with full respect for his personal dignity and right to privacy. Each patient shall be treated in accordance with a specialized treatment plan suited to his disorder. Such treatment plan shall include a discharge plan which shall include, but not be limited to, (1)

integrated setting, and provide adequate supports and services to [the plaintiff] in her supportive housing"; and (4) enter permanent injunctive relief ordering the state to provide periodic review of patients who are involuntarily civilly committed in a manner that includes, inter alia,[5] that "[a]t each monthly treatment

reasonable notice to the patient of his impending discharge, (2) active participation by the patient in planning for his discharge and (3) planning for appropriate aftercare to the patient upon his discharge." General Statutes § 17a-542.

[5] Specifically, with respect to the plaintiff's request for injunctive relief, the plaintiff requested that the court "[e]nter permanent injunctive relief ordering the state to provide periodic review of patients who are involuntarily civilly committed as follows:

"A. At each involuntary civil commitment hearing, the treating psychiatrist will testify within a reasonable degree of medical certainty when it is likely that the patient will stabilize and no longer be a danger to self or others or gravely disabled or be able to receive community supports and services in a less restrictive setting.

"B. At each monthly treatment team meeting, the attending psychiatrist will assess the present mental status of the patient and determine within a reasonable degree of medical certainty whether the patient no longer meets commitment standards. If the patient likely does not meet commitment standards, the unit director or social worker shall immediately request a periodic review of the patient's commitment with the probate court having jurisdiction of the matter.

"C. The treatment team shall designate and document in the patient's chart that each patient is ready for discharge as soon as the patient is likely to no longer be a danger to self or others or gravely disabled or is able adequately to receive services in a less restrictive setting. The fact that the state does not have a less restrictive setting readily available shall not be a factor in the determination of whether the patient meets commitment standards.

"D. The state and the treatment team shall presume that supportive housing, community housing with services wrapped around the individual based on the individual's preferences and needs, is the most integrated setting. The team may rebut the presumption of supportive housing only with documented facts and evidence based evaluations and tests.

"E. As soon as a patient is declared ready for discharge, the state and the facility shall discharge the patient to the most integrated setting within a reasonable period of time. The state shall establish and maintain a mental health system that has the capacity at all levels of care, with a priority for supportive housing, so that institutionalized patients in state operated psychiatric facilities may be discharged within a reasonable period of time.

"F. The state shall enact laws that authorize the probate court to order discharge to the most integrated setting, subject to contempt proceedings, if patients are not discharged within a reasonable period of time.

team meeting, the attending psychiatrist will assess the present mental status of the patient and determine within a reasonable degree of medical certainty whether the patient no longer meets commitment standards. If the patient likely does not meet commitment standards, the unit director or social worker shall immediately request a periodic review of the patient's commitment with the probate court having jurisdiction of the matter"; that "[t]he state shall establish and maintain a mental health system that has the capacity at all levels of care"; and that the state "enact laws that authorize the probate court to order discharge to the most integrated setting . . . ."

At a February 2, 2018 probate hearing, shortly after the present action was commenced, representatives of the Department of Mental Health and Addiction Services, Connecticut Valley Hospital, and Capital Region Mental Health Center informed the Middletown Probate Court that the plaintiff could be accommodated at Lotus Home, a residential living facility, and could be released there on March 14, 2018. The Middletown Probate Court continued the hearing until March 14, 2018, and, on that date, the plaintiff was discharged and released to the Lotus Home facility.[6]

In May, 2018, on the basis of the plaintiff's release to the Lotus Home facility, the defendants filed a motion to dismiss the plaintiff's action in the Superior Court. They argued that, because the plaintiff was no longer civilly committed, her claims were moot and the court,

"G. Appoint a court monitor, paid for by the defendant, to ensure that the state is in compliance with this court's orders for injunctive relief."

[6] The record reflects that the Lotus Home facility is an "intensive program" funded by the Department of Mental Health and Addiction Services for "challenging, high-risk female clients that require on-site, 24 hours a day, 7 days a week (24/7), supervision." The plaintiff was at the Lotus Home facility for more than two years, until June, 2020, when she was discharged to state funded senior housing, where she continues to receive daily residential care and outpatient care.

as a result, lacked subject matter jurisdiction over her complaint.

In June, 2018, the plaintiff filed a motion for class certification. The plaintiff moved to certify two proposed classes, consisting of (1) "[a]ll psychiatric inpatients involuntarily civilly committed to a state operated psychiatric facility who are likely to not meet commitment standards before their annual or biennial review and who have not had a probate court periodic review requested by the facility" (periodic commitment review class), and (2) "[a]ll psychiatric inpatients involuntarily civilly committed to a state operated psychiatric facility who have been declared discharge ready by their treatment teams or not meeting commitment standards by the probate court but who remain in the facility unnecessarily institutionalized and segregated for an unreasonable period of time because of a lack of appropriate placements, supports and services in the community" (less restrictive setting class). The defendants filed an objection to the plaintiff's motion, arguing that the plaintiff failed to satisfy the requirements for class certification set forth in Practice Book §§ 9-7 and 9-8, including the requirements for typicality and numerosity set forth in § 9-7.

On July 12, 2019, the court, *Frechette*, *J.*, issued a memorandum of decision denying the defendants' motion to dismiss and denying the plaintiff's motion for class certification. With respect to the defendants' motion to dismiss, the court determined that the plaintiff's claims fell within the exception to the mootness doctrine for issues capable of repetition, yet evading review.

With respect to the plaintiff's motion for class certification, the court concluded that the plaintiff failed to satisfy certain requirements set forth in Practice Book

§§ 9-7 and 9-8.[7] Specifically, the court determined that the plaintiff failed to satisfy the numerosity requirement set forth in § 9-7, and, even assuming arguendo that the plaintiff met the requirements of § 9-7, the plaintiff failed to establish that the defendants "acted or refused to act on grounds generally applicable to the class[es]," as required by § 9-8 (2).

On February 1, 2023, the plaintiff again filed a motion for class certification. The plaintiff moved to certify the same two classes previously proposed, specifically, the periodic commitment review class and the less restrictive setting class. The defendants filed an objection to the plaintiff's motion.

The court, *Hon. Edward S. Domnarski*, judge trial referee, denied the plaintiff's motion for class certification on July 5, 2023. The court determined that the plaintiff failed to satisfy the numerosity requirement for the same reasons that Judge Frechette denied the initial motion and that the plaintiff also failed to satisfy the typicality and commonality requirements set forth in Practice Book § 9-7.

On August 21, 2023, the parties filed motions for summary judgment. The plaintiff claimed that she was entitled to judgment as a matter of law on her requests for declaratory and injunctive relief. In their motion

[7] Practice Book § 9-7 provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Practice Book § 9-8 provides in relevant part: "An action may be maintained as a class action if the prerequisites of Section 9-7 are satisfied, and in addition . . . (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."

and accompanying memorandum, the defendants maintained that the plaintiff's claims were moot on the basis that she was clinically discharged to the Lotus Home facility, and, in the alternative, they argued that the plaintiff's claims failed on their merits, as a matter of law. The parties filed objections to each other's respective motions and submitted documentary evidence in support thereof.

On February 28, 2024, the court, *Hon. Edward S. Domnarski*, judge trial referee, issued a memorandum of decision denying the plaintiff's motion for summary judgment and granting the defendants' motion for summary judgment. The court first dealt with the defendants' argument that the plaintiff's claims were moot because she had already been discharged from Connecticut Valley Hospital. The court rejected that argument because it largely adopted the reasoning of Judge Frechette, who had previously held that, because, inter alia, given the plaintiff's lengthy psychiatric history, the same factual scenario of which she complains could likely arise again, and, therefore, the plaintiff's claims qualified for review under the capable of repetition, yet evading review exception and met the requirements set forth by our Supreme Court in *Loisel* v. *Rowe*, 233 Conn. 370, 382, 660 A.2d 323 (1995).[8]

The court proceeded to review the plaintiff's claims to determine whether the plaintiff or the defendants

[8] "Our cases reveal that for an otherwise moot question to qualify for review under the 'capable of repetition, yet evading review' exception, it must meet three requirements. First, the challenged action, or the effect of the challenged action, by its very nature must be of a limited duration so that there is a strong likelihood that the substantial majority of cases raising a question about its validity will become moot before appellate litigation can be concluded. Second, there must be a reasonable likelihood that the question presented in the pending case will arise again in the future, and that it will affect either the same complaining party or a reasonably identifiable group for whom that party can be said to act as surrogate. Third, the question must have some public importance." *Loisel* v. *Rowe*, supra, 233 Conn. 382.

were entitled to judgment as a matter of law. As an initial matter, the court noted that, in the plaintiff's objection to the defendants' motion for summary judgment, she abandoned her claims pertaining to the Connecticut Patients' Bill of Rights. The court, therefore, considered them withdrawn and concluded that the plaintiff limited her claim to substantive due process arguments afforded by article first, § 8, of the Connecticut constitution and the statutory authority of the probate courts of Connecticut to order timely discharge of patients to less restrictive settings.

The court further concluded that the plaintiff failed to establish that § 17-498 (g) violates the due process clause of the Connecticut constitution and failed to demonstrate that she was entitled to the injunctive relief she requested. Specifically, the court concluded that § 17-498 (g)'s requirement that the state initiate a recommitment hearing at least every two years complies with due process and our Supreme Court's decision in *Fasulo*. The court also concluded that the plaintiff's request for the court to enter an order to ensure that a less restrictive placement is always available is an "enormous and consequential request for which the plaintiff has provided no authority" and there was nothing in the holding of *Fasulo* that mandated a discharge to "a less restrictive placement." As a result, the court determined that the defendants were entitled to judgment as a matter of law. This appeal followed.

I

The plaintiff first claims that the court improperly rendered summary judgment in favor of the defendants because (1) it erred in concluding that the two year review process set forth in § 17a-498 (g) does not violate the due process clause of article first, § 8, of the Connecticut constitution, and (2) it erred in concluding that *Fasulo* does not provide the probate court with the

authority to discharge a patient "who no longer meets the legal standard for commitment" to a less restrictive setting.[9] The defendants argue that the court's decision was proper and, additionally, they raise the threshold issue that the trial court lacked jurisdiction to consider the plaintiff's claim concerning the probate court's authority to compel placement to a less restrictive setting because the plaintiff lacked standing to assert that claim. Specifically, the defendants argue that, because that claim relates to patients who "no longer [meet] the legal standard for commitment," and the plaintiff herself continued to meet the standard for civil commitment, "she is not among the class of individuals impacted by this hypothetical question and lacks standing to pursue it." The defendants similarly argue that the plaintiff's due process claim was based on the flawed premise that she no longer met the standard for civil commitment once she was designated "discharge ready" by her treatment team. We agree with the defendants and, accordingly, we conclude that the plaintiff lacked standing to assert her claims.

[9] The plaintiff also claims, in a footnote, that the trial court erred in finding that she withdrew her claims under the Connecticut Patients' Bill of Rights. Our review of the plaintiff's objection to the defendants' motion for summary judgment reflects that the plaintiff made conflicting statements about whether she was withdrawing her claims. She first stated that "the plaintiff's arguments regarding whether the Patients' Bill of Rights incorporates a right to discharge to the most integrated setting have been withdrawn" but then stated that "the plaintiff's claims regarding discharge to a less restrictive setting are now only claims based on the due process clause of the Connecticut constitution, article first, § 8, *Fasulo* . . . and the plain language of [General Statutes] § 17a-541, civil rights, and [General Statutes] § 17a-542, right to a discharge plan." Sections 17a-541 and 17a-542 fall within the Connecticut Patients' Bill of Rights. Regardless of whether the plaintiff withdrew those claims, however, the plaintiff's related prayers for relief in her complaint relate to the discharge of patients "within a reasonable time of *no longer meeting commitment standards*"; (emphasis added); and, accordingly, the plaintiff lacked standing to pursue such claims for the reasons set forth subsequently in this opinion. As we note, the plaintiff was adjudicated to have met the statutory civil commitment standards until a less restrictive placement was available, and her hearing before the probate court took place only two months after she was declared discharge ready.

Where lack of jurisdiction is raised, we must first address it. See *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 816, 12 A.3d 852 (2011) ("Once the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . . The court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.)); see also *PHH Mortgage Corp.* v. *Cameron*, 130 Conn. App. 238, 241, 22 A.3d 1282 (2011).

"The issue of standing implicates this court's subject matter jurisdiction. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: [F]irst, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected."

(Citations omitted; internal quotation marks omitted.) *State* v. *Long*, supra, 268 Conn. 531–32.

The defendants contend that this issue presents questions of law over which this court should exercise plenary review, citing *Winakor* v. *Savalle*, 343 Conn. 773, 781, 276 A.3d 407 (2022). We agree that our review is plenary. "Because standing implicates subject matter jurisdiction . . . and thus raises a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *Wisniewski* v. *Palermino*, 351 Conn. 390, 399, 330 A.3d 857 (2025).

The defendants argue that the plaintiff seeks "an abstract declaration that probate courts 'have authority to order the discharge of a patient *who no longer meets the legal standard for commitment to a less restrictive setting*.' " (Emphasis altered.) The defendants further contend that the Middletown Probate Court held that the plaintiff continued to meet that standard for continued civil commitment set forth in § 17a-498 (g) by having "psychiatric disabilities" and being "gravely disabled" but that the plaintiff chose not to appeal the rulings of the Middletown Probate Court. They argue that the plaintiff is not among the class of individuals impacted by this "hypothetical question" and, therefore, that she lacks standing to pursue it.

To this argument, the plaintiff responds that she did not appeal from the Middletown Probate Court's orders because she was aggrieved by being unnecessarily institutionalized due to the conduct of the defendants, not the conduct or rulings of the Probate Court, and that she did not appeal from the Probate Court's rulings because "an appeal would do no good without a place to discharge to" and she did not seek a discharge to homelessness. She further contends that her aggrievement "was the defendants' violation of her constitutional and statutory rights under the due process

clause and the Connecticut Patients' Bill of Rights to liberty and to not be unnecessarily institutionalized due to a failure to timely provide community residential services and support" and "the [trial] court's repeated findings of standing should be upheld."[10]

In his oral argument before this court, appellate counsel for the plaintiff stated: "The problem [the plaintiff] seeks to address is that civilly committed patients are held in state psychiatric hospitals after they are declared to be ready for discharge by the treatment team and they're held there unnecessarily both because they are not given a timely probate court due process hearing and because there are insufficient community mental health resources for them to be discharged to."

We note the following relevant facts from the record. The plaintiff was declared "discharge ready"[11] by her treatment team on August 2, 2017. Just two months later, on October 13, 2017, the Probate Court promptly held a state initiated annual commitment review hearing, although none was required by law until two years

[10] We note that, although the trial court addressed the issue of whether the plaintiff's claims were moot as a result of her release to the Lotus Home facility, it did not consider whether the plaintiff lacked standing as a result of the Probate Court's finding that she continued to meet the standard for civil commitment.

[11] In support of their motion for summary judgment, the defendants submitted deposition testimony from Charles Dike, the medical director for the Department of Mental Health and Addiction Services. In explaining what "discharge ready" means, he stated: "There are people, for example, who might still have risks attached to them, but the risks are manageable risks. . . . We are not discharging them completely . . . . We still worry that something bad might happen in those risks, but we still discharge them if we think that that's what they need. . . . [I]t's not straightforward. The case for which we are here today is a prime example of that. It's not a casual, you are ready to move. The history of significant violence and the consequences of that cannot be ignored or pushed under the rug. So the question will become while you are in the hospital, you might look like you're fine, but unless and until we're able to figure out what additional resources you're going to need in order to be fine in the community, the answer is not straightforward, because, as I said, there are people who might need a highly restrictive stay in the community."

after the plaintiff's initial commitment.[12] Two orders entered regarding the plaintiff's continued hospitalization, on October 13, 2017, finding that the plaintiff continued to meet the standard for civil commitment, and, on February 2, 2018, continuing the plaintiff's commitment until a less restrictive placement was available. The plaintiff did not appeal from either judgment.[13] Both the October 13, 2017 and February 2, 2018 judgments became final. The plaintiff did not file the present declaratory judgment action in the Superior Court until February 14, 2018.

To address the defendants' argument concerning standing, which all parties have briefed on appeal, we first must address the judgments of the Middletown Probate Court relating to whether it found that the plaintiff met the statutory standards for continued commitment. On March 21, 2025, we ordered the parties to

[12] The plaintiff's initial commitment hearing was held on October 14, 2016. Pursuant to § 17a-498 (g), the probate court must hold a review at least every two years, and each patient has a right to an annual hearing upon her request.

At oral argument before this court, the plaintiff's counsel acknowledged that a review hearing could have been held even sooner if the hospital had requested one, because "[u]sually hearings get scheduled within two weeks in Middletown Probate Court."

[13] The state claims that the plaintiff was under a conservatorship at all relevant times pursuant to General Statutes § 45a-644 (b) and her conservator had the authority to act on her behalf with respect to authorizing an appeal from a decree of probate affecting her. We do not find evidence of that in the record, as the reference to the plaintiff's conservator cited by the defendants mentions the conservator only in the context of developing the plaintiff's plan of care for her discharge to the Lotus Home facility.

However, in addition, the state claims that the plaintiff was being assisted by an attorney through the Connecticut Legal Rights Project on October 24, 2017, which was well within the forty-five day period in which she could appeal from the Probate Court's October 13, 2017 decision. We do find evidence in the record of that. In the filings in connection with the trial court's adjudication, Connecticut Valley Hospital's integrated progress notes indicate that the "CLRP . . . advocates" had been present at an October 24, 2017 conference held on the plaintiff's behalf. CLRP is an acronym for the Connecticut Legal Rights Project.

augment the record on appeal to include any orders or memoranda of decision issued by the Probate Court in connection with the hearings it held on October 13, 2017, and February 2, 2018. In a response dated March 27, 2025, the parties promptly provided this court with a stipulation including the decree regarding the October 13, 2017 proceeding and relayed the Probate Court's response that there was no formal memorandum for the February 2, 2018 hearing.

The October 13, 2017 probate order tracks the governing statute, § 17a-498 (c) (3) and (g), regarding the continuance of civil commitments in a hospital for psychiatric disabilities. That statute provides that, to continue such commitment, the probate court must make a finding by clear and convincing evidence:

(1) That the person has psychiatric disabilities and is dangerous to himself or others,

OR

In the alternative to finding that the person is dangerous to himself or others, (2) that the patient is "gravely disabled."

See General Statutes § 17a-498 (c) (3) and (g). Additionally, if the court finds by clear and convincing evidence that the person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled, the court shall make an order for the person's commitment, considering whether or not a less restrictive placement is available. See General Statutes § 17a-498 (c) (3).

In its October 13, 2017 decree, the Probate Court found that the plaintiff "has psychiatric disabilities" and is "gravely disabled." Also as required by § 17a-498 (c) (3), it found that "a less restrictive placement [was] not available" at that time.

The defendants argue that the plaintiff's "entire case rests on the false premise that she no longer met the civil commitment standard when her clinicians deemed her 'discharge ready' on August 2, 2017," and that the trial court lacked jurisdiction to review any claim about the Probate Court's authority to compel placement in a less restrictive setting because, inter alia, the plaintiff lacks standing. Specifically, because the Probate Court found that the plaintiff continued to meet the standard for civil commitment, the defendants argue that, pursuant to the authority of *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 982 A.2d 1053 (2009), the plaintiff does not have a "personal and legal interest" that has been "injuriously affected." (Internal quotation marks omitted.) Id., 214–15.

We agree with the defendants that the plaintiff was adjudicated by the Probate Court in a final judgment dated October 13, 2017, and that, because she continued to meet the statutory standard for civil commitment, she does not have the specific personal and legal standing to assert her claims for declaratory relief. We also conclude that she lacks standing to assert her claim that she and others are not given timely due process probate hearings. We conclude that she lacks standing to assert that claim because she received prompt attention and docketing of matters relating to her continued commitment by the Middletown Probate Court.

In reaching this conclusion, we reject the premise underlying all of the plaintiff's claims that she no longer met the standard for civil commitment and that there must be immediacy to a less restrictive alternative to hospitalization, once she was deemed "discharge ready." Section 17a-498, which governs the procedures for involuntary civil commitment, does not use the term "discharge ready," and the plaintiff points to no authority that supports the implicit assumption that the concepts are interchangeable. The Probate Court, instead,

found that the plaintiff had psychiatric disabilities and was "gravely disabled," in accordance with § 17a-498.

As set forth previously in this opinion, in her complaint, the plaintiff alleged that she was bringing the present action to, inter alia, "enforce the substantive constitutional rights established in [*Fasulo* v. *Arafeh*, supra, 173 Conn. 473][14] to liberty *as soon as the person does not meet commitment standards*" and "to require the state to measure the need and create capacity for residential supports and services in the community so that a person shall be discharged to the most integrated setting appropriate with their needs *within a reasonable time of not meeting state standards for civil commitment*." (Emphasis added.) The plaintiff claimed that § 17a-498 (g) violates the state constitution because "the vast majority of patients committed to state operated inpatient psychiatric facilities stabilize and *no longer meet commitment standards long before the mandatory two year review*, resulting in significant numbers of patients being unnecessarily institutionalized and segregated." (Emphasis added.) She also

[14] As explained previously in this opinion, *Fasulo* held that "the due process clause of the Connecticut constitution mandates that involuntarily confined civilly committed individuals be granted periodic judicial reviews of the propriety of their continued confinement." *Fasulo* v. *Arafeh*, supra, 173 Conn. 479. Our Supreme Court stated: "Commitment must be justified on the basis of a legitimate state interest, and the reasons for committing a particular individual must be established in an appropriate proceeding. Equally important, confinement must cease when those reasons no longer exist. . . . To satisfy due process, the procedure for releasing a civilly committed patient must be adequate to assure release of those who may no longer constitutionally be confined. Due process is a flexible concept, the content of which must be renewed each time it is used to measure the adequacy of challenged procedures." (Citations omitted; internal quotation marks omitted.) Id., 476–77. Subsection (g) of § 17a-498, which went into effect after the *Fasulo* decision was released, addressed these concerns by providing the opportunity for an annual review and a hearing at least every two years, with the patient's continued commitment being evaluated based on the same standard as the initial commitment. See id., 481–82; see also Public Acts 1976, No. 76-227, § 3; Public Acts 1977, No. 77-595, § 3.

claimed that patients "have a constitutional right to be discharged *as soon as they no longer meet commitment standards*" and "as soon as their present mental status indicates that they are not a danger to self or others or gravely disabled."

On appeal, the plaintiff continues to premise her claims on her contention that she and other patients like her no longer meet the standard for civil commitment, or likely no longer meet that standard, after being declared discharge ready. For instance, in her brief to this court, the plaintiff argues that, pursuant to *Fasulo*, "the due process clause of the Connecticut constitution creates a liberty interest not to be held in a state psychiatric hospital *when their present mental status indicates that they no longer meet commitment standards*," and "the probate court must have authority to order the discharge of a patient *who no longer meets the legal standard for commitment* to a less restrictive setting." (Emphasis added.) In addition, she claims that she and her proposed classes' right to constitutional liberty "is violated by state actors when they are held in a state operated inpatient psychiatric hospital without a timely commitment review hearing *after they no longer meet the legal standard for civil commitment*." (Emphasis added.)

In reviewing the plaintiff's claims, it appears that the plaintiff incorrectly assumes that her classification as "discharge ready" meant that she no longer met, or likely no longer met, commitment standards. However, pursuant to the Probate Court's October 13, 2017 finding, the plaintiff had "psychiatric disabilities" and was still considered "gravely disabled," and, therefore, she still met the legal standard for civil commitment. The plaintiff did not appeal from the Probate Court's judgment within the forty-five day period set forth in General Statutes § 45a-186 (b). Furthermore, in *Fasulo*, the court held that, to satisfy due process concerns, "[t]he state's

power to confine terminates when the patient's condition no longer meets the legal standard for commitment. Since the state's power to confine is measured by a legal standard, the expiration of the state's power can only be determined in a judicial proceeding which tests the patient's present mental status *against the legal standard for confinement*." (Emphasis added.) *Fasulo* v. *Arafeh*, supra, 173 Conn. 479.

Moreover, the plaintiff continues to take issue with the two year review period set forth in § 17a-498 (g). She has not shown that she has standing to assert that claim. She received an annual review and prompt scheduling for hearings thereafter. She has not shown that she has been injuriously and specifically harmed. She personally had promptly received a state initiated annual hearing in October, 2017, only two months after she was designated "discharge ready." The Probate Court held another hearing in February, 2018, only four months after the annual hearing, and the plaintiff was expeditiously released to the Lotus Home facility in March, 2018, once that placement became available to meet her continuing clinical needs. As previously noted, Lotus Home is a facility for "challenging, high-risk female clients that require on-site, 24 hours a day, 7 days a week (24/7), supervision," where the plaintiff remained for two years. Accordingly, we conclude that the plaintiff does not have the specific personal and legal interest that has been "specially and injuriously affected"; (internal quotation marks omitted) *State* v. *Long*, supra, 268 Conn. 532; in order to have standing to assert her claims for declaratory and injunctive relief.

II

The plaintiff also requests this court to review the trial court's denial of her February 1, 2023 motion for class certification with respect to her claims. We have concluded, however, in part I of this opinion, that the

claims underlying the plaintiff's putative class action fail because she lacks the specific, personal and legal interest in the subject matter of the challenged action as distinguished from a general interest of the community as a whole and has not shown that any such interest has been specially and injuriously harmed and affected by the challenged action. Because the plaintiff's claims fail, her request for class certification fails with it.

Practice Book § 9-7 contains four elements for class certification, namely, numerosity, commonality, typicality, and adequacy of representation. See *Rodriguez* v. *Kaiaffa, LLC*, 337 Conn. 248, 254, 253 A.3d 13 (2020). The typicality element requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . ." Practice Book § 9-7 (3).

"[T]here cannot be adequate typicality between a class and a named representative unless the named representative has individual standing to raise the legal claims of the class. . . . [T]ypicality measures whether a sufficient nexus exists between the claims of the named representatives and those of the class at large. Without individual standing to raise a legal claim, a named representative does not have the requisite typicality to raise the same claim on behalf of a class." (Internal quotation marks omitted.) *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 633, 894 A.2d 240 (2006).

Accordingly, in the present case, because the plaintiff lacks standing to raise her claims; see part I of this opinion; she also lacks the requisite typicality to raise those same claims on behalf of a class.

The judgment is reversed only as to the form of the judgment and the case is remanded with direction to render a judgment of dismissal.

In this opinion the other judges concurred.

MARVIN NARCISSE *v.* COMMISSIONER OF MENTAL HEALTH AND ADDICTION SERVICES (AC 47195)

Moll, Seeley and Lavine, Js.

Syllabus

Pursuant to *Duperry* v. *Solnit* (261 Conn. 309), in all cases "in which a defendant pleads not guilty by reason of mental disease or defect, and the state substantially agrees with the defendant's claim of mental disease or defect, with the result that the trial essentially is not an adversarial proceeding, the trial court must canvass the defendant to ensure that his plea is made voluntarily and with a full understating of its consequences."

The petitioner, who had previously been found not guilty of certain crimes by reason of mental disease or defect and committed to the jurisdiction of the Psychiatric Security Review Board, appealed, on the granting of certification, from the habeas court's judgment denying his petition for a writ of habeas corpus. He claimed, inter alia, that the habeas court improperly determined that the underlying criminal proceeding was contested and adversarial in nature and, thus, he was not required to be canvassed pursuant to *Duperry*. *Held*:

The habeas court did not improperly deny the habeas petition with respect to the petitioner's claim that his plea of not guilty with the affirmative defense of mental disease or defect, made pursuant to statute (§ 53a-13 (a)), was not made knowingly and voluntarily because he was not canvassed pursuant to *Duperry*, as the evidence in the record supported the court's finding that, because the prosecutor did not substantially agree with the petitioner's affirmative defense, the underlying criminal proceedings were adversarial and contested, and, thus, a canvass pursuant to *Duperry* was not required.

The habeas court did not improperly deny the habeas petition with respect to the petitioner's claims of ineffective assistance of trial counsel, as the court correctly determined, on the basis of its assessment of the credibility of the testimony of trial counsel and the petitioner, that the petitioner failed to meet his burden of demonstrating that his trial counsel performed deficiently by failing to advise him properly regarding his affirmative defense of mental disease or defect, and, because this court determined that the canvass requirements of *Duperry* were inapplicable, his claim that trial counsel performed deficiently by failing to advise him regarding those requirements necessarily failed.

Argued February 19—officially released July 1, 2025

Procedural History

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

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

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *JoAnne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. On the granting of his petition for certification to appeal, the petitioner, Marvin Narcisse, who had been found not guilty of certain crimes by reason of mental disease or defect and committed to the jurisdiction of the Psychiatric Security Review Board (board) for a maximum period of forty years, appeals from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus (operative habeas petition).[1] In the operative habeas petition, he alleged that his plea of not guilty with the affirmative defense of mental disease or defect, made pursuant to General Statutes § 53a-13 (a),[2] was not made knowingly

[1] The operative habeas petition, which was filed on July 20, 2020, and is titled "Amended Petition," is actually the petitioner's third amended habeas petition.

[2] General Statutes § 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

Although § 53a-13 (a) was the subject of a technical amendment in 2019; see Public Acts 2019, No. 19-27, § 1; that amendment has no bearing on the merits of this appeal. For simplicity, we refer to the current revision of the statute.

and voluntarily because he was not canvassed pursuant to *Duperry* v. *Solnit*, 261 Conn. 309, 329, 803 A.2d 287 (2002), and that his criminal trial counsel, Attorney Kim W. Mendola (trial counsel), had provided ineffective assistance. On appeal, the petitioner claims that the habeas court improperly determined that (1) the underlying criminal proceeding was contested and adversarial in nature and, thus, that the petitioner was not required to be canvassed pursuant to *Duperry*, and (2) his trial counsel did not render deficient performance by failing to advise the petitioner regarding the canvass requirements of *Duperry*.[3] We disagree with both claims and affirm the judgment of the habeas court.

We first set forth the facts underlying the criminal charges that were brought against the petitioner, as found by the court, *Devlin*, *J*. "On the afternoon of December 22, 2011, [the victim, Margery Meketa] exited a store located near the intersection of William Street and Roosevelt Street in Bridgeport . . . . At that time

[3] We note that, in his operative habeas petition, the petitioner alleges that his trial counsel was ineffective on the basis of six grounds, namely, that trial counsel (1) "failed to advise him of and [to] explore options other than [his] plea" with the affirmative defense of mental disease or defect, (2) "pressured [him] to take the plea rather than explore other options such as a plea agreement," (3) "improperly advised him that he would be committed [to] the [jurisdiction of the board] for . . . a short period of time," (4) "failed to advise him regarding the *Duperry* canvass requirements," (5) "failed to ensure that [he] was properly canvassed," and (6) "failed to advise him that he could withdraw his plea or appeal the validity of his plea based on the inadequacy of the canvass." (Emphasis omitted.) On appeal, the petitioner challenges only the court's determinations that trial counsel was not ineffective in failing to advise him regarding his affirmative defense of mental disease or defect and concerning the canvass requirements of *Duperry*. We, therefore, limit our analysis to those grounds and deem any claim relating to the other grounds raised in the operative habeas petition abandoned. See *Walker* v. *Commissioner of Correction*, 176 Conn. App. 843, 856, 171 A.3d 525 (2017) (when claim raised at trial is not adequately briefed on appeal, claim is deemed abandoned); *Merle S.* v. *Commissioner of Correction*, 167 Conn. App. 585, 588 n.4, 143 A.3d 1183 (2016) (claims alleged in habeas petition that were denied by habeas court but not pursued by petitioner on appeal were deemed abandoned).

. . . Meketa was over sixty years of age and in fact was approximately seventy-seven years old. As she walked from the store on the sidewalk, the [petitioner] ran toward her from the rear. As the [petitioner] approached . . . Meketa, he increased his speed and tackled her like a football player.

"[Meketa] fell forward and with great force hit her head on a concrete sidewalk. The [petitioner] then proceeded to stab [her] repeatedly in the face with a broken off stem of a wine glass. He also stomped [on] and kicked her. Alfredo Serrano observed the attack and came to . . . Meketa's aid. He . . . fought with the [petitioner] to get him away from . . . Meketa. During their tussle, the [petitioner] was able to break loose from Serrano and returned to his attack on . . . Meketa, again stomping [on] and kicking her. He also tried to lift her shirt to get at her bare skin with the glass stem.

"Eventually, a third person, Dennis Shaw, enter[ed] the fracas to assist Serrano, and the two were ultimately able to pull the [petitioner] away. The police arrived on the scene soon after. Following the break-up of the attack, but while all parties were still on the scene, a witness video recorded what was happening. [The] video, which was played [to the court], shows . . . Meketa motionless on the ground with gruesome injuries to her head and substantial bleeding. The video also shows the [petitioner] seated on the ground with his back against a fence. On [that] December afternoon, he [was] wearing only a T-shirt, socks, no shoes, [and] boxer shorts with no trousers or pants.

"During [the] incident, the [petitioner] made no effort to steal . . . Meketa's purse or any of her other property. He was described by witnesses as acting deranged and in a rage directed at . . . Meketa. There's no evidence that these people knew each other or had ever had any contact whatsoever before this day."[4]

[4] The court also found that, "[f]ollowing the assault . . . Meketa spent several months in the hospital. Initially, she was not able to talk and could

Following the assault, the petitioner was charged with attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a, assault in the first degree in violation of General Statutes § 53a-59 (a) (1), and assault of an elderly person in the first degree in violation of General Statutes § 53a-59a (a). The petitioner elected to be tried to the court, which canvassed him regarding his waiver of his right to a jury trial. A trial to the court, *Devlin*, *J.*, took place on March 12 and April 9, 2013, after which the court found that the state had proven the elements of the charges beyond a reasonable doubt. The court, however, also found that the petitioner had met his burden of establishing his affirmative defense that, as a result of mental disease or defect, he "lacked substantial capacity . . . to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." General Statutes § 53a-13 (a). Following the submission of a report to the court prepared by the respondent, the Commissioner of Mental Health and Addiction Services, concerning the petitioner's mental condition and a hearing thereon, the court found that the petitioner "constitute[d] a danger to himself and to others" and ordered that he "be committed to the jurisdiction of the [board] and . . . be confined in a hospital for psychiatric disabilities for a maximum of forty years."

The petitioner commenced this habeas action in May, 2016. In his operative habeas petition, he alleged two counts: in count one, he alleged that the trial court improperly failed to canvass him in accordance with the requirements of *Duperry*; and, in count two, he alleged that his trial counsel provided ineffective assistance. See footnote 3 of this opinion. A habeas trial took place on February 6, 2023. The petitioner presented as

not breathe on her own as a result of the injuries sustained in the assault. She is now in a wheelchair being unable to walk and she has memory loss . . . and other medical problems."

witnesses himself and his trial counsel, and offered several exhibits into evidence, which were admitted. The respondent offered no witnesses or exhibits. Following the evidentiary hearing, the habeas court rendered judgment denying the operative habeas petition. Thereafter, the habeas court granted the petition for certification to appeal, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

Before turning to the merits of the petitioner's claims on appeal, we set forth our standard of review governing habeas corpus appeals. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Canady* v. *Commissioner of Correction*, 231 Conn. App. 603, 610, 333 A.3d 797, cert. denied, 352 Conn. 901, 334 A.3d 1006 (2025).

I

The petitioner's first claim is that the habeas court improperly determined that the underlying criminal proceeding was contested and adversarial in nature and, thus, that the petitioner was not required to be canvassed pursuant to *Duperry*. We are not persuaded.

Because the petitioner's first claim is predicated on *Duperry* v. *Solnit*, supra, 261 Conn. 309, we first provide a brief discussion of that case and other relevant case law. In *Duperry*, the petitioner, who had been charged with arson in the first degree and the manufacture of bombs in connection with the explosion of a pipe bomb

at a psychiatric treatment facility; id., 312–13; was found not guilty of those crimes by reason of mental disease or defect and was committed to the jurisdiction of the board "to be confined in a hospital for psychiatric disabilities for a maximum term of twenty-five years." Id., 315. The petitioner in *Duperry* subsequently filed a petition for a writ of habeas corpus alleging, inter alia, that "his plea of not guilty by reason of mental disease or defect violated his due process rights under both the federal and state constitutions because he was not made aware of and did not fully understand the consequences of his plea . . . ." Id. The habeas court agreed with that claim, concluding, inter alia, that " '[t]he requirements governing the taking of a guilty plea also apply to the acceptance of a plea [of] not guilty by reason of mental disease or defect' "; id., 315–16; and that "the record was devoid of any indication that the trial court had canvassed the petitioner in a manner analogous to the requirements of Practice Book § 39-19, which prescribes the required canvass of a defendant who pleads guilty . . . ." (Footnote omitted.) Id., 316. The habeas court, therefore, concluded that the petitioner, at the time of his plea, did not "understand the consequences of pleading not guilty by reason of mental disease or defect, thereby rendering his plea involuntary." Id.

On appeal in *Duperry*, our Supreme Court determined that the habeas court, "by concluding that a criminal defendant who pleads not guilty with the affirmative defense of mental disease or defect must be canvassed as though he is pleading guilty to ensure that his plea is made knowingly and voluntarily"; (footnote omitted) id., 311; "improperly established a new constitutional rule in a collateral proceeding in contravention of the principle announced in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)"; *Duperry* v. *Solnit*, supra, 261 Conn. 311; in which the United

States Supreme Court held that, "in general, new constitutional rules should not be declared or applied in collateral proceedings, such as habeas corpus review." Id., 318. Nevertheless, our Supreme Court exercised its supervisory authority over the administration of justice and ruled that, "in all future cases in which a defendant pleads not guilty by reason of mental disease or defect, and the state substantially agrees with the defendant's claim of mental disease or defect, with the result that the trial essentially is not an adversarial proceeding, the trial court must canvass the defendant to ensure that his plea is made voluntarily and with a full understanding of its consequences." Id., 329. The court in *Duperry* did not define what it means to "substantially [agree] with a defendant's claim of mental disease or defect . . . ." Id. Notably, after the petitioner in *Duperry* "pleaded not guilty by reason of mental disease or defect and opted for a court trial . . . [the trial] began immediately. In accordance with their prior discussions, the parties presented their respective cases without opposition. First, the parties presented evidence with respect to the petitioner's mental state, and, second, the state introduced evidence regarding the underlying charges. The entire proceeding was completed in less than two hours, and the trial court immediately rendered its judgment . . . ." Id., 314.

Just over two years after the decision in *Duperry*, our Supreme Court decided *State* v. *Ouellette*, 271 Conn. 740, 859 A.2d 907 (2004). In *Ouellette*, following a trial to a three judge court, the trial court rejected the defendant's affirmative defense of mental disease or defect and found him guilty of murder. Id., 742–43. On appeal, the defendant, relying on *Duperry*, claimed, inter alia, that "his constitutional right to due process was violated by virtue of the trial court's failure to canvass him in connection with his plea of not guilty by reason of mental disease or defect to ensure that his plea was

knowing, voluntary and intelligent . . . .'' Id., 743. Our Supreme Court rejected this claim, concluding that ''the defendant's due process rights were not implicated by virtue of the trial court's failure to canvass him regarding his plea of not guilty by reason of mental disease or defect.'' Id., 769. In reaching that conclusion, the court first noted that, in adopting a rule in *Duperry* ''requiring trial courts to canvass defendants who elect to plead not guilty by reason of mental disease or defect,'' it had limited the rule in two important respects. Id., 767. ''First, the rule is prospective in nature, and second, it applies to cases in which the state substantially agrees with the defendant's claim of mental disease or defect, with the result that the trial essentially is not an adversarial proceeding . . . .'' (Internal quotation marks omitted.) Id.

The court explained further: ''As we observed in *Duperry* . . . and as courts in a number of other jurisdictions also have recognized; [see] e.g., *Miller* v. *Angliker*, 848 F.2d 1312, 1320 (2d Cir.), cert. denied, 488 U.S. 890, 109 S. Ct. 224, 102 L. Ed. 2d 214 (1988); *United States* v. *Brown*, 428 F.2d 1100, 1102–1103 (D.C. Cir. 1970); there are certain practical similarities between guilty pleas and pleas of not guilty by reason of mental disease or defect or by reason of insanity. We know of no court, however, that has required, as a matter of *constitutional law*, a . . . canvass [pursuant to *Boykin* v. *Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)] of a defendant who pleads not guilty by reason of mental disease or defect or by reason of insanity. Moreover, those courts that have required such a canvass have done so not as a matter of constitutional mandate but, rather, on the basis of prudential considerations; [see] e.g., *United States* v. *Brown*, supra, 1103–1104; *State* v. *Shegrud*, 131 Wis. 2d 133, 138, 389 N.W.2d 7 (1986), cert. denied, 479 U.S. 1037, 107 S. Ct. 891, 93 L. Ed. 2d 843 (1987); see *People* v. *Vanley*, 41 Cal. App.

3d 846, 856, 116 Cal. Rptr. 446 (1974); *Legrand* v. *United States*, 570 A.2d 786, 792–94 (D.C. App. 1990); and even then, only in circumstances in which the state has not opposed the defendant's claim or in which the facts are not otherwise in dispute. See, e.g., *United States* v. *Brown*, supra, 1103; *People* v. *Vanley*, supra, 853; *Legrand* v. *United States*, supra, 788; *State* v. *Shegrud*, supra, 135. Indeed, in truly contested cases, we reasonably may presume that, in light of the adversarial nature of the proceeding, defense counsel will be particularly diligent in advising the defendant of the effect that a claim of mental disease or defect is likely to have on the defendant's rights. In the absence of any precedent or other authority to indicate that a court is constitutionally required to canvass a defendant who pleads not guilty by reason of mental disease or defect, and in view of the fact that the state vigorously contested the defense raised by the defendant, we conclude that the defendant's due process rights were not implicated by virtue of the trial court's failure to canvass him regarding his plea of not guilty by reason of mental disease or defect." (Citation omitted; emphasis in original; footnote omitted.) *State* v. *Ouellette*, supra, 271 Conn. 768–69.

With that background in mind, we set forth the following additional facts, which are relevant to our resolution of this claim. The petitioner's criminal trial commenced on March 12, 2013, with the state presenting its case concerning the charged offenses. In particular, the state presented testimony from the two witnesses to the assault on the victim—Serrano and Shaw—both of whom described in detail the circumstances of the attack, with Serrano stating that he thought that the petitioner was "high on some drugs," and Shaw testifying that he had told the police that he believed that the petitioner was "crazy." The state presented testimony

from two other witnesses, submitted exhibits into evidence, and rested its case-in-chief that day. The petitioner did not challenge any of the state's evidence concerning the charged offenses.

The trial resumed on April 9, 2013, when the petitioner began presenting evidence in support of his affirmative defense of mental disease or defect. The petitioner's first witness was Alexander Westphal, a psychiatrist and fellow in the Department of Law and Psychiatry at Yale School of Medicine who had examined the petitioner and made findings concerning his mental health in a written report that was submitted into evidence. Westphal testified regarding the petitioner's psychiatric history, which included, inter alia, a history of having visual and auditory hallucinations; a family history of bipolar disorder, depression, and anxiety; and a history of "extensive [phencyclidine (PCP)] use," for which he was hospitalized. Westphal testified that the petitioner "has a very substantial history of substance abuse. He's used a variety of substances, beginning with marijuana, but later, as he got older, used most, I think, importantly PCP repeatedly." When asked whether "the usage of the drugs [was] the cause of [the petitioner's] illness," Westphal responded, "[n]o," but that "it could have contributed . . . ." Westphal testified that, in his opinion and to a reasonable degree of medical certainty, the petitioner suffers from a mental disease, namely, "schizoaffective disorder," which "prevented him from understanding the wrongfulness of his actions . . . ." The prosecutor cross-examined Westphal with respect to his diagnosis of the petitioner, asking whether, inter alia, there is a violent aspect to patients with schizoaffective disorder, to which Westphal responded that patients diagnosed with that disorder typically do not have violent symptoms. Afterward, Westphal confirmed

that the ingestion of PCP could cause an otherwise nonviolent person to become violent.[5]

On cross-examination, the prosecutor also questioned Westphal regarding whether, in his thorough investigation of the petitioner's background, he ever "notice[d] any . . . incidents of violent contact or . . . unprovoked attacks on other people [aside from the event that formed the basis for the charges in the present case]," to which Westphal responded in the negative. The prosecutor also questioned Westphal regarding whether there was anything in the petitioner's "environment that may have contributed to [his] sudden snap" from a person experiencing "baseline fluctuation of psychiatric symptoms to one that he's never had before, where he's attacking people." Additionally, the prosecutor questioned Westphal concerning the petitioner's inability to recall the attack on the victim and whether he thinks it is possible for a person "to have

[5] Specifically, the following colloquy transpired:

"[The Prosecutor]: All right. And, would you say also that if someone was taking certain drugs or medications—like, for instance, PCP—would that tend to have an influence on a person who had this kind of disorder?

"[Defense Counsel]: Your Honor, objection. Foundation.

"The Court: No, the doctor testified that [the petitioner] said he took PCP a lot. No, that's overruled.

"[The Prosecutor]: Would that have—do you think that would have an impact on symptoms that somebody would . . . experience?

"[Westphal]: Would the ingestion of PCP have impact?

"[The Prosecutor]: Yes.

"[Westphal]: Yes.

"[The Prosecutor]: Could it make it—if somebody was not violent before, could it make it so that they were violent after taking that?

"[Westphal]: Yes.

"[The Prosecutor]: The effect that it might have, would it be . . . only concurrent with the administration of the . . . drug or would it have a residual effect as well?

"[Westphal]: The aspect of PCP, which had been associated with violence, is . . . related to the acute phase of intoxication.

"[The Prosecutor]: And is there also some impact that, aside from the acute phase, it could have some residual effect as well?

"[Westphal]: Yeah. It affects cognition and it affects mood."

[a] psychiatric illness and not [be] malingering . . . but actually experiencing [the illness] but still be able to lie," to which Westphal replied, "[y]es, absolutely." On redirect, Westphal responded, "[n]o," when asked whether, in his review of the records of the Department of Correction following the assault, he saw "any indication of a positive blood test for any other substance like the PCP." The prosecutor also cross-examined Madelon Baranowski, a psychologist and associate professor in the Department of Law and Psychiatry at Yale School of Medicine who testified for the defense and also had evaluated the petitioner, and asked her several questions concerning the petitioner's memory.

During closing remarks, the prosecutor first stated his position that the testimony of the eyewitnesses established beyond a reasonable doubt that the petitioner committed the charged offenses. With respect to the issue of the petitioner's affirmative defense of mental disease or defect, the prosecutor acknowledged that he was not able to suggest an alternative motive for the assault and that there was no question that the petitioner suffers from a mental illness. He argued, however, that, when "assessing *whether* . . . the elements of the defense have been met by a preponderance [of the evidence]," the question before the court was whether the petitioner's assault against the victim occurred as part of his mental illness or whether it was influenced by the petitioner's use of drugs, which would have precluded the petitioner's affirmative defense pursuant to § 53a-13 (b).[6] (Emphasis added.) Ultimately,

[6] General Statutes § 53a-13 (b) (1) provides: "It shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof, unless such drug was prescribed for the defendant by a prescribing practitioner, as defined in section 20-571, and was used in accordance with the directions of such prescription."

Although § 53a-13 (b) has been the subject of minor amendments after the events in the present case; see Public Acts 2023, No. 23-19, § 16; Public Acts 2021, No. 21-192, § 12; Public Acts 2020, No. 20-4, § 11; Public Acts

the prosecutor stated that this case presents a "fifty-fifty situation," in that there was no doubt that the petitioner suffered from a mental illness but that questions remained as to what had caused the petitioner to become violent and attack the victim.[7]

2019, No. 19-27, § 1; those amendments have no bearing on the merits of this appeal. For simplicity, we refer to the current revision of the statute.

[7] In particular, the prosecutor stated: "[F]irst of all . . . the [petitioner] . . . [has] a psychiatric record going . . . back to when he was eight years old. He has a criminal record spanning a long period of time. . . . Westphal seems to have conducted a serious study of . . . both. What is absent is any violence. He gets . . . irritable, he . . . seems to make people uncomfortable, but he hasn't committed any act of . . . violence. So, the question becomes . . . you have this long-standing mental illness, why today . . . what has happened? Is there something in the environment that has caused this situation to escalate or is it just a random, psychiatric event that causes him suddenly, after all this time, to suddenly go out and lash out in the manner that he did, at some person . . . that he's not even involved with, just a random person on the street.

"And . . . there are other issues. He uses drugs. It's reported here in the report that he has used just about every kind of drug that could exacerbate his condition. He uses PCP with and without marijuana. He uses PCP with and without ketamine. He . . . smokes that drug. He's . . . had violations of his parole for that. He's tested positive for PCP.

"Back in 2011 [at the time of the assault], they didn't—unfortunately, there is none around the time when this event occurred, but he was using . . . according to the report, he reported using this K2 and Spice, which are . . . chemicals similar to THC, one of the principal psychoactive substances in marijuana, and they are synthesized without any oversight—mostly in China . . . . However . . . they are different from the normal marijuana in that they confer a greater risk of psychosis, particularly in people already vulnerable to psychosis.

"So, on the one hand . . . the conclusions and the testimony give us a person with a baseline of a person with a mental illness, there's . . . no way to contest that, but we find him engaging in conduct for which there's no rational motive, which [he] does report no memory for. And . . . there is no medical suggestion of . . . anything, other than speculation, as to what could have happened to change that behavior on this day from what he's been doing for all this time, to suddenly becoming homicidal, basically.

"And the only thing we have on the other hand is his use of the drugs. This is something—it's all over the doctor's report. All kinds of drugs, which could exacerbate symptoms. So, we don't know if he did or he didn't. We don't know that he didn't [take drugs].

"And so, I think the position that I would take is . . . that we're at this fifty-fifty situation, which is not . . . a situation [that] is contemplated by

At the habeas trial, the petitioner's trial counsel testified at length regarding the circumstances surrounding the petitioner's underlying criminal trial. She testified that, at some point prior to trial, there were discussions about a not guilty plea with the affirmative defense of mental disease or defect but that "[t]he state refused to agree to" the affirmative defense of mental disease or defect, as "the state did not agree that . . . [it] was an appropriate disposition."[8] Trial counsel testified that, during those pretrial discussions, "Judge Devlin . . . felt that . . . although the state didn't have any evidence, he felt there was a drug ingestion component to the case, and he said [that the parties could] certainly take a go at it at trial, but there were no guarantees at all." Trial counsel explained that the state's reasoning for opposing such a defense was because "[t]he victim's family was very much against it," and because the state "simply felt it was far too serious [of a case] and thought there was a drug component to it . . . ." Trial counsel testified that the state did not dispute that the petitioner had a mental illness but was "adamantly opposed to the use of the [not guilty by reason of mental disease or defect] defense because . . . there was some indication that [the petitioner] has used PCP and actually was

the statute. . . . [W]e know there was a spontaneous shift in his mental condition. . . . [W]as it spontaneous in that . . . it just occurred as part of the course of his illness or was it influenced by what we know to be something that he does, which is that he uses these types of drugs."

The prosecutor then referred to the language in § 53a-13 (b) (1), which provides that "[i]t shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion . . . of intoxicating liquor or any drug . . . unless such drug was prescribed," and stated that it was not the state's burden to prove that the petitioner was using drugs and that the defense had not established that the assault was not prompted by the petitioner's use of drugs. Immediately following those remarks, the court noted that, two months prior to the assault, the petitioner had tested negative for drug use but that no further testing had been conducted thereafter, especially when the petitioner started behaving strangely sometime in November, 2011.

[8] We note that the prosecutor at the petitioner's criminal trial, John Smriga, was not called to testify at the petitioner's habeas trial.

a known PCP user in the neighborhood and . . . that contributed [to the cause for the assault] and not a mental illness," even though there was "no evidence" of the petitioner having used PCP on the day of the attack.[9] Trial counsel repeatedly testified that the state "strongly" contested the petitioner's affirmative defense and that the petitioner's "drug issue" was the primary issue in dispute. When asked whether she was familiar with *Duperry* and had discussed it with the petitioner, trial counsel responded: "It didn't need to be because it wasn't an agreed upon disposition. You only need to do that canvass if you have an agreed upon disposition, and we did not have that. This was an opposed disposition." She also recalled having been contacted by Attorney Monte Radler, a public defender, after the criminal trial and "being pressured" to say that the petitioner's case was an agreed upon disposition. She testified that she told Radler that she "could not be a part of saying something that was not true. [She] would not perpetrate a fraud upon the court. . . . [She] had [that] conversation with many other people, including Judge Devlin. . . . [She] was . . . asked many times if this was an agreed upon disposition, and [she], quite emphatically, had told everybody the truth, which [is] that it was not an agreed upon disposition."

The petitioner also testified at his habeas trial. On cross-examination, he acknowledged that he had written a letter to his trial counsel asking her to say that the trial was not contested. On redirect, he testified that he never told his trial counsel to lie for him.

The habeas court in the present case made the following findings with respect to the petitioner's *Duperry* claim. After evaluating "the tenor and tone of the underlying proceeding to determine, after a scrupulous

[9] Trial counsel stated that, following the assault, the police did not test the petitioner for drugs or find any drugs on his person or following a search of his residence.

review of the record, whether the court trial was essentially nonadversarial," the court found that "neither the conclusions nor the rationales of *Duperry* and *Ouellette* support the petitioner's claim that the trial court's failure to canvass the [petitioner] with respect to his pursuit of the affirmative defense of not guilty by reason of [mental disease or defect] implicated his right to due process, as the underlying court trial was indeed adversarial and contested in nature, in that the prosecuting authority, although certainly fighting the weight of the evidence, did not agree, substantially or otherwise, with the petitioner's affirmative defense or a . . . commitment [to the board]. A lengthy review of the entirety of the evidence presented at the habeas trial, including the testimony of the witnesses and exhibits, [which include] the underlying trial transcripts, compel this court's finding.

"Chief among the dispositive testimony on this issue was the unwavering testimony of [trial counsel] that, despite her attempts to secure the agreement of the prosecuting attorney to an 'uncontested' [not guilty by reason of mental disease or defect] trial, the prosecuting attorney . . . 'refused to agree' as he was of the opinion that [a finding of not guilty by reason of mental disease or defect] and the accompanying disposition of commitment was not appropriate. It was his opinion, and that of the family of the victim, that the case was 'too serious' for [a not guilty by reason of mental disease or defect] disposition, despite the petitioner's clear and severe mental illness. The court credits [trial] counsel's testimony that [the prosecutor] was 'adamantly opposed to [a not guilty by reason of mental disease or defect] finding largely based on the petitioner's use of PCP, despite the lack of evidence of the petitioner's PCP use at the time of the attack on the victim. This court does not interpret [an exhibit submitted by the petitioner][10]

[10] The exhibit consists in part of an email communication between the petitioner's trial counsel and Radler, in which trial counsel stated, in part,

in the same manner as the petitioner in that the court does not find that it constitutes evidence of an uncontested [not guilty by reason of mental disease or defect] trial. The trial court, *Devlin*, *J.*, also stated that the potential drug ingestion component to the case made it clear to him that there was 'no guarantee' of [a not guilty by reason of mental disease or defect] verdict. This being the case, there was no necessity that the court canvass the petitioner in the manner asserted in the operative [habeas] petition." (Footnote added.)

The petitioner's contention in this appeal that the underlying criminal proceeding was not contested and adversarial in nature is based on his assertions that the state "substantially agreed" with his affirmative defense of mental disease or defect and that "any 'contest' was illusory." The petitioner notes that the defense did not challenge any of the evidence presented by the state relating to the charged offenses and that the state did not contest that the petitioner was mentally ill. He further asserts that "[t]he state did not challenge the conclusions of the petitioner's experts . . . [or] offer its

that the prosecutor "had told [the victim's family] that [a verdict of not guilty by reason of mental disease or defect] would be the result. There was literally no outrage on their part." The exhibit was marked for identification purposes only and used at trial to refresh trial counsel's recollection as to whether she ever told Radler that the victim's family was not surprised about the outcome of the criminal trial. The court stated that it would consider the email in the exhibit for impeachment purposes only, as trial counsel testified that she could not recall making that statement to Radler. On appeal, the petitioner argues that the email constituted "clear evidence that trial counsel was aware that the state perceived the [not guilty by reason of mental disease or defect] verdict, prior to the verdict, as a foregone conclusion." The state correctly points out, however, that the email was not admitted for substantive purposes, which precludes our consideration of it in this appeal. See *Sharp Electronics Corp.* v. *Solaire Development, LLC*, 156 Conn. App. 17, 31 n.8, 111 A.3d 533 (2015) ("Documents marked at trial only for identification and not entered as full exhibits . . . are not substantive evidence for consideration by the trier of fact. See *State* v. *Kamel*, 115 Conn. App. 338, 345, 972 A.2d 780 (2009); see also C. Tait & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 1.29.3, p. 93 ('[e]xhibits for identification are not in evidence').").

own expert to rebut such conclusions. The state did not even have the petitioner examined prior to trial to rebut the evidence to be presented by the petitioner. . . . In effect, everything aside from the issue of sanity was stipulated to [as was the case in *Duperry*]. See *Duperry* v. *Solnit*, supra, 261 Conn. 323 . . . . [T]he state cursorily argued that the [petitioner] had a history of drug use. . . . Indeed, aside from the inherent burden of proof that a defendant must establish, the sole issue in dispute was voluntary intoxication, such that would negate the [affirmative] defense. . . . However, there was no evidence that the petitioner had been voluntarily intoxicated at the time of the offense. . . . There was no evidence of drug use.[11] . . . The state acknowledged that the petitioner was mentally ill, but merely speculated during oral argument that drug use may have precipitated the violent outburst . . . .'' (Citations omitted; footnote added.) We disagree with the petitioner's characterization of the state's position at the criminal trial.

The question before us of whether the habeas court properly determined that the underlying criminal proceeding was contested and adversarial in nature such that the trial court was not required to canvass the petitioner pursuant to *Duperry* involves a mixed question of law and fact, over which we exercise plenary review; see *Canady* v. *Commissioner of Correction*, supra, 231 Conn. App. 610; as we must determine whether the habeas court properly applied the legal requirements set forth in *Duperry* to its factual finding concerning the nature of the criminal trial. On the basis of our thorough review of the record, including the transcripts of the petitioner's criminal trial, we conclude that the evidence in the record supports the

[11] We note that, at the criminal trial, Judge Devlin specifically stated that the evidence of the petitioner's drug use consisted of the petitioner's statements to Westphal regarding his long history of using drugs.

habeas court's finding that the proceeding was adversarial and contested, and, thus, we agree with the habeas court's legal determination that the petitioner's criminal trial was not the type of proceeding for which a canvass pursuant to *Duperry* was required.

At the outset, the record indicates that the habeas court found that the criminal proceeding was contested and adversarial on the basis of its assessment of the credibility of trial counsel's testimony at the habeas trial. Specifically, the court found trial counsel's testimony to be unwavering with respect to the prosecutor's refusal to agree to an uncontested trial, and it credited trial counsel's "testimony that [the prosecutor] was 'adamantly opposed' to [a not guilty by reason of mental disease or defect] finding largely based on the petitioner's use of PCP . . . ." The habeas court also noted that, in her testimony at the habeas trial, trial counsel remarked that Judge Devlin had told the parties that there were no guarantees as to a verdict of not guilty by reason of mental disease or defect in light of the "drug ingestion component to the case . . . ." On the basis of those findings, the habeas court determined that the prosecuting authority "did not agree, substantially or otherwise, with the petitioner's affirmative defense," that "there was no necessity that the court canvass the petitioner" pursuant to *Duperry*, and, thus, that the petitioner had failed to carry his burden as to count one of the operative habeas petition.

"In a habeas trial, the court is the trier of fact and, thus, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony . . . . It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) *Balbuena* v. *Commissioner of Correction*, 231 Conn. App. 289, 327, 332 A.3d 1008, cert. denied, 352 Conn. 905, A.3d (2025). "[T]his court does not retry the case

or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [habeas] [court's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *Brown* v. *Commissioner of Correction*, 230 Conn. App. 384, 399, 330 A.3d 134, cert. denied, 351 Conn. 921, 333 A.3d 103 (2025); see also *Lopez* v. *Commissioner of Correction*, 232 Conn. App. 825, 828, A.3d (2025) (" '[a] pure credibility determination made by a habeas court is *unassailable*' " (emphasis in original)). In the present case, the habeas court was free to find, on the basis of trial counsel's testimony, that the state had opposed or contested the petitioner's affirmative defense of mental disease or defect, despite the state's agreement that the petitioner suffered from a mental illness, and, because that finding was based on a credibility determination, it is unassailable.

Primarily on the basis of that factual finding, the court made a legal determination that the parties did not substantially agree on a not guilty by reason of mental disease or defect disposition for purposes of *Duperry*. The petitioner contends that the court improperly relied exclusively on trial counsel's subjective perception of whether a substantial agreement existed, thereby ignoring "the prophylactic purpose of *Duperry*," and that "[a] review of the record [of the criminal trial] demonstrates that this was not a truly contested case" and that the parties "substantially agreed" to the disposition. These contentions simply are not supported by the record, and, for the following reasons, we reject them.

Our resolution of the petitioner's claim rests on a construction of the language in *Duperry* requiring a canvass "in all future cases in which . . . the state *substantially agrees* with the defendant's claim of mental disease or defect . . . ." (Emphasis added.) *Duperry* v. *Solnit*, supra, 261 Conn. 329. As we have stated,

the court in *Duperry* did not define what it means to substantially agree. "[A]ppellate courts consistently have defined 'substantially' to mean to a considerable extent or degree." (Internal quotation marks omitted.) *State* v. *King*, 346 Conn. 238, 256, 288 A.3d 995 (2023); see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1245. The word "agree" is defined in part as "to concur in (as an opinion) . . . to consent to as a course of action . . . to accept or concede something . . . ." Merriam-Webster's Collegiate Dictionary, supra, p. 26. It follows, therefore, that, for the state to have substantially agreed with the petitioner's affirmative defense of mental disease or defect, it had to have consented to, accepted or conceded the affirmative defense to a considerable degree or extent. Although the petitioner is correct that "substantial agreement" does not mean that the state had to be in "complete agreement" with the affirmative defense of mental disease of defect, it nevertheless requires agreement with or acceptance of the affirmative defense to a large extent, such as what occurred in *Duperry*, in which "the parties presented their respective cases *without opposition*." (Emphasis added.) *Duperry* v. *Solnit*, supra, 314.

By contrast, in the present case the state opposed the petitioner's affirmative defense. First, in his case-in-chief, the prosecutor elicited testimony from Serrano that, in his efforts to stop the petitioner from attacking the victim, Serrano thought that the petitioner was "high on some drugs . . . ." Moreover, the prosecutor thoroughly cross-examined Westphal regarding his diagnosis of the petitioner, the petitioner's drug use, whether there is a violent aspect to patients with schizoaffective disorder, and whether the ingestion of PCP could cause an otherwise nonviolent person to become violent. Although the petitioner attempts to minimize the drug component of the state's theory of the case, it was the

central issue in contention. The petitioner's position, that the prosecutor's theory of the case relied on the petitioner's drug use as the possible cause for his violent outburst against the victim merely in a cursory fashion, is contradicted by the record. The prosecutor's line of questioning on his cross-examination of Westphal, as well as his closing argument, were aimed at demonstrating that the petitioner's assault of the victim was not prompted by his mental illness, as the petitioner's history demonstrated that he previously had been nonviolent, but, rather, may have been the result of the petitioner's use of PCP, which would have precluded the petitioner from establishing his affirmative defense under § 52a-13 (a) that he "lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." See General Statutes § 53a-13 (b) (1) (affirmative defense of mental disease or defect precluded when proximate cause is due to voluntary ingestion of drugs); see also footnote 6 of this opinion. Indeed, it was clear from the prosecutor's closing argument that he contested whether the petitioner had met his burden of establishing his affirmative defense and that the state did not agree that the petitioner's mental illness was the cause of the assault. The fact that the prosecutor ultimately was unsuccessful in his opposition does not undermine our conclusion that he did indeed oppose the affirmative defense. In his argument to the contrary, the petitioner conflates the question of whether he met his burden of establishing his affirmative defense of mental disease or defect with the question of whether the prosecutor contested that affirmative defense.

Moreover, even though the prosecutor conceded that the petitioner suffers from a mental illness, that is just one element of the affirmative defense. The second element, the causation element—whether, as a result

of the mental disease or defect, the petitioner lacked the substantial capacity to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law—undoubtedly was contested by the prosecutor. Consequently, we agree with the habeas court's determination that the prosecutor did not substantially agree with the petitioner's affirmative defense of mental disease or defect. Accordingly, the habeas court properly determined that *Duperry* does not apply to the present case. The petitioner's first claim, therefore, fails.

II

We next consider the petitioner's claim that the habeas court improperly determined that his trial counsel did not perform deficiently by failing to advise him regarding the canvass requirements of *Duperry* and his affirmative defense of mental disease or defect. The petitioner, relying on *State* v. *Ouellette*, supra, 271 Conn. 768–69, asserts that, even if the habeas court correctly determined that the underlying criminal proceeding was truly contested, "it was incumbent upon trial counsel to meaningfully convey the *Duperry* canvass requirements to the petitioner" and that "[a]dvising the petitioner of the canvass requirements set forth in *Duperry* was necessary" for trial counsel to ensure that the petitioner entered his plea knowingly and intelligently.[12] We do not agree.

[12] The petitioner confuses the language of our Supreme Court in *Ouellette* stating that, "in truly contested cases, we reasonably may presume that, in light of the adversarial nature of the proceeding, defense counsel will be particularly diligent in advising the defendant of the effect that a claim of mental disease or defect is likely to have on the defendant's rights"; *State* v. *Ouellette*, supra, 271 Conn. 768–69; as requiring counsel to convey the *canvass requirements* of *Duperry*, which, as our Supreme Court has made clear, must be conveyed only in cases in which " 'the state substantially agrees with the defendant's claim of mental disease or defect, with the result that the trial essentially is not an adversarial proceeding . . . .' " Id., 767.

We first set forth general principles of law that govern our review of claims of ineffective assistance of counsel. "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

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

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

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . .

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier. . . . [T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition. . . . [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 229 Conn. App. 548, 562–63, 327 A.3d 387 (2024), cert. denied, 351 Conn. 908, 330 A.3d 881 (2025).

The habeas court in the present case made the following findings in support of its determination that the petitioner failed to prove that trial counsel's representation was deficient: "First, as the court has found the credible evidence adduced supports [trial counsel's] characterization of the underlying court trial as 'adversarial' . . . the court finds summarily as follows: (1) [trial counsel] did not fail to advise the petitioner of the *Duperry* canvass requirements, as such requirements are inapplicable to the instant matter; (2) [trial counsel] did not fail to ensure that the petitioner was 'properly' canvassed. As this claim is duplicative of the claim immediately preceding, the same finding applies. There were no deficiencies in court canvasses in this matter; and (3) [trial counsel] was under no obligation to advise the petitioner of his opportunity to move to withdraw his plea or appeal the validity of his plea, as, given the inapplicability of [the] *Duperry* requirements to the instant matter, there were no deficiencies in the court's canvass.

"Additionally, the court credits the testimony of [trial] counsel. The court credits her testimony that after 'many, many conversations' between herself and the petitioner, '[they] made the decision together' that the [mental disease or defect] defense in [the] hopes of securing a . . . verdict [of not guilty by reason of mental disease or defect] was the best avenue to pursue. [Trial counsel] testified credibly [that] the petitioner believed, after consultation with mental health experts, that he would receive better mental health care in the custody of the respondent than with the Department of Correction. The consultations resulted in the production of reports that guided that defense team's decisions.

"[Trial counsel] testified that the petitioner was 'not always dealing with reality' and [that] 'many conversations' were necessary during the preparation of the defense. [Trial counsel] testified that she never guaranteed the [not guilty by reason of mental disease or defect] verdict, that she prepared [the petitioner] for the [potential] of a guilty verdict and a remand to [the] custody [of the Department of Correction], and [that she] advised him [that] the defense had to prove the [mental disease or defect defense] at trial. She further testified that she would have properly advised the petitioner that a [not guilty by reason of mental disease or defect] verdict was 'a very difficult disposition' to secure. . . . Further, [trial] counsel discussed options other than [a not guilty by reason of mental disease or defect] defense with the petitioner. . . . This court, based on the credible evidence adduced at the instant trial, finds that [trial] counsel's representation was not deficient, based on the petitioner's diagnoses, the underlying trial record, and the characterization of the incident in question. Finally, [trial] counsel testified credibly that the petitioner was 'happy' with the outcome of the underlying trial, as it was the outcome he

wanted [in that] he wished to be placed into a therapeutic setting rather than [with the Department of Correction] . . . .''

The habeas court also specifically found not credible the petitioner's testimony that, inter alia, he did not understand the consequences of asserting an affirmative defense of not guilty by reason of mental disease or defect and that his trial counsel failed to advise him regarding a commitment to the board. In particular, the habeas court found the petitioner's testimony to be ''self-serving and contrary to the credited testimony of [trial] counsel'' and that ''his assertions find no support in any part of the record of credible evidence adduced in this [matter], including [in] any portion of the underlying proceedings as contained in the exhibits provided to this court. Specifically, the petitioner has failed to establish (1) that [trial] counsel failed to advise him of and explore options other than a [mental disease or defect] defense, (2) that [trial] counsel pressured him to pursue [a mental disease or defect] defense as opposed to exploring other options . . . (3) that [trial] counsel advised him of a brief/short period of commitment to the [board], and (4) that [trial] counsel failed to research the law and consequences of pursuing an agreed or contested [mental disease or defect] defense and to properly advise the petitioner.''

In light of this court's conclusion in part I of this opinion that the canvass requirements of *Duperry* are inapplicable to the present case, which involved a contested criminal trial in which the state contested the petitioner's affirmative defense of mental disease or defect, the petitioner's claim that his trial counsel performed deficiently by failing to advise him regarding the *Duperry* canvass requirements necessarily fails.

To the extent that the petitioner also is claiming in this appeal that his trial counsel performed deficiently

by failing to advise him adequately regarding his affirmative defense of mental disease or defect, we conclude that this claim fails as well. The primary evidence offered in support of the petitioner's claim that his trial counsel performed deficiently was his own testimony at the habeas trial. The habeas court, however, specifically found not credible the petitioner's testimony that his trial counsel failed to properly advise him regarding his affirmative defense of mental disease or defect and that he did not understand the not guilty by reason of mental disease or defect process, as well as his contention that his trial counsel failed to advise him regarding a commitment to the board. On the other hand, the habeas court specifically credited trial counsel's testimony about the many conversations she had with the petitioner regarding his affirmative defense of mental disease or defect and the advice she had given him relating thereto.

"As our Supreme Court has observed, an appellate court does not . . . evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 179 Conn. App. 160, 173, 178 A.3d 1079 (2018); see also *Johnson* v. *Commissioner of Correction*, 229 Conn. App. 577, 614, 327 A.3d 916 (2024) ("[t]his court must defer to the habeas court's weighing of the facts and determinations of credibility"), cert. denied, 351 Conn. 902, 329 A.3d 239 (2025).

The habeas court's determination that trial counsel did not perform deficiently was based on its assessment of the credibility of the testimony of trial counsel and the petitioner, and this court cannot disturb that credi-

bility assessment. See *Smith* v. *Commissioner of Correction*, supra, 179 Conn. App. 173. "Because the petitioner's claim is premised entirely on issues of credibility, he cannot prevail." *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 72, 174 A.3d 206 (2017); see also *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 328, 159 A.3d 1174 ("[w]e will not disturb the habeas court's finding as it relates to the petitioner's credibility"), cert. denied, 327 Conn. 904, 170 A.3d 1 (2017). The habeas court, therefore, correctly determined that the petitioner failed to meet his burden of demonstrating that his trial counsel performed deficiently by failing to advise him properly regarding his affirmative defense of mental disease or defect.[13] See *Crocker* v. *Commissioner of Correction*, 220 Conn. App. 567, 590–94, 300 A.3d 607, cert. denied, 348 Conn. 911, 303 A.3d 10 (2023); *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 483–84, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

Accordingly, we conclude that the habeas court properly denied the petitioner's operative habeas petition.

The judgment is affirmed.

In this opinion the other judges concurred.

ISMAIL ABDUS-SABUR *v.* COMMISSIONER OF CORRECTION
(AC 46937)

Alvord, Suarez and Clark, Js.

Syllabus

The respondent, the Commissioner of Correction, appealed, on the granting of certification, from the habeas court's judgment granting in part the petitioner's habeas corpus petition, in which the petitioner claimed, inter alia,

[13] In light of this determination, we need not address whether the petitioner established the prejudice prong of the *Strickland* test. See *Taft* v. *Commissioner of Correction*, supra, 229 Conn. App. 563.

that he was actually innocent of the murder of the victim. The respondent contended that the court improperly concluded that M, the petitioner's trial counsel, had rendered ineffective assistance by failing to subpoena the petitioner's brother, I, and to present I's testimony that he had committed the murder. *Held*:

The habeas court improperly granted in part the habeas petition, as the petitioner failed to overcome the strong presumption that M's informed, strategic decision not to subpoena I or to present I's testimony was reasonable trial strategy, which the court improperly concluded amounted to deficient performance.

At the time of trial, it was reasonable for M to have concluded that I had been uncooperative and that his testimony would be unpredictable in light of I's steadfast, pretrial reluctance to meet with and to admit to M's investigators his responsibility for the crime, as well as I's failure to come forward at the petitioner's criminal trial and his avoidance in speaking about his role in the victim's murder until he was subpoenaed to testify at the habeas trial nine years later.

The habeas court also failed to consider, from M's point of view, the risk that I's testimony could corroborate that of the state's witnesses identifying the petitioner as the gunman or, if confronted with videos I had made in which he confessed to the crime, that I could testify that the videos were false and had been made at the petitioner's direction, which might have undermined the central theory of the defense case, which was that the state's witnesses were not credible.

Argued February 3—officially released July 1, 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 granting the petition in part, from which the respondent, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Kelly Masi*, senior assistant state's attorney, for the appellant (respondent).

Nicole P. Britt, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellee (petitioner).

Opinion

ALVORD, J. The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting in part the third amended petition for a writ of habeas corpus filed by the petitioner, Ismail Abdus-Sabur. On appeal, the respondent claims that the court incorrectly determined that the petitioner's criminal trial counsel had rendered ineffective assistance by failing to subpoena and present the testimony of the petitioner's brother. We agree and, accordingly, reverse in part the judgment of the habeas court.

The following facts, as this court set forth in the petitioner's direct appeal from his conviction, and procedural history are relevant to our resolution of the present appeal. "On the evening of January 17, 2014, the [petitioner] was at an apartment on the third floor of a Waterbury housing complex known as 'Brick City.' The [petitioner's] friends, Arvaughn Clemente and Daniel Clinton, were hosting a house party at the apartment. The [petitioner's] brother, Isa Abdus-Sabur (Isa),[1] and Ryan Curry, Sthalron Freeman, and Katrina Montgomery were also in attendance. Clemente was dating Ja-Ki Calloway, who was also in the apartment. Calloway's father, Kareem Morey, Sr. (victim), rented a second floor apartment in the same complex, where he resided with his adult son, Kareem Morey, Jr. (Kareem). On the evening of January 17, 2014, his other son, Kentrell Morey, was also at the housing complex.

"That night, Calloway's brother, Kareem, learned that Clemente had assaulted Calloway, and became angry. Kareem and Kentrell then presented themselves at the

[1] At trial, the witnesses referred primarily to the individuals at Brick City at the time of the shooting by the following nicknames: the petitioner was known as "Get Rich" or "Rich," Isa was known as "Caesar" or "Ceez," Clemente was known as "Problem," and Clinton was known as "Country" or "DaDa."

third floor apartment and demanded that Calloway leave the apartment, but she refused. Kareem wanted to fight Clemente for having assaulted his sister. A verbal altercation then ensued between the Morey brothers and the men inside the apartment, which spilled onto the landing outside the apartment. The altercation escalated into a fistfight between a number of the party attendees and the Morey brothers.

"After the fight ended, the Morey brothers, upset by the altercation, left and walked to a nearby neighborhood to recruit additional people to renew the fight. They also called the victim, who had not been present at the initial altercation, and he informed them that he would return home. When the Morey brothers left, the partygoers returned to the third floor apartment. At this point, Montgomery overheard the [petitioner] mention a gun to the other men at the party.

"At about 10:30 p.m., the Morey brothers returned to Brick City with four additional men. Around this time, the victim also returned and parked his car on the street outside of the housing complex. The Morey brothers then entered the interior courtyard of Brick City through a passage from the street and climbed the stairs to the landing outside of Clemente and Clinton's third floor apartment. The victim remained standing at ground level in the courtyard near the foot of the stairs. The Morey brothers began kicking Clemente and Clinton's apartment door. Eventually, the door to the apartment opened, but all the lights were off inside the apartment. Shortly thereafter, Kareem heard the 'click, click' sound of a gun. The Morey brothers then fled by descending the stairs toward the courtyard.

"As the Morey brothers retreated down the stairs, the occupants of Clemente and Clinton's apartment emerged onto the third floor landing overlooking the courtyard. Within the crowd on the third floor porch

were the [petitioner], Isa, Clemente, Clinton, Curry, and Freeman. The [petitioner] then began firing a black handgun from the railing of the landing toward the people in the courtyard below.

"By the time the [petitioner] started shooting, the Morey brothers had arrived at the bottom of the stairs, where the victim was standing. When the victim heard the first gunshot, he pushed Kareem out of the way. The victim was then struck in the chest with a .45 caliber bullet. He told his sons that he had been hit and ran out of the courtyard through the passage toward his parked vehicle. The victim was driven to St. Mary's Hospital in Waterbury, where he later died as a result of the gunshot wound to his chest.

"Following the shooting, the [petitioner] and Isa ran to the [petitioner's] car and left Brick City. The next day, the [petitioner] and Isa pulled up in a sport utility vehicle [(SUV)] alongside Kentrell's girlfriend, Zyaira Cummings, while she was walking on a street near Brick City. The [petitioner] then said to Cummings, 'they're next,' which she interpreted to be a threat against the Morey brothers, whom she then warned about the interaction. On January 18, 2014, the day after the shooting, the [petitioner] fled to Southington. On January 21, 2014, the [petitioner] traveled to New York City. That same day, the police obtained a warrant for his arrest. The [petitioner] eventually turned himself in on January 27, 2014." (Footnote added.) *State* v. *Abdus-Sabur*, 190 Conn. App. 589, 590–93, 211 A.3d 1039, cert. denied, 333 Conn. 911, 215 A.3d 735 (2019).

At trial, the petitioner was represented by Attorney Michael Moscowitz. "After a trial by jury, the [petitioner] was convicted of murder and criminal possession of a firearm. The court sentenced the [petitioner] to forty-five years of incarceration for his conviction of murder and two years of concurrent incarceration

for his conviction of criminal possession of a firearm, for a total effective sentence of forty-five years of incarceration."[2] Id., 593.

The petitioner commenced the present habeas action in June, 2018. In his third amended petition, filed in February, 2023, the petitioner alleged four counts. In count one, the petitioner asserted a claim of actual innocence. In count two, the petitioner alleged that Moscowitz provided ineffective assistance of counsel by, inter alia, failing to pursue a third-party culpability defense implicating Isa as the shooter, failing to properly investigate whether Isa was the actual shooter, and failing to consult with or present the testimony of an expert on eyewitness identification.[3] In counts three and four, the petitioner alleged that his appellate counsel, Attorney Jodi Zils Gagne and Attorney Raymond Durelli, performed deficiently by failing to brief adequately a claim that the court improperly admitted evidence of the petitioner's alleged gang affiliation.

The habeas court, *Bhatt*, *J.*, held a trial on the petition in April and May, 2023. The court heard the testimony of Isa; the petitioner's sister, Aneesa Amatus-Sabur (Aneesa); the petitioner; Christina Lougal, the habeas investigator for the petitioner's counsel; James Olundsen, a digital forensics examiner; Durelli, who represented the petitioner in his direct appeal; Moscowitz;

[2] The petitioner filed a direct appeal from his criminal conviction. He claimed that "(1) there was insufficient evidence to prove beyond a reasonable doubt that he possessed the specific intent to kill, as required for the crime of murder, (2) the trial court improperly denied his request for a third-party culpability instruction, and (3) that the court improperly admitted evidence of his gang affiliation." *State* v. *Abdus-Sabur*, supra, 190 Conn. App. 590. This court affirmed the judgment of conviction; see id., 606; and our Supreme Court denied the petitioner certification to appeal. See *State* v. *Abdus-Sabur*, 333 Conn. 911, 215 A.3d 735 (2019).

[3] The petitioner also alleged that Moscowitz had provided ineffective assistance by failing to challenge Cummings' account of the petitioner's threat on the day following the shooting and by failing to consult with or present the testimony of a cell phone records expert. The habeas court denied these claims.

Ismael Perez, an investigator with the Office of the Public Defender in Waterbury; James Naccarato, an inspector with the conviction integrity unit of the Office of the Chief State's Attorney; and Paul Cicarella, an investigator for Moscowitz. The petitioner offered, and court admitted into evidence, two video recordings in which Isa took responsibility for the shooting (confession videos).[4]

Prior to testifying, Isa had been appointed counsel and was advised as to his fifth amendment right against self-incrimination. Isa testified that he was at a party at the third floor apartment in Brick City on the night of the shooting when a group of people arrived to fight his friend, Clemente. The fight happened outside and, after the group tried to "jump" Clemente, Isa and others joined the fight. Isa testified that the group left Brick City but then returned and kicked in the door of the third floor apartment. Isa testified that "somebody screamed gun" and Isa ran outside onto the third floor landing and "shot downwards" twice, but not at any particular person. He testified that the petitioner was behind the refrigerator at the time of the shooting. Isa testified that he went home after the shooting and that Aneesa drove him to the train station the next day, where he traveled to New York and stayed for "[l]ike a month."[5] Isa testified that he did not know that anyone was hit by the gunfire until the petitioner called him about two days after the shooting and told him that the petitioner was going to be charged for the shooting. Isa told the petitioner that he would turn himself in and take responsibility for the shooting.

Isa testified that, before the petitioner's criminal trial, in 2014, Isa created, with Aneesa's help, the two confession videos, in which he took responsibility for the

[4] There are two confession videos because Isa recorded the video twice. As the habeas court found, the two videos are substantively the same.

[5] On cross-examination, Isa testified that he had stayed in New York for about four months.

shooting.[6] Isa testified that he was concerned at the time about retaliation from the victim's family. Isa testified that he made the confession videos because the petitioner asked him to, and that he told the truth. Isa testified that he made the videos of his own free will and that no one threatened him or told him what to say. Isa testified that he had never brought the confession videos to the police but that he did tell Moscowitz' investigator about them before the petitioner's criminal trial. Isa testified that Moscowitz did not ask for a copy of the confession videos, and Isa did not show him the videos.

Isa further testified that he had spoken to Moscowitz' investigator, who told him that he would be called to testify at the petitioner's criminal trial but that he was not called to testify. Isa testified that he was not in hiding at the time and was never issued a subpoena. Isa testified that he did not attend the trial and that the investigator, without explanation, told him not to come to the trial. Isa testified that he would have testified at the petitioner's criminal trial had he been asked to do so. Isa testified that he had told his mother and siblings that he was the shooter at about the time that the trial started.

Isa testified that, during the years following the shooting, he had phone conversations with an attorney more than twenty times and that the attorney had told him not to come forward or speak to anyone. Isa testified that, when contacted in 2020 by the habeas investigator, Lougal, he told her that he was the shooter.

Aneesa testified that she was not present on the night of the shooting but that she drove Isa to the train station

[6] Olundsen testified that he had reviewed the confession videos and saw no sign that they were manipulated or edited. Olundsen also testified that the date stamp on the videos was November 29, 2014, but, because the dates and times are set by the user of that particular camera, he was unable to verify the date stamp.

the next day. Aneesa testified that Isa told her that something had happened, but did not tell her what. Aneesa testified that Isa eventually told her that he was the shooter. Aneesa testified that she first learned of Isa's involvement from Attorney Leslie Cavanagh, a public defender who initially was appointed, prior to Moscowitz, to represent the petitioner. Aneesa testified that she and her mother went to the public defender's office with Isa to speak with Cavanagh, but they were informed when they arrived that Cavanagh "would not be speaking to [them]."

With respect to the confession videos, Aneesa testified that "[i]t was asked of [Isa] to make the video[s] in case something were to happen to Isa. If, say, he was no longer here. That we would have this as evidence as to his doing this." When asked whether Isa made the videos willingly, she testified, "[f]or the most part, yes. . . . It wasn't forced" but that he had some "hesitation" and "apprehension." Aneesa testified that she did not share the confession videos with Moscowitz, the police, or the state's attorney's office but that Moscowitz was aware that they were available and did not ask for them.

Aneesa testified that Moscowitz "didn't much want to speak" to her when she tried contacting him and that his secretary at one point told her that she had Isa's name and that "Moscowitz was well aware of . . . Isa." Aneesa also testified that it was her understanding that Moscowitz was aware of the existence of the confession videos. Aneesa testified that she tried to talk to Moscowitz about what she knew but never brought up the videos with him. Aneesa testified that she did not speak with an investigator from Moscowitz' office. According to Aneesa, it was her understanding that she was "on the subpoena list, and none of us were called." Aneesa further testified: "[C]ountless times, Isa tried and attempted to meet with these counsel members

that were representing [the petitioner] to make a statement. To take ownership. But it was always met with, hold on, just wait, oh, then come, no, hold on again. It was always this back and forth, back and forth situation."

The petitioner testified at the habeas trial that he was in the third floor apartment at the time of the shooting. The petitioner testified that he told Moscowitz at their first meeting that Isa was the shooter. According to the petitioner, he told Moscowitz about the confession videos on the "second or third court date with him," and he continued to mention the videos to Moscowitz throughout the whole time that Moscowitz represented him.[7] The petitioner testified that Moscowitz told him that his investigator had spoken with Isa. The petitioner testified that Moscowitz did not obtain the confession videos because he did not believe they were of value and that Moscowitz "had felt that he was going to be able to do whatever he was going to do without [them]." The petitioner testified that Moscowitz thought that no one would take the confession videos seriously. The petitioner testified that Moscowitz did not talk to Isa, any other family members, or anyone who was present at the shooting scene about Isa's involvement. He paraphrased Moscowitz' plan as wanting "to wait [until] trial and [for] lack of . . . better words, basically, spring [Isa's testimony] on the prosecution." The petitioner testified that Isa never was subpoenaed.[8]

[7] The petitioner also testified that he had told his appellate counsel that Isa was responsible for the shooting and that the confession videos existed. Durelli also testified that the petitioner had told him that he was innocent, that Isa had committed the crime, and about the existence of the videos. Durelli testified that he told the petitioner that he "should certainly raise [the issue] with his habeas attorney if and when the time came."

[8] At his sentencing, the petitioner stated: "[E]ven though I've been convicted of killing [the victim], the conviction is wrong. I'm not responsible for his death. Throughout this case, I had believed the person responsible would have came forward, but that did not happen. So, at this time I stand before you to be punished for a crime I did not commit."

Lougal testified that she first met with Isa in September, 2020, at which time he said that he was present during the shooting but did not state that he was the shooter. According to Lougal, she met with Isa a second time in November, 2020, and he admitted to her that he was the shooter and told her that he had thrown the gun in the East River in New York City.

Moscowitz testified that he had practiced law as a criminal defense attorney for more than thirty years. He testified that he was appointed to represent the petitioner and received the state's discovery but did not speak with or obtain the file from Cavanagh. Moscowitz hired two investigators, Joe DeMarco and Cicarella. Moscowitz reviewed a surveillance video of the location of the shooting (surveillance video) that had been obtained from a tenant of Brick City and testified that "[y]ou could not identify anyone from the video, but you could see all the figures and where they went." Moscowitz testified that his theory of the case was "[t]hat the individuals that identified [the petitioner] could not have identified him because they were not in a position on the landings to observe who was on the third landing."

Moscowitz testified that the petitioner told him that his brother "did the shooting and was going to come into court and testify to that factor." Moscowitz did not recall whether the petitioner had told him that Isa had confessed to other family members, and Moscowitz testified that he had "never heard" of videos in which Isa confessed. Moscowitz testified that he had met Isa only once; Isa approached him during jury selection and told him he was the petitioner's brother, but "he did not indicate he did—that he committed any murder, anything like that." Moscowitz testified that he told his investigators about Isa and that they tried to arrange an interview with Isa, but he never showed up. Moscowitz believed that the investigators had tried "at least five

to six times to meet with [Isa], and he would never show up." Moscowitz testified that "we were trying to make contact with [Isa]—and we never made contact with him—because we wanted to know, did you commit the murder, and then prep him to do one of two things: either turn himself in to the police, which he never did, or to come in and testify, which he never did." Moscowitz did not recall speaking to any other family members but believed that his investigators spoke to family members in an effort to find Isa. Moscowitz testified that his investigators "went to [Isa's] location, but he was never there." Moscowitz testified that he believed his investigators "spoke to [Isa] over the phone and, once again, tried to meet with him. But that . . . was never fruitful."

Moscowitz testified that he did not subpoena Isa because "my client said his brother is going to come in, and we never—we only met him that one time, and that one time was out in front of the courthouse where he just left." Moscowitz testified that he would have subpoenaed Isa if he or his investigators could have found him, but they could not find him. Moscowitz also stated: "I also, first, before I subpoenaed, wanted to find out whether he had, you know, committed the murder or not, and we didn't know that other than what [the petitioner] had told us." Moscowitz stated that he had "a questionnaire, that he was going to ask [Isa] questions if he did take the [witness] stand." Moscowitz testified that he filed, in accordance with his standard procedure, a motion to sequester witnesses, which he acknowledged would have prohibited Isa from entering the courtroom, but that Isa could have waited in the hallway. On cross-examination, Moscowitz again stated that he "never subpoenaed [Isa] because [he] wanted to speak to him first," and also acknowledged that "it would have been the best thing" for Isa to come in and tell him that he was the shooter.

When asked on cross-examination whether he would have used the confession videos if he had them, Moscowitz testified that he would have had to demonstrate Isa's unavailability: "If I could lay a proper foundation to introduce the video[s], because it's an interesting concept. A video comes in, I just can't throw it into evidence. . . . I have to lay a foundation. So, someone would have to testify that they were present when the—and they took the video. . . . I'd have to have a proper foundation because I know the state's attorney would have objected unless I laid a foundation."

Perez testified that he and Cavanagh met with the petitioner, who told them that he was innocent and that his brother was the shooter. Perez also testified that he had a vague recollection of the petitioner telling him that his brother had confessed to other family members. Perez testified that the petitioner did not tell him about any videos made by Isa. When asked whether Isa had made an attempt to come forward to the public defender's office, Perez stated: "I do remember at one point I became aware that he was going to come in. I think he came in, and . . . Cavanagh, I assume was due to ethical reasons, she contacted one of the public defenders from the [geographical area court] . . . I think it was Attorney Terri Dalton—to speak to [Isa] first. And I don't know what they talked about. I'm sure maybe his rights were read or whatever, explained things. And the next thing I hear is that he left. So, that's all I remember."

Naccarato testified that the conviction integrity unit of the Office of the Chief State's Attorney had received a request to open a case on the petitioner's behalf. Naccarato began working on the case in July, 2022. Naccarato testified: "I had Isa's phone number, and I called him. I left a message [stating] who I was and why I was calling. I waited. Several weeks went by . . . with no response. I then found Aneesa's phone number,

his sister. I contacted Aneesa and told her who I was and what I was doing, and that I wanted to speak to Isa. So . . . Aneesa said that she would speak to Isa and let him know, and so it was my understanding that I may get a call back from Isa." Naccarato testified that he called Isa again in September, 2022, and Isa said that he would come in, gave Naccarato a date, and said that he wanted to speak with his attorney and have his attorney contact Naccarato. Naccarato testified that he made one more attempt to contact Isa at the end of March, 2023.

Cicarella testified that he was hired to investigate the petitioner's criminal case in September, 2016. Cicarella testified that he was not aware of any videos in which Isa made a statement about the shooting. Cicarella testified that he spoke with Isa twice, once at Isa's home. Cicarella testified: "[W]hen we spoke with him, anytime the conversation came up about who committed this crime or did he do it—we asked it directly because we were told that he may have committed the crime by our client and, I believe, our client's sister—and at that point he said he did not—would not answer it. He wanted to consult with his attorney. And we made a few other attempts to get a hold of him again to ask that or get him to come to court . . . ." Cicarella reiterated: "[He] did not answer the specific question about who committed the crime or if he committed the crime, and he said he would have to talk to his attorney."

Isa was recalled to testify by the respondent's counsel and again confirmed that he wanted to continue testifying and that he understood that there was no statute of limitations applicable to the crime of murder, for which he could be charged and imprisoned. Isa again testified that he was the shooter and that he got the gun from on top of the refrigerator. Isa testified that he did not recall being contacted by the conviction integrity unit. He also testified that he had spoken to

Attorney Larry Hopkins, who advised him not to go to the police. Isa testified that, when he spoke with Moscowitz outside the courtroom, he did not tell Moscowitz that he was the shooter.

On August 29, 2023, the habeas court, *Bhatt*, *J.*, issued a memorandum of decision in which it granted in part and denied in part the habeas petition. The court rejected the petitioner's actual innocence claim on the ground that Isa's confession was not newly discovered evidence, explaining that it was "known to [the petitioner] that Isa would admit to being the real shooter and [that] Aneesa recorded Isa confessing to the crime." The court also rejected the petitioner's ineffective assistance of appellate counsel claims.

The habeas court found that Moscowitz performed deficiently by failing to pursue and introduce evidence of third-party culpability with Isa as the third party. The court first stated that it found Isa's confession credible. It explained: "It is significantly compelling when an individual takes the [witness] stand against the advice of counsel, waives their fifth amendment privilege against self-incrimination and confesses to committing a crime for which there is no statute of limitations and which exposes them to sixty years' incarceration. Isa appeared before this court, having been subpoenaed, and took the [witness] stand to admit to being the shooter. The court cannot disregard this without actual evidence demonstrating that the confession was false or not credible: for instance, physical evidence making his version of events not possible or the testimony of all the other witnesses and the state's theory being inconsistent with the proffered version or actual evidence of a credible motivation for him to fabricate and expose himself to sixty years' incarceration. The fact that Isa confessed twice under oath, subject to cross-examination and the

penalty of, effectively, life in prison, significantly bolsters his credibility. Common factors that would undermine the credibility of Isa's confession are also not present: he was not a codefendant who was convicted of the same offense and has served or is serving his sentence; nor is he serving a lengthy sentence for another offense, thus leaving him with nothing to lose if he falsely admits to this crime to save his brother; and this is not a recent confession, made for the first time some nine years after the incident. There is no evidence that Isa suffers from some terminal illness that gives him incentive to lie about being the actual shooter nor of other potential motives that Isa could have. Further, the court notes that his version of events is generally consistent with what was presented at the criminal trial. Notably, it is undisputed that both he and [the petitioner] were present on the third floor shortly before the shooting. All of the above lead the court to find Isa's testimony credible." (Footnotes omitted.)

The habeas court also referenced the fact that the family of the petitioner and Isa attempted to have Isa meet with Cavanagh shortly after the petitioner's arrest, but that Isa left the building after meeting with counsel. The court also found that the petitioner told Moscowitz that Isa would confess to the crime and that the confession videos were recorded on or about November 28 or 29, 2014. The court further found that the petitioner told Moscowitz about the confession videos well before 2017. The court found that Moscowitz' investigators knew where Isa lived but that Isa was not subpoenaed to testify at the criminal trial. The court rejected Moscowitz' explanation that he did not want to subpoena Isa before speaking to him as "not a valid reason for not subpoenaing Isa."

The habeas court acknowledged that Isa failed to follow up when Moscowitz and his investigator attempted to meet with him but nonetheless determined

that the failure to subpoena Isa under such circumstances constituted deficient performance, citing decisions from other jurisdictions. The court found that, had Moscowitz subpoenaed Isa, he would have appeared, reasoning: "There is no evidence that Isa was in hiding or had fled the state. He was recalcitrant in talking to . . . Moscowitz' investigators, stating that he would have to consult with his own attorney before admitting to his involvement in the incident. However, he also testified that he did tell . . . Moscowitz' investigator about the videos he recorded. He was on the state's witness list, and there was a sequestration order prohibiting witnesses from being present during trial. It is also important to note that the one time Isa *was* subpoenaed to court—for this habeas trial—he appeared, consulted with counsel, took the [witness] stand against the advice of counsel and confessed under oath and subject to cross-examination to being the actual shooter. It is for that reason that the court also concludes that he would have testified in accordance with his videotaped confession and his testimony to this court that he was the real shooter." (Emphasis in original.) The court further found that, even if Isa had invoked his privilege against self-incrimination at the criminal trial, the confession videos would have been admissible as substantive evidence as a statement against penal interest.

Finally, the habeas court concluded that the petitioner was prejudiced by Moscowitz' "failure to present Isa's confession to the jury . . . ." Accordingly, the court granted the petition in part. On September 5, 2023, the court granted the respondent's petition for certification to appeal.[9] This appeal followed.

[9] On September 8, 2023, the habeas court granted the petitioner's petition for certification to appeal. Although the petitioner filed an appeal challenging the court's rejection of his actual innocence claim, he subsequently withdrew that appeal.

We first set forth guiding principles of law, as well as our standard of review, which are well settled. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"Because our resolution of the present case turns on our review of the performance prong, some additional explication of that prong is necessary. In any case presenting an ineffectiveness claim, the performance inquiry

must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . Nevertheless, [j]udicial scrutiny of counsel's performance *must be highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court *must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action *might* be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"Inasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues

that may potentially lead to facts relevant to the defense of the case. . . .

"Nevertheless, strategic choices made after thorough investigation of law and facts relevant to plausible options *are virtually unchallengeable*; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. . . .

"Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the

attorney, without a reasonable investigation *and without adequate explanation*, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it. . . . Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. . . .

"[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, [including] when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case. . . .

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . The United States Supreme Court has cautioned that a reviewing court, in considering whether an attorney's performance fell below a constitutionally acceptable level of competence pursuant to the standards set forth herein, must properly apply the strong presumption of competence that *Strickland* mandates and is *required* not simply to give [trial counsel] the benefit of the doubt . . . but *to affirmatively entertain the range of possible reasons* [*that*] *counsel may have had for proceeding as* [*he*] *did*. . . . This strong presumption of professional competence extends to counsel's investigative efforts . . . as well as to choices made by counsel regarding what defense strategy to pursue." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197

Conn. App. 822, 829–34, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).

With the foregoing legal principles in mind, we turn to our discussion of the merits of the respondent's claim on appeal. The respondent claims that the habeas court improperly determined that Moscowitz had rendered ineffective assistance of counsel by failing to subpoena and present the testimony of Isa at the petitioner's criminal trial. Our de novo consideration of whether Moscowitz' decision not to subpoena and present the testimony of Isa was objectively reasonable under the circumstances requires a comprehensive discussion of the evidence presented to the jury at the criminal trial.

At the petitioner's criminal trial, the state presented the testimony of Cindy Nunez, who lived in the second floor apartment with her former boyfriend, Taquan Price, Kentrell, and Kareem. The victim sometimes also stayed in the second floor apartment. Nunez testified that, on the night of the shooting, Kareem "got jumped" upstairs and said that Kentrell was going to call their father and get some people to return upstairs to settle the fight. Nunez recalled hearing a car horn and looked outside and saw the victim's car. Nunez testified that she went outside to the second floor porch and saw Kareem, Kentrell and about four other people run up the stairs and kick open the third floor door. Clinton exited the third floor apartment, with about six or seven people following behind him, and Clinton was yelling at Kareem and Kentrell. Kareem wanted to fight Clemente. The petitioner, who Nunez had seen on four occasions prior to the shooting, was one of the people exiting the third floor apartment. Nunez testified that she saw the petitioner on the third floor porch holding a handgun. She saw a flash from the gun, heard a loud boom and looked down and saw that her leg was bleeding. Nunez testified that she heard three gunshots. Price told her

that the victim had been shot. Nunez went to the hospital to see what happened but did not seek medical treatment and, after waiting for a while, went home.

Nunez testified that she did not give a statement to the police on the night of the shooting because she was scared that the Bloods were going to "do something" to her. A few days after the shooting, detectives stopped Nunez on the street and told her that she needed to go with them to the police station to give a statement. Nunez identified the petitioner in a sequential photographic array. Nunez testified that Isa was at Brick City on the night of the shooting, but she did not know whether he was present on the third floor porch at the time of the shooting.

On cross-examination, Nunez testified that she told a former friend, Queyla Martinez, on the day of the shooting that she had heard two gunshots and that she did not see who had fired the gun. On redirect examination, Nunez explained that she had lied to Martinez when she told her that she did not see who fired the gun, but that she "didn't want to talk about it with anyone" and confirmed that she was sure that it was the petitioner who had the gun. Nunez was recalled by the state and testified that she told Martinez that Kareem said that it was Clinton who had shot the victim.[10] Nunez repeated her testimony that she saw the petitioner shoot the gun.

The state also presented the testimony of Cummings, who stated initially that she did not want to testify and was scared. She testified that she went to Brick City on the night of the shooting. Along the way, she saw

[10] The state recalled Kareem, who testified that he had never told Nunez that Clinton shot the victim. The petitioner presented the testimony of Martinez, who testified that Nunez had told her on or about January 18 or 19, 2014, that Nunez did not know who shot from the third floor porch but also told her during the same time period that Clinton was the shooter.

knives and picked them up and put them in her boots. When she arrived at Brick City, she saw the victim getting out of his car and gave him a knife. She testified that, after walking into Brick City, she heard gunshots coming from the third floor. She saw the victim push Kareem to the floor and heard the victim say that "he was hit." Cummings testified that she had known of the petitioner for about three years. She testified that she saw the petitioner, Isa, and others on the third floor. She testified that she saw a gun, about eight and one-half inches in length, but did not testify as to who was holding the gun. After the victim was brought to the hospital, Cummings went to the hospital and later to the police station and gave a statement. Cummings testified that she lied in her first statement to the police when she told them that she was not present for the shooting. Cummings testified that, on the day after the shooting, a silver SUV drove up next to her, and the petitioner rolled the window down and said, "they're next," and then drove away. Isa also was in the car with the petitioner. Cummings testified that she warned Kentrell and Kareem of this threat.

On cross-examination, Moscowitz questioned Cummings regarding her statements to the police on January 18 and 19, 2014. With respect to the January 18 statement, Cummings testified that she had told the police that she was on Willow and Johnson Streets, which are not near Brick City, when she heard the gunshots. Cummings testified: "I indicated that that whole statement was false." Cummings testified that she told the truth in her January 19 statement to the police, in which she stated that she did not see who was shooting but she knew that it was coming from the third floor porch. Cummings testified that she did not see Nunez in the courtyard.

Pursuant to a capias, Kareem appeared and testified that he and Kentrell had gotten into a fight with the

petitioner, Isa, and others. Kareem left to get more people and called the victim. Kareem returned to Brick City, went upstairs to the third floor porch, and kicked open the apartment door. The lights were off in the third floor apartment. Kareem testified that he called Clemente out of the apartment to have a fistfight. Kareem testified that Kentrell pulled him back from the door of the third floor apartment and, when he got down to the courtyard, looked up and saw the petitioner and Isa on the third floor porch. The victim and others were present in the courtyard. Kareem testified that he heard gunshots and saw the petitioner holding a gun that was "pointed right down." Kareem testified: "[T]he bullet was really meant for me, but [the victim] ended [up] pushing me out the way . . . ." Kareem testified that he saw the petitioner and Isa run away and leave in a silver Nissan SUV, and that he tried to run after the vehicle. Kareem then went to the hospital.

Kareem gave a statement to the police on the night of the shooting and a second statement a few days later. Although he told the police that he saw the petitioner, Isa, and others inside the third floor apartment when the door opened, he testified at trial that he did not recall seeing them inside. Kareem also testified that he did not tell the police when he gave them his first statement that he had seen who shot the victim. When he gave his second statement, he told the police that the petitioner shot the victim. Kareem testified that he did not tell the police at first because he was scared of the petitioner, who was in a gang, and felt like he "was next."[11]

On cross-examination, Kareem testified that Nunez did not live with him. Kareem further testified that the petitioner and Isa look alike because they are brothers.

[11] On cross-examination, Kareem testified that he also was afraid of being arrested.

Kareem stated that he had only seconds, not minutes, to look upstairs from the courtyard to the third floor, and acknowledged that it was "dark up there"[12] and that two of the three men he saw, the petitioner and Isa, looked very similar. Kareem testified that, during the next two days following the shooting and before he returned to the police department on January 21, 2014, to give his second statement, he had heard "on the street" that it was the petitioner who had shot the victim. On redirect examination, Kareem reiterated that he had seen the man who shot the victim and that there was no doubt in his mind that it was the petitioner.[13]

During closing argument, Moscowitz argued that the state's case centered on Nunez and Kareem[14] and emphasized to the jury the conflicting testimony the state had presented. With respect to Nunez, Moscowitz advanced the argument that she could not have seen the shooter because her view was blocked by the stairs. Moscowitz urged the jury to examine closely the surveillance videos and suggested to the jury: "You'll have to

[12] On redirect examination, Kareem testified that there was enough light to see the third floor. Justin Rodriguez also was present at Brick City on the night of the shooting and testified at trial pursuant to a capias. On cross-examination, he testified that it was dark on the third floor porch and that he did not see who fired the gun. Rodriguez testified that he was on the second floor, behind the staircase and next to Nunez, at the time of the shooting. Rodriguez' statement to the police included the following: "Another guy named Rich [the petitioner's nickname] was there, too, but he wasn't fighting like those other guys. He just . . . kept telling them to get them every time Kareem and Kentrell got loose." At trial, Rodriguez testified that he did not know anyone named Rich and did not recognize the petitioner.

[13] Gary Pelosi, an inspector with the Division of Criminal Justice, testified that he had met with Kareem. Pelosi testified that Kareem reviewed the statement in which he identified the petitioner as the shooter and reaffirmed that it was correct. Pelosi testified that, when he informed Kareem that he would have to testify regarding the statement and its truthfulness, Kareem's demeanor changed and he said that the portion of this statement in which he identified the petitioner as the shooter was not true and that he did not know who the shooter was. Pelosi testified that he met with Kareem a second time and that Kareem said that the petitioner was the shooter, and that he was afraid and did not want to testify.

[14] Similarly, the prosecutor argued in closing argument: "Ultimately, this case comes down to the credibility of . . . Nunez and . . . [Kareem]."

play it yourself and you'll be able to position people as to where they were and how fast this happened, and that would be as to how it was—someone was able to observe anything since it happened so fast." Moscowitz also reiterated Nunez' testimony that she had lied to Martinez that she did not know who shot the victim. Moscowitz also highlighted that Kareem first told the police that he did not know who shot the victim and that there was evidence that Kareem told Nunez that Clinton was the shooter.

During its deliberations, the jury sent a note asking to review portions of Nunez' testimony, including "where she was standing," "who was holding the gun and where the gun was pointed toward," and "what she heard during [the] shooting event." The jury also asked how many statements Nunez gave to the police and when she gave them, and asked to rewatch a portion of the surveillance video.

Having set forth the evidence presented at the criminal trial, we turn to the respondent's specific arguments on appeal. The respondent argues that the habeas court improperly determined that the petitioner had satisfied his burden of demonstrating that Moscowitz' conduct fell outside the wide range of reasonable professional assistance. We agree with the respondent that the petitioner failed to demonstrate that Moscowitz' informed, strategic decision not to pursue Isa's testimony reflected deficient performance.[15]

We take as the starting point of our analysis the principle that "a court must indulge a strong presumption that counsel's conduct falls within the wide range

[15] In light of our resolution of this claim, we need not address the respondent's remaining arguments, including that the habeas court improperly applied a per se rule of conduct in its memorandum of decision when it stated that, "[w]hen a defense attorney develops evidence that another person may have committed the crime, he or she is duty-bound to pursue it and call witnesses at trial to attempt to show it." (Internal quotation marks omitted.)

of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . . Accordingly, our review of the petitioner's claim requires us, first, affirmatively to contemplate the possible strategic reasons that might have supported trial counsel's [decision not to have the witness testify] . . . and, second, to consider whether those reasons were objectively reasonable." (Internal quotation marks omitted.) *Godfrey-Hill* v. *Commissioner of Correction*, 221 Conn. App. 526, 537, 302 A.3d 923, cert. denied, 348 Conn. 929, 304 A.3d 861 (2023).

In the present case, Moscowitz testified about his reason for not subpoenaing Isa or presenting Isa's testimony. See id., 544 ("[w]hether to call a particular witness at trial . . . is a tactical decision for defense counsel, and, to the extent that the decision might be considered sound trial strategy, it cannot be the basis of a finding of deficient performance" (internal quotation marks omitted)). Specifically, Moscowitz testified that he "never subpoenaed [Isa] because [he] wanted to speak to him first." He reiterated that, although the petitioner had told him that Isa was responsible for the shooting, Moscowitz and his investigators had tried to contact Isa "because we wanted to know, did you commit the murder, and then prep him to do one of two things: either turn himself in to the police, which he never did, or to come in and testify, which he never did."

As the habeas court recognized in its memorandum of decision, Isa, after attempting to meet with Cavanagh, who was the petitioner's counsel at that time, and being redirected to meet with alternative counsel from the

public defender's office, "left the building and did not provide a confession to . . . Cavanagh or her investigator." Additionally, the court found that "the evidence [demonstrated] that Isa failed to follow up when . . . Moscowitz and his investigator attempted to meet and speak prior to trial." The court also found that Isa was "recalcitrant in talking to . . . Moscowitz' investigators, stating that he would have to consult with his own attorney before admitting to his involvement in the incident." Finally, the court recognized that Isa "failed to come forward at the criminal trial" and "avoid[ed] speaking to anyone about his role until he was subpoenaed to testify some nine years later . . . ."

These findings were supported by the evidence presented at the habeas trial, including the testimony of Cicarella, who spoke with Isa twice. As noted previously, Cicarella testified that, when the question of who committed the crime was posed, Isa would not answer and wanted to consult with his attorney. Moscowitz believed that the investigators had tried "at least five to six times to meet with him, and he would never show up." Moreover, on the one occasion that Isa spoke with Moscowitz, he again did not indicate any involvement in the crime.[16] Thus, at the time of trial, it would be reasonable for Moscowitz to have deemed Isa uncooperative. See *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 567 n.21, 198 A.3d 52 (2019) ("[w]e are required to review defense counsel's performance on the basis of counsel's perspective at the time, not on the basis of hindsight" (internal quotation marks omitted)).

Faced with Isa's steadfast reluctance to meet with the investigators and his unwillingness to admit responsibility for the crime, Moscowitz reasonably could have

[16] The habeas court concluded that Moscowitz' reason for not subpoenaing Isa was not "valid . . . ." Given the circumstances of the present case, including the court's findings that Isa was recalcitrant and repeatedly failed to tell Moscowitz or his investigators that he was the shooter, we disagree with the court that Moscowitz' reason for proceeding as he did was not valid.

determined that Isa's testimony would be unpredictable and, therefore, not helpful to the petitioner's defense. Cf. *Godfrey-Hill* v. *Commissioner of Correction*, supra, 221 Conn. App. 545 ("[counsel] reasonably could have concluded that the benefit of presenting [the witness'] testimony was outweighed by any damaging effect it might have" (internal quotation marks omitted)); see also, e.g., *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 743, 936 A.2d 653 (2007) (rejecting claim that counsel's failure to subpoena witness whose testimony potentially would be exculpatory constituted ineffective assistance when counsel viewed witness as "reluctant," in that she declined to provide written statement to investigating police officers, failed to speak with prosecutor after defense counsel encouraged her to do so, and had provided defense counsel with inconsistent testimony), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

Notably, in concluding that Moscowitz' performance was deficient, the habeas court limited its consideration to only the possibilities that Isa, once subpoenaed, either would have testified that he was the shooter or would have invoked his fifth amendment privilege against self-incrimination, which may have allowed Moscowitz to introduce the confession videos into evidence.[17] The habeas court did not, however, consider, that from Moskowitz' point of view, there was a risk that Isa could further corroborate the state's witnesses in identifying the petitioner as the shooter or, if confronted with his confession videos, testify that they

[17] The habeas court credited the petitioner's testimony that he had told Moscowitz about the confession videos before 2017. The court found that Durelli's testimony that the petitioner had told Durelli about the confession videos supported the petitioner's credibility. The court did not credit the testimony of both Moscowitz and Cicarella that they were not told about the existence of the confession videos. Perez also testified that no one had told him about any confession videos. On appeal, the respondent does not claim that the court's factual finding that Moscowitz was aware of the confession videos was clearly erroneous.

were false and made at the petitioner's direction.[18] "[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is . . . potentially harmful to the case . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 166 Conn. App. 95, 141, 140 A.3d 1087 (2016), aff'd, 330 Conn. 520, 198 A.3d 52 (2019).

Finally, Moscowitz actively pursued a defense that relied on demonstrating the weaknesses in the state's case. As this court previously has stated, "[t]o support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates." (Internal quotation marks omitted.) Id. Moscowitz reasonably could have determined that Isa's testimony, if he had corroborated that of the state's witnesses or disputed the accuracy of his confession videos, might have undermined the central theory of the defendant's case, namely, that neither Nunez nor Kareem were credible. Moscowitz testified that the defense strategy was to discredit Nunez and Kareem on the ground that they could not have seen the shooter

[18] As noted previously, the habeas court credited Isa's confession and testimony at the habeas trial that he would have come to court had he been subpoenaed. This finding does not preclude, in our evaluation of whether Moscowitz' decision not to subpoena Isa was objectively reasonable, the consideration of the risks that Moscowitz reasonably could have perceived as to Isa's potential testimony at the time of the criminal trial, given Isa's "recalcitrance" at that time. See *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015) ("[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" (internal quotation marks omitted)).

from their vantage points. To support his defense theory, Moscowitz engaged in extensive cross-examination of both witnesses. In closing argument, Moscowitz highlighted the inconsistencies and forcefully urged the jury to rewatch the surveillance video. Significantly, in evaluating the strength of the state's case to determine whether the petitioner had proven prejudice, the habeas court recognized that the "testimony and identifications [of Nunez and Kareem] had been questioned and impeached," and that the "eyewitness' opportunity to view the actual showing was brief, in dark lighting conditions." The habeas court further noted that the jury sought detailed playback of witness testimony, namely, Nunez' testimony, and asked to rewatch the surveillance video. Our appellate courts "have recognized that a request by a jury may be a significant indicator of their concern about evidence and issues important to their resolution of the case." (Internal quotation marks omitted.) *State* v. *Devalda*, 306 Conn. 494, 510, 50 A.3d 882 (2012).

On the basis of the foregoing, we conclude that the petitioner did not meet his burden of overcoming the strong presumption that Moscowitz' decision not to subpoena or present the testimony of Isa was reasonable trial strategy. Thus, we further conclude that the habeas court improperly concluded that Moscowitz' decision amounted to deficient performance under the *Strickland* standard. In light of our conclusion, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Moscowitz' decision.

The judgment is reversed only with respect to the habeas court's determination that Michael Moscowitz provided ineffective assistance of counsel by failing to subpoena and present the testimony of the petitioner's brother and the case is remanded to the habeas court with direction to render judgment denying the petition

as to that claim; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MARITA TAMMY CASTELINO *v.* WHITMAN, BREED, ABBOTT & MORGAN, LLC
(AC 47014)

Seeley, Westbrook and Palmer, Js.

Syllabus

The plaintiff appealed from the trial court's judgment for the defendant, rendered following its grant of the defendant's motion for summary judgment on the plaintiff's complaint alleging, inter alia, employment discrimination based on disability. The plaintiff claimed that the court improperly concluded that a genuine issue of material fact did not exist with respect to her claims. *Held*:

The trial court properly rendered summary judgment for the defendant, as the evidence, even when viewed in the light most favorable to the plaintiff, was insufficient to create a genuine issue of material fact as to whether the plaintiff's position, at the time of her hiring, required some measure of in person work in the office, and the same evidence also established, as a matter of law, that the plaintiff's proposed accommodation to work entirely from home was not reasonable because that accommodation would eliminate an essential job function.

Argued November 12, 2024—officially released July 1, 2025

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

James C. Riley, with whom, on the brief, was *John M. Hendele IV*, for the appellee (defendant).

Opinion

PALMER, J. The plaintiff, Marita Tammy Castelino, appeals from the summary judgment rendered by the trial court in favor of the defendant, Whitman, Breed, Abbott & Morgan, LLC, with respect to her claims under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes § 46a-51 et seq., for disability discrimination, failure to accommodate, and retaliation. On appeal, the plaintiff contends that the court improperly granted the defendant's motion for summary judgment because, contrary to the court's determination, there are genuine issues of material fact with respect to each of the plaintiff's claims and, consequently, the plaintiff is entitled to a jury trial on her claims. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, viewed in the light most favorable to the plaintiff as the nonmoving party, and procedural history are relevant to our analysis. Commencing on May 29, 2020, the plaintiff was employed by the defendant, a law firm, to serve as an administrative assistant in the defendant's real estate practice group. The plaintiff was hired to work for Attorney Cynthia Smith, who headed the defendant's real estate practice group, and, more specifically, to provide support to Cynthia Smith's longtime paralegal, Carla Smith.[1] Among other matters, Cynthia represents landlords and tenants in commercial leases, sellers and purchasers in sale and purchase transactions, and developers in various transactions.

The plaintiff was told that her position was "mostly" remote and that she would be expected to go into the

[1] For ease of reference, we hereinafter refer to Cynthia Smith and Carla Smith by their first names throughout this opinion. Although they share the same last name, the record does not indicate that Cynthia and Carla are related.

office "once in a while," on an "as needed" basis. At the start of the COVID-19 pandemic in March, 2020, certain of the defendant's practice groups had converted to a mostly remote work model. The real estate practice group, however, continued to work from the office on a regular basis, subject to social distancing restrictions and required mask wearing. The exception was Carla, who was directed by her physician not to come into the office because she suffers from a chronic health condition that severely compromises her immune system.

During the plaintiff's first two weeks with the defendant, Cynthia was traveling and out of the office, and the plaintiff remained in the office organizing physical files. The plaintiff learned that COVID-19 testing was being performed at a medical facility in the same office building where the defendant's office was located, and she observed that nurses from that medical facility used the same restrooms as the defendant's employees. As a result, the plaintiff, who previously had been diagnosed with diabetes and asthma, was concerned about being exposed to COVID-19.

The plaintiff relayed her concerns to Cynthia during a phone conversation on June 11, 2020, and requested to work exclusively remotely. Cynthia denied the plaintiff's request. The plaintiff memorialized this conversation in an email to herself and her husband. Although the defendant did not permit the plaintiff to work remotely on an exclusive or continuous basis, Cynthia granted the plaintiff's requests to do so on specific days.

According to the plaintiff, when she worked in the office, she spent approximately one third to one half of her time performing personal errands for Cynthia, such as accessing documents from files concerning Cynthia's personal properties, picking up lunch for Cynthia, and making "personal deposits" on Cynthia's

behalf at a bank. With respect to the other work that required the plaintiff's presence in the office, she was expected to maintain physical files, scan client documents, and meet with clients to obtain "ink signatures" and notarize documents for real estate closings.

Throughout the month of June, Cynthia and Carla expressed their concerns to each other about the plaintiff's work performance. On June 8, only one week after the plaintiff began work at the defendant, Carla sent an email to Cynthia expressing frustration with the plaintiff, stating, among other things: "I don't think she is going to work out unless she can grasp a lot of things quicker than she's shown [in] the past week. She does not pay attention to what's contained in e-mails." On June 11, the plaintiff emailed Cynthia and Carla concerning signatures the plaintiff had missed in a real estate contract. On June 15, Carla emailed the plaintiff regarding incorrect information that the plaintiff had entered on a wire transfer request form.

On June 16, Cynthia emailed Anthony Riccio, an employment recruiter who had worked with the defendant to fill the position for which the plaintiff was hired, and told him that there were some "growing pains" with the plaintiff, explaining that "[t]here are a few issues as she seems to get quite flustered and consequently does not pay attention to details, but we will give her a few more days to settle in. I would expect, however, with someone of her experience that she will grasp things quickly." Cynthia also inquired of Riccio about the length of the plaintiff's probationary period.

In the beginning of July, Cynthia and Carla continued to email the plaintiff about certain performance issues, including the fact that she had provided a client with the wrong financial statement during a real estate closing. On July 9, Cynthia decided that the plaintiff's

employment would be terminated. Carla emailed Riccio, stating that, after careful consideration, it had become "increasingly evident that [the plaintiff] is not going to succeed in [her] role" because she did not demonstrate the real estate experience reflected on her resume or discussed during the interview process, and she lacked the necessary attention to detail. Carla asked Riccio to begin the process of finding a replacement for the plaintiff. Cynthia, who was copied on the email chain, thanked Riccio for his assistance and stated: "It is very disappointing, and I am very sorry to say that [the plaintiff] is just not a good fit for this particular role."

The plaintiff continued working for the defendant, unaware of her impending termination. On July 23, Carla emailed the plaintiff and inquired whether she had contacted clients to obtain information for certain sale documents, a task that Carla had asked the plaintiff to do a few days earlier. When the plaintiff responded that she had not done so, Cynthia, who again was copied on the email chain, emailed Attorney Kevin Walsh, one of the defendant's managing partners, and asked: "When are we terminating her? I cannot trust her to follow-up or perform even rudimentary tasks." The plaintiff's employment was terminated on July 27, not quite two months after she commenced work with the defendant.

The plaintiff thereafter filed a timely complaint with the Commission on Human Rights and Opportunities (CHRO), which issued a release of jurisdiction on June 30, 2021. Subsequently, on September 23, 2021, the plaintiff commenced the present action against the defendant. In count one of her complaint, the plaintiff alleged that the defendant had violated General Statutes § 46a-60 (b) (1)[2] by discriminating against her and termi-

[2] General Statutes § 46a-60 (b) (1) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or an employer, by the employer or the employer's agent, except in the case of a bona fide occupational qualification or need, to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against

nating her because of her physical disabilities, namely, diabetes and asthma. In count two, the plaintiff alleged that the defendant had violated § 46a-60 (b) (1) by failing to provide her with a reasonable accommodation for her disabilities. In count three, the plaintiff alleged that the defendant had violated § 46a-60 (b) (4)[3] by terminating her employment in retaliation for requesting a reasonable accommodation.

On March 15, 2023, the defendant filed a motion for summary judgment accompanied by a memorandum of law maintaining that (1) the plaintiff could not establish a prima facie case with respect to any of her claims, (2) her employment was terminated for a legitimate, nondiscriminatory reason, namely, her performance deficiencies, and (3) she could not demonstrate that the defendant's proffered reason for her termination was pretextual. The defendant submitted several exhibits in support of its motion, including affidavits from Cynthia, Carla, and Walsh.

On April 26, 2023, the plaintiff filed a revised complaint containing the same three claims as the original complaint. The plaintiff, however, made more specific factual allegations in connection with her failure to accommodate claim, alleging that "the defendant failed to accommodate the plaintiff's disability by failing to

any individual in compensation or in terms, conditions or privileges of employment because of the individual's race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability, physical disability, including, but not limited to, blindness, status as a veteran or status as a victim of domestic violence . . . ."

[3] General Statutes § 46a-60 (b) (4) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . [f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

permit remote work from home, failing to provide digital copies of documents, and failing to provide a large computer screen . . . ."

On May 30, 2023, the plaintiff filed an objection to the defendant's motion for summary judgment, contending, in her memorandum of law in opposition to the defendant's motion, that judgment as a matter of law was inappropriate because there were disputed issues of fact material to her claims. In support of her contention, the plaintiff provided the court with several exhibits, including her deposition testimony and affidavit; the email memorializing her June 11, 2020 phone conversation with Cynthia; the defendant's answer to the plaintiff's CHRO complaint; a copy of an email between Cynthia and Riccio in May, 2020, concerning the plaintiff's start date and whether she was comfortable coming into the office; and the defendant's answers and objections to the plaintiff's interrogatories and requests for production. The defendant filed a reply memorandum on June 9, 2023.

The court, *Hon. Kenneth B. Povodator*, judge trial referee, held a hearing on the defendant's motion for summary judgment on June 12, 2023. On October 10, 2023, the court issued a memorandum of decision concluding that there were no genuine issues of material fact with respect to the plaintiff's claims and that the defendant was entitled to judgment as a matter of law.[4]

[4] In resolving the defendant's summary judgment motion, the trial court engaged in the well settled analytical framework applicable to employment discrimination claims, pursuant to which, as we explain more fully hereinafter, "the plaintiff first must establish a prima facie case, then the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision. . . . Once the defendant offers a legitimate, nondiscriminatory reason, then the plaintiff has the burden to prove by a preponderance of the evidence that the proffered reason is pretextual." (Citation omitted; footnote omitted.) *Lassen* v. *Hartford*, 223 Conn. App. 285, 290–91, 308 A.3d 564 (2024).

With respect to the disability discrimination claim set forth in count one of the plaintiff's complaint, the court first determined that the plaintiff had not provided evidence to establish each of the elements of her prima facie case. As an initial matter, the court expressed doubt as to whether the plaintiff had satisfied her burden of demonstrating that her chronic conditions of asthma and diabetes qualified her as disabled for purposes of CFEPA,[5] particularly in view of the fact that those conditions did not have any appreciable impact on her job performance. The court also concluded that the plaintiff could not establish that she was qualified for her position because she could not perform the essential functions of her job with the accommodation that she had requested. Specifically, the court determined that working entirely remotely was not a reasonable accommodation request, as a matter of law, because that accommodation would have eliminated an essential function of her job, namely, the work that she was required to do in the office. Finally, the court further determined that the plaintiff was unable to establish a prima facie case under CFEPA because she had failed to establish that the adverse employment action, that is, her termination, had occurred under circumstances that gave rise to an inference of discrimination.[6]

The court also concluded that, even if the plaintiff could establish a prima facie case for her disability

[5] Pursuant to General Statutes § 46a-51 (15), " '[p]hysically disabled' refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness, including, but not limited to, epilepsy, deafness or being hard of hearing or reliance on a wheelchair or other remedial appliance or device . . . ."

[6] "To establish a prima facie case of discrimination, an employee plaintiff must show that (1) [she] is a member of a protected class; (2) [she] was qualified for the position; (3) [she] suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." (Internal quotation marks omitted.) *Lassen* v. *Hartford*, 223 Conn. App. 285, 290 n.5, 308 A.3d 564 (2024).

discrimination claim, the evidence offered by the defendant satisfied its burden of providing a legitimate, nondiscriminatory justification for the plaintiff's termination, specifically, her performance deficiencies. With respect to whether the plaintiff could demonstrate that the reason proffered by the defendant was merely a pretext for discrimination, the court stated: "[I]t remains a challenge to treat the plaintiff's claims as anything other than an attempt to take the combination of the defendant's dissatisfaction with her performance and her own efforts to change her job requirements and recharacterize them as improper conduct by the defendant."

The court next concluded that the plaintiff's claim that the defendant failed to provide her with a reasonable accommodation, as set forth in count two, "require[d] little discussion" given the court's conclusion on the discrimination claim.[7] The court explained in relevant part as follows: "The plaintiff's conception of a reasonable accommodation was the conversion of a job requiring at least some level of attendance at the workplace into a job fully performed remotely. In a sense, even more extreme, she wanted to have input if not be the arbiter of what work she should be required to do. She emphatically thought it inappropriate that she was required to run errands for a principal of the firm. The plaintiff was the low person on a three person working group within the firm, headed by [Cynthia]. If the defendant, as an institution or through [Cynthia], deemed it in the firm's best interest that the plaintiff's

[7] "In order to establish a prima facie case for a reasonable accommodation claim, the plaintiff must produce enough evidence for a reasonable jury to find that (1) [s]he is disabled within the meaning of the [statute], (2) [s]he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it." (Internal quotation marks omitted.) *Barbabosa* v. *Board of Education*, 189 Conn. App. 427, 437–38, 207 A.3d 122 (2019).

role included running errands for the attorney—thereby allowing [Cynthia] to dedicate more of her time to her obligations as a lawyer—it plausibly may have been a practice reasonably subject to question in some objective or theoretical sense, but not in terms of whether a job accommodation should have been granted. That she may not have seen a need for hand delivery of documents also might have been a plausible question as to firm efficiency, but not as a function of her job that needed to be changed to accommodate her. There is no explanation as to how, when hired for a job requiring at least some presence in the office, the plaintiff can claim a reasonable accommodation would have been excusing all on-site work."

The court's conclusion rejecting the plaintiff's retaliation claim was predicated on its threshold determination that the plaintiff's accommodation request was unreasonable as a matter of law.[8] The court stated: "The plaintiff provides no authority for the proposition that there can be liability associated with a denial of an improper request for accommodation. The theme, throughout, is that the employer has no obligation to change the nature of the job, and especially attendance at the workplace, simply because an employee makes the request. . . . [T]he unreasonable request for an accommodation cannot be a shield with respect to an unsatisfactory employee, with the situation compounded by the employee's efforts to change the functions of her job in a manner inconsistent with the terms on which she initially had been hired." Accordingly, the

[8] To establish a prima facie case of retaliation, a plaintiff must show "(1) that [s]he participated in a protected activity; (2) that the defendant knew of the protected activity; (3) an adverse employment action against [her]; and (4) a causal connection between the protected activity and the adverse employment action." (Internal quotation marks omitted.) *Lassen* v. *Hartford*, 223 Conn. App. 285, 290–91 n.5, 308 A.3d 564 (2024). In the present case, the protected activity alleged by the plaintiff was her request for what she maintains constituted a reasonable accommodation.

court rendered summary judgment for the defendant, and this appeal followed. Additional facts will be set forth as necessary.

We begin by setting forth the relevant standard of review and legal principles that govern our analysis. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party . . . [and] the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendants' motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Stubbs* v. *ICare Management, LLC*, 198 Conn. App. 511, 520, 233 A.3d 1170 (2020).

"Under [CFEPA] . . . employers may not discriminate against certain protected classes of individuals, including those who are physically disabled." (Internal quotation marks omitted.) Id., 521. Section 46a-60 (b)

provides in relevant part: "It shall be a discriminatory practice . . . (1) [f]or an employer . . . to discharge from employment any individual or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . present or past history of . . . physical disability . . . ." Moreover, "[§] 46a-60 (b) (1) requires employers to reasonably accommodate an employee's disability." *Bartolotta* v. *Human Resources Agency of New Britain, Inc.*, 224 Conn. App. 248, 272, 312 A.3d 59, cert. denied, 349 Conn. 908, 313 A.3d 513 (2024). In addition, § 46a-60 (b) (4) makes it unlawful for any person to "discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice . . . ."

"The standard applicable to the plaintiff's claim of disability discrimination, which is based on disparate treatment, [failure to accommodate] and retaliation is the *McDonnell Douglas-Burdine*[9] model of analysis. . . . Under this framework, the plaintiff first must establish a prima facie case, then the burden of production shifts to the defendant to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision. . . . Once the defendant offers a legitimate, nondiscriminatory reason, then the plaintiff has the burden to prove by a preponderance of the evidence that the proffered reason is pretextual." (Citations omitted; footnote omitted.) *Lassen* v. *Hartford*, 223 Conn. App. 285, 290–91, 308 A.3d 564 (2024); see also *Stubbs* v. *ICare Management, LLC*, supra, 198 Conn. App. 521; *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, 170 Conn. App. 79, 95, 153 A.3d 687 (2017).

[9] "See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." *Lassen* v. *Hartford*, 223 Conn. App. 285, 290 n.4, 308 A.3d 564 (2024).

As set forth previously in this opinion, the court's conclusion on all three of the plaintiff's claims rested primarily on its determination that the plaintiff's requested accommodation to work entirely remotely was not reasonable as a matter of law,[10] and, therefore, the plaintiff had failed to establish a prima facie case with respect to each of her claims. "To establish a prima facie case of employment discrimination pursuant to § 46a-60 (b) (1) on the basis of either a disparate treatment disability discrimination claim or a reasonable accommodation claim, a plaintiff must establish a common essential element, namely, that he or she is qualified for the position. . . . In order for an employee to be qualified, he or she must be able to perform the essential functions of the job with or without a reasonable accommodation . . . ." (Internal quotation marks omitted.) *Barbabosa* v. *Board of Education*, 189 Conn. App. 427, 437–38, 207 A.3d 122 (2019). In addition, to establish a prima facie case of retaliation, a plaintiff must show, inter alia, that she "participated in a protected activity"; (internal quotation marks omitted) *Lassen* v. *Hartford*, supra, 223 Conn. App. 290 n.5; and the protected activity alleged in this case was the plaintiff's request for a reasonable accommodation.

On appeal, the plaintiff claims that the court improperly rendered summary judgment in favor of the defendant because, inter alia, a genuine issue of material

[10] The plaintiff contends that "[t]here are two accommodations in play in this case: work remotely from home and a second computer monitor." In opposition to the defendant's motion for summary judgment, the plaintiff had submitted evidence that, at the end of June, 2020, she requested a second computer monitor after she experienced vision issues related to her diabetes and temporarily lost vision in one eye. The trial court's discussion of this alleged accommodation request is limited. On appeal, the plaintiff does not provide any substantive argument regarding why the court improperly rendered summary judgment on her failure to accommodate claim in light of this particular proposed accommodation. Accordingly, we limit our analysis to the plaintiff's requested accommodation of remote work.

fact exists as to whether her request to work entirely remotely constituted a reasonable accommodation that did not eliminate an essential function of her position.[11] Specifically, the plaintiff contends that working in the office was not an essential function of the job because her position initially was intended to be remote and "[t]he only job tasks that required her to be in the office were the personal errand tasks that she was doing for [Cynthia]," which "[t]he defendant admitted . . . was not a part of her job duties and responsibilities." We are not persuaded.

"[A]n accommodation is not reasonable if it, in essence, requires an employer to eliminate an essential function of a job." (Internal quotation marks omitted.) *Frantti* v. *New York*, 850 Fed. Appx. 17, 20 (2d Cir. 2021); see id. (evaluating employment discrimination claim under provisions of analogous federal law). Although "reasonableness is normally a question of fact, summary judgment may be granted in cases where . . . the plaintiff's proposed accommodation would eliminate the essential functions of the job." (Internal quotation marks omitted.) *Barbabosa* v. *Board of Education*, supra, 189 Conn. App. 446.

[11] The plaintiff also claims, inter alia, that the court improperly concluded that no genuine issue of material fact existed as to whether the plaintiff was disabled and, therefore, a member of a protected class; whether the plaintiff could establish an inference of discriminatory intent; whether the defendant's proffered reason for her termination was pretextual; and whether there was a causal connection between the protected activity and the adverse employment action as required for her retaliation claim. "Because [s]ummary judgment is appropriate where no genuine issue of material fact exists, and the defendant is entitled to judgment as a matter of law, with respect to any one element that the plaintiff is required to prove in order to prevail at trial . . . an appellate court need not address every basis articulated by a trial court in rendering summary judgment." (Internal quotation marks omitted.) *Lassen* v. *Hartford*, supra, 223 Conn. App. 291 n.6. Accordingly, because we agree with the trial court that the plaintiff has not demonstrated the existence of a genuine issue of material fact as to whether she could perform the essential functions of her position with her requested accommodation, we need not address the plaintiff's claims regarding the other elements of her claims. See id.

Neither this court nor our Supreme Court appears to have addressed the circumstances under which working remotely constitutes a reasonable accommodation.[12] Accordingly, "[w]e look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both." (Internal quotation marks omitted.) *O'Reggio* v. *Commission on Human Rights & Opportunities*, 350 Conn. 182, 190, 323 A.3d 1048 (2024).

A determination of whether a specific job has essential functions that require in person work involves a "case-specific inquiry." *Kinney* v. *St. Mary's Health, Inc.*, 76 F.4th 635, 644 (7th Cir. 2023). "The term essential functions, which is not defined in the statutes themselves, is generally defined in [the Americans with Disabilities Act] regulations promulgated by the Equal Employment Opportunity Commission . . . to mean the fundamental duties to be performed in the position in question, but not functions that are merely marginal." (Internal quotation marks omitted.) *Tafolla* v. *Heilig*, 80 F.4th 111, 119 (2d Cir. 2023). "Under this standard, a court must give considerable deference to an employer's judgment regarding what functions are essential for service in a particular position . . . . Ultimately, however, the question whether a task constitutes an

[12] We note that, in *Barbabosa* v. *Board of Education*, supra, 189 Conn. App. 427, this court held that the trial court properly determined that the defendant Board of Education of the town of Manchester (board) was entitled to summary judgment on the claim of the plaintiff, Dianna Barbabosa, a school paraprofessional, that the board was required to accommodate her disability, which resulted in her frequent and extended absences from work, by affording her intermittent leaves of absence. Id., 434–36. In reaching its conclusion, this court explained that Barbabosa was not able to perform an essential function of her employment, either with or without her proposed accommodation, namely, maintaining regular attendance, and, consequently, the accommodation she sought was not reasonable. Id., 447–48. Thus, although *Barbabosa* addresses the issue of attendance at work in the context of a discrimination claim under CFEPA, the case does not implicate the issue presented here concerning remote work.

essential function depends on the totality of the circumstances." (Citation omitted; internal quotation marks omitted.) Id. The court must conduct "a fact-specific inquiry into both the employer's description of a job and how the job is actually performed in practice," in which it "draw[s] all inferences in favor of the nonmoving party." (Internal quotation marks omitted.) Id. The court may consider, among other things, "written job descriptions, the amount of time spent on the job performing the function, and the consequences of not requiring the plaintiff to perform the function." (Internal quotation marks omitted.) *Frantti* v. *New York*, supra, 850 Fed. Appx. 20.

In the present case, the defendant submitted evidence in support of its summary judgment motion demonstrating that working in the office is an essential component of the plaintiff's job. Specifically, in her affidavit, Cynthia explained that, "[a]lthough certain of the [defendant's] practice groups were then largely practicing remotely, we ultimately determined that we needed someone capable of working in the office at least part of the time due to the number of tasks that required in-person work, including the creation and maintenance of physical files, locating documents and information contained in those files, occasional in-person meetings with clients, preparing transaction documents for execution by clients, forwarding original documents once executed or recorded, and other tasks that necessitated a physical presence in the office. Thus, while I anticipated that the new hire could work remotely as work flow and scheduling allowed, it was a requirement and condition of the position that the new hire be willing to work in the office at least part of the time. I was open to the idea that over time, as the new hire became more familiar with the requirements of the position and my practices, proficient with [the defendant's] systems, and gained an understanding of the client files, he or

she could work remotely more often. However, at least during the first months of employment, I needed the administrative assistant to be present in the office most days." Cynthia further stated that the plaintiff did not object to working in the office during the first couple of weeks while Cynthia was traveling and, initially, the plaintiff did not advise Cynthia that she had a health condition that prevented her from working in the office. As Cynthia also explained, "[h]ad [the plaintiff] done so, I would not have been able to hire her, as working from the office was an essential function of the job."

With respect to the amount of time that the plaintiff would be permitted to work remotely, Cynthia stated that, "[f]rom the outset or near outset of her employment, we had agreed that depending on scheduling of transactions, [the plaintiff] would be able to work one day per week from home. . . . I did not reject the possibility of her working additional days from home as she became more familiar with our matters and systems, but told her that I needed her in the office on the schedule to which we had previously agreed (i.e., four days per week), and that we could evaluate further when I returned to the office later in June." In his affidavit, Walsh similarly averred that "the administrative assistant position was not a fully remote position; rather, the person hired was required to work in the office at least part of the time, with the partner-in-charge ([Cynthia]) having discretion to allow the administrative assistant to work remotely depending on workflow and scheduling of transactions."

In the plaintiff's deposition testimony, submitted in opposition to the defendant's motion for summary judgment, she acknowledged that she was expected to work in the office at least part of the time and that her position was not intended to be entirely remote. Specifically, she testified that the position "wasn't fully remote," but rather "[m]ostly remote with coming into the office as

needed . . . .'' When asked about her understanding as to how often she would be required to be in the office on a weekly basis, the plaintiff responded: ''Sometimes none. Sometimes a few hours. Other weeks it could be I might need to go a few days that week. It was just as needed. It was open-ended as needed when it was absolutely necessary.'' She also explained that '' '[a]s needed' was how it was phrased'' during the interview process and that she would be required to go into the office ''once in a while if you really need to.'' As to whether she was told that the position was ''partially'' remote, the plaintiff testified: ''It was as needed; so that's a yes. That's an as needed. Partially remote? No. It was mostly remote. . . . No, it's not partially remote. It was remote with . . . an as needed to be partially in the office. The partial is more so for in the office, but it was remote and go into the office as needed.''

In addition, in her objection to the defendant's motion for summary judgment, the plaintiff argued that ''[t]he legal assistant job with the defendant was supposed to be *mostly* remote.''[13] (Emphasis added.) Similarly, at the hearing on the motion, the plaintiff's counsel acknowledged that, although the plaintiff requested an accommodation to work ''entirely'' remotely, the plaintiff was told during the hiring process that her position would be ''mostly'' remote. Accordingly, in its decision, the court stated: ''[*T*]*here is no claim that* [*the plaintiff*] *had been hired for a position that was intended to be 100 percent remote*. . . . There may be a dispute as to whether the job was intended to be mostly in office or mostly remote, but the plaintiff does not appear to contest the fact that at least some duties assigned to her required some level of physical presence in the

[13] In her revised complaint, the plaintiff alleged that ''[t]he defendant told the plaintiff that her job would have her working in the office one to two days per week and the other days from home.''

office, at least as originally structured." (Emphasis added.)

On appeal, the plaintiff suggests that she was told, from the outset, that her position would be entirely remote. Citing her deposition testimony, the plaintiff contends that Cynthia and Walsh told the plaintiff that her job would be remote.[14] In that portion of the deposition, however, the plaintiff was asked: "Did anyone from [the defendant] tell you in words or substance that your position with the firm would be *mostly* remote?" (Emphasis added.) The plaintiff responded, "[y]es," and when asked who told her that, the plaintiff responded that Cynthia and "the recruiter," Riccio, did so. Although there are some portions of the plaintiff's testimony suggesting that her position was intended to be "remote," without qualification, we do not review that testimony in isolation. As set forth previously, the plaintiff expressly testified that her position "wasn't fully remote."

With respect to the duties that the plaintiff was expected to perform in the office, she submitted evidence that, when viewed in the light most favorable to her claim, could demonstrate that there were some in office tasks that were not essential or otherwise could be done remotely. Specifically, in her deposition testimony, the plaintiff stated that she spent one third to

[14] The plaintiff also refers to an email from Cynthia to Riccio, which was attached to the plaintiff's objection to the motion for summary judgment and states in relevant part: "We will be extending an offer to [the plaintiff], however, we have to figure out the appropriate start date, if she is comfortable coming into the office, or prefers to work from home." To the extent that the plaintiff contends that this email gives rise to an issue of fact as to whether the plaintiff was given the option to work from home *exclusively*, we are not persuaded. There is nothing in the record to indicate that this message was conveyed to the plaintiff at any time prior to her termination. Moreover, the plaintiff's own deposition testimony acknowledges that the position for which she was hired was not fully remote and, therefore, contradicts her suggested interpretation of the email.

one half of her time completing personal errands for Cynthia, which the defendant admitted, in its answer to the plaintiff's CHRO complaint, were not part of the plaintiff's job duties and responsibilities.[15] The plaintiff also testified that she could answer phone calls remotely if given access to download the defendant's phone system onto her cell phone and she "couldn't see that [she] had to be deleting pages and manipulating documents from an office desk."

In her deposition testimony, however, the plaintiff also recognized that there were certain tasks, aside from the alleged personal errands for Cynthia, that needed to be done in the office. Specifically, the plaintiff testified that, aside from accessing Cynthia's personal files, "there might be an occasional reason to go in. That's why it wasn't fully remote." She explained: "No one can give me any good reason as to why I have to be in that office except for [Cynthia's] personal files that [were] there. That's the only thing I can come up with. Because everything else, *unless I need to go into that office to get an ink signature or to actually pick up a file that may not be available on the database . . . or to actually pick up a physical file and compare it to what's on there to make sure everything is right*, there really isn't a whole lot of reason for me to keep going into the office day in and day out and to be there all day long." (Emphasis added.) The plaintiff further stated: "It's what needs to be done that determines if I am needed to be in the office. A physical ink signature that needs to be notarized requires me to go in and physically obtain that signature and notarize it. Ink documents that are being delivered by a client that didn't email them for whatever reason and they need to be scanned, I could go in and pick up those documents, get them scanned then do what I have to do, and go home."

[15] The defendant also denied that Cynthia had the plaintiff run personal errands for her.

In light of the plaintiff's own testimony, the trial court aptly observed that "the plaintiff seems to acknowledge that her employment, from the start, required at least some level of performance of work at the office location. . . . Although she claims that some of her assignments were unnecessary or could have been assigned to someone else in the office . . . she seems to acknowledge that some of the work-related functions she was asked to perform required physical presence in the office."

On the basis of our review of the evidence, we agree with the trial court that no genuine issue of material fact existed as to whether working in the office was an essential function of the plaintiff's position. Although the parties' evidence conflicted as to how often the plaintiff was expected, at the time of her hiring, to work in the office—according to the plaintiff, the position was mostly remote, whereas Cynthia averred that the plaintiff was expected to work in the office most of the time—it is undisputed that the job required some measure of in person work. The plaintiff's claim that her in office tasks were "marginal" and, therefore, not essential; see *Tafolla* v. *Heilig*, supra, 80 F.4th 119; hinges on her assertion that "[t]he only job tasks that required her to be in the office were the personal errand tasks that she was doing for [Cynthia]." The plaintiff's contention, however, is belied by her own deposition testimony in which she acknowledges that there were other tasks that necessitated a physical presence in the office, in particular, maintaining physical files, scanning client documents, and meeting with clients to obtain "ink signatures" and notarize documents for real estate closings. We therefore conclude that the evidence, even when viewed in the light most favorable to the plaintiff, was insufficient to create a genuine issue of material fact with respect to this issue.

Moreover, the same evidence definitively establishing that in office work is an essential part of the plaintiff's job also establishes, as a matter of law, that the plaintiff's proposed accommodation to work entirely from home was not reasonable because that accommodation would eliminate an essential job function. See *Barbabosa* v. *Board of Education*, supra, 189 Conn. App. 448. Consequently, we conclude that the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

BIRCH GROVES ASSOCIATION, INC. *v.* KATHLEEN CASEY JORDON
(AC 47213)

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

Syllabus

The defendant property owner appealed from the trial court's judgments of foreclosure by sale rendered for the plaintiff homeowners association in its action to foreclose water liens on two of the defendant's properties located within the community served by the plaintiff. The defendant claimed, inter alia, that the court abused its discretion by not vacating her default for failure to plead. *Held*:

The trial court correctly determined that the plaintiff's amended complaint, which was filed after the defendant had been defaulted and which sought to foreclose on an additional three years' worth of unpaid water liens, did not make any substantial changes to the cause of action or interject new material issues into the case and, therefore, did not extinguish the defendant's default.

The trial court did not abuse its discretion by not setting aside the default for good cause shown pursuant to the rule of practice (§ 17-42) because, even if the defendant were correct that her delay in pleading did not cause prejudice to the plaintiff, her motion did not allege any facts demonstrating that good cause existed to set aside the default that she failed to address for nearly three years.

This court declined to review the defendant's inadequately briefed claim that the trial court improperly relied on the plaintiff's affidavit of debt in rendering the foreclosure judgments.

Argued March 17—officially released July 1, 2025

Procedural History

Action to foreclose water liens on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendant was defaulted for failure to plead; thereafter, the court, *Fox, J.*, denied the defendant's motion to set aside the default and rendered judgments of foreclosure by sale, from which the defendant appealed to this court. *Affirmed.*

Christopher G. Winans, for the appellant (defendant).

John J. Bowser, for the appellee (plaintiff).

Opinion

CRADLE, C. J. The defendant, Kathleen Casey Jordon, also known as Kathleen C. Jordan, appeals from the judgments of foreclosure by sale rendered in favor of the plaintiff, Birch Groves Association, Inc. On appeal, the defendant claims that the court (1) abused its discretion by not vacating her default for failure to plead, and (2) erred in rendering judgments on the basis of the plaintiff's affidavit of debt when the debt was disputed by the defendant. We affirm the judgments of the trial court and remand the case for the purpose of setting new sale dates.

The following undisputed facts and procedural history are relevant to this appeal. The plaintiff is a homeowners association that provides services, including the maintenance of the community water system, to properties within the Birch Groves community in New Milford. The defendant owns two parcels of real property, 7 Juniper Lane and 15 Juniper Lane, which are

each located within that community and, thus, receive water from the water system maintained by the plaintiff.

In March, 2020, the plaintiff brought this action against the defendant, alleging that she had failed to pay the annual water use fee levied against each of her properties in 2018 and 2019. In a two count complaint, the plaintiff sought to foreclose several water liens on the defendant's properties resulting from the unpaid fees.[1] On October 23, 2020, the plaintiff filed a request to amend its complaint. In the proposed amended complaint, the plaintiff alleged that the defendant had again failed to pay the annual water charge levied against each property in 2020 and sought to recover those unpaid fees as well. The defendant did not object.[2] Thereafter, on February 16, 2021, the plaintiff filed a demand for disclosure of defense. On April 1, 2021, the defendant filed a disclosure of defense, asserting, inter alia, that "[t]he plaintiff's bills for water are arbitrary and capricious insofar as the defendant is not a member of the plaintiff."[3]

The defendant, however, failed to file an answer either to the original complaint or the amended complaint, and, on April 20, 2021, the plaintiff filed a motion for default for failure to plead. On April 28, 2021, the plaintiff's motion was granted, and a default was entered against the defendant. Despite the protracted

[1] In count one of the complaint, the plaintiff sought to foreclose water liens on the 7 Juniper Road property, and, in count two, it sought to foreclose water liens on the 15 Juniper Road property. The two counts, including the material allegations against the defendant and the amount of unpaid water charges with respect to each property, were otherwise identical.

[2] Because the defendant did not object to the proposed amended complaint within fifteen days, the amendment was deemed to have been filed by the consent of the defendant. See Practice Book § 10-60 (a) (3).

[3] The plaintiff also had filed a motion for default for failure to disclose defense on March 18, 2021. Following the defendant's April 1, 2021 disclosure of defense, the court, *Kowalski*, *J.*, denied the plaintiff's motion on April 5, 2021.

settlement discussions that followed, the parties were unable to reach an agreement, and, on February 14, 2023, the plaintiff moved for a judgment of foreclosure by sale.

Thereafter, on October 6, 2023, the court, *Shaban*, *J.*, issued a notice to the parties scheduling a hearing for November 13, 2023, to address the dormancy status of the case. In advance of that hearing, the plaintiff, on October 12, 2023, filed another request to amend its complaint (2023 amendment). Specifically, the plaintiff sought to foreclose on an additional three years' worth of water liens on each property resulting from the defendant's failure to pay her annual water use fees in 2021, 2022, and 2023. The defendant again did not oppose the plaintiff's amendment.[4] On November 8, 2023, the defendant filed an answer to the 2023 amendment, in which she denied the material allegations against her and asserted as a special defense that the plaintiff's water charges had been imposed in an "arbitrary and capricious manner."[5]

Following the November 13, 2023 dormancy status conference, a hearing on the plaintiff's motion for judgment was scheduled for December 18, 2023.[6] In advance of that hearing, the plaintiff filed an affidavit of debt on November 30, 2023. On December 15, 2023, three days before the scheduled hearing, the defendant filed a motion to set aside the default for failure to plead.[7]

[4] See footnote 2 of this opinion.

[5] In addition, the defendant (1) claimed a setoff, alleging that she had "made a payment of $1000," and (2) filed a counterclaim sounding in trespass, alleging that "[t]he plaintiff repeatedly flushes and discharges its water hydrants" onto her property without permission.

[6] The hearing on the plaintiff's motion for judgment of foreclosure originally was scheduled for December 4, 2023. On that date, the court issued notice to the parties that the hearing was continued to December 18, 2023.

[7] The defendant also filed on the same date an objection to the plaintiff's motion for judgment of foreclosure by sale "for the reasons noted in [the defendant's] motion to set aside default . . . ."

On December 18, 2023, after hearing argument by both parties, the court, *Fox*, *J.*, issued an oral ruling denying the defendant's motion to set aside the default and granting the plaintiff's motion for judgment. On the same date, the court rendered separate judgments of foreclosure by sale as to each of the defendant's properties.[8] In rendering the judgments, the court, relying on the plaintiff's affidavit of debt, found that the defendant owed the plaintiff $4157.32 in unpaid water charges, plus interest and fees, with respect to each property, and set a sale date of April 6, 2024, for both properties.[9] This appeal followed.

I

The defendant first claims that the court abused its discretion by not vacating the default for failure to plead. Specifically, the defendant argues that the filing of the 2023 amendment effectively extinguished the default pursuant to this court's decision in *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 176 A.3d 1210 (2017). In the alternative, the defendant argues that the court abused its discretion in not setting aside the default for good cause shown.

Before addressing the merits of the defendant's arguments, we set forth our standard of review and the legal principles relevant to her claim. "[T]he effect of a default is to preclude the defendant from making any further defense in the case so far as liability is concerned . . . ." Practice Book § 17-33 (b). When a party is in default for failure to plead, "the judicial authority, at or after the time it renders the default . . . [also] may . . . render judgment in foreclosure cases . . .

[8] The court indicated at the December 18, 2023 hearing that it was considering rendering two separate judgments because "the underlying complaint involve[d] two pieces of property." Neither party's counsel objected.

[9] On December 19, 2023, the court issued corrected judgments "to update the committee [of sale]" because "[t]he prior committee had a conflict of interest."

provided the plaintiff has also made a motion for judgment and provided further that any necessary affidavits of debt or accounts or statements . . . are submitted to the judicial authority." Practice Book § 17-33 (b). If a motion for judgment already has been filed by the plaintiff at the time the defaulted party files her answer, as was the case here, "the default may be set aside only by the judicial authority."[10] Practice Book § 17-32 (b).

"The abuse of discretion standard of review applies to a court's ruling on a motion to set aside a default . . . . [A] foreclosure action constitutes an equitable proceeding. . . . In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court. . . . This court must make every reasonable presumption in favor of the trial court's decision when reviewing a claim of abuse of discretion. . . . Our review of the trial court's exercise of legal discretion is limited to the question of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 739.

A

The defendant first claims that the court abused its discretion by not setting aside the default because, she argues, the court incorrectly concluded that the 2023 amendment did not allege new material facts and, therefore, had not extinguished the default.

[10] Conversely, had the defendant filed her answer prior to the plaintiff's filing of the motion for judgment, the default would have been set aside automatically by operation of law. See Practice Book § 17-32 (b). In this case, however, it is undisputed that the defendant's answer was filed subsequent to the plaintiff's motion for judgment.

In support of this contention, she relies on *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 727, in which this court concluded that the plaintiff's filing of an amended complaint effectively extinguished the defendant's default for failure to plead to the original complaint. Id., 745. In *Scroggin*, the plaintiff commenced a foreclosure action against the defendant by way of a one count complaint in December, 2009. Id., 730. After the defendant was defaulted for failure to plead in June, 2010, the plaintiff filed an amended complaint, which contained, inter alia, two additional counts directed at the defendant.[11] Id., 731–34. Five years later, on November 24, 2015, the plaintiff moved for a judgment of strict foreclosure with respect to the amended complaint. Id., 734. On April 4, 2016, the defendant filed an answer to the amended complaint and an objection to the 2015 motion for judgment. Id. This court in *Scroggin* noted that "[t]he [trial] court, however, indicated that it would not give any effect to the [answer] filed by the defendant to the . . . amended [complaint] . . . on the ground that [the filing was] untimely, having been presented to the court more than five years following the default. The [trial] court observed, as well, that in the lengthy period of time that ensued following the default, the defendant did not move to set aside that default." Id., 738. Accordingly, the trial court granted the plaintiff's motion for judgment of strict foreclosure. Id., 737.

On appeal to this court, "[t]he defendant argue[d] that, in fairness to him, the default should have been extinguished by the filing of the amended complaint

[11] The amended complaint in *Scroggin* contained six counts. Count one "generally was consistent with the allegations brought against the defendant in the original one count complaint," counts two through four were directed at an additional defendant that was not named as a party in the original complaint, and counts five and six set forth new claims against the original defendant. *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 731–34.

and that the court should have given effect to his answer . . . .'' Id., 737–38. This court agreed, concluding that the amended complaint substantially changed the pleadings and, therefore, effectively extinguished the defendant's default for failure to plead in response to the original complaint. Id., 743–44. Specifically, ''[t]he original [one count] complaint, sounding in foreclosure, invoked the [trial] court's equitable powers. [In contrast] [c]ount five of the amended complaint sounded in unjust enrichment and count six accused the defendant of engaging in fraudulent conduct. The amended complaint . . . interjected new material factual allegations and new legal theories on which the plaintiff relied. . . . [T]hus, the amended complaint materially altered the nature of the claims against the defendant.'' Id., 744. ''In light of the changes to the plaintiff's case that were reflected in the amended complaint,'' this court held that ''it was inequitable for the [trial] court not to have considered the default entered in 2010 to have been extinguished. . . . Although it was appropriate for the court to have considered the lengthy period of time that followed the entry of the default, it nonetheless abused its discretion by failing to consider the effect of the amended complaint upon that default.'' (Footnote omitted.) Id., 745.

In the present case, the defendant argued in her motion to set aside the default that the additional three years' worth of water liens that were referenced in the 2023 amendment ''drastically increased the amount of damages,'' thereby constituting ''a substantial change'' from the original complaint and interjecting new material issues into the case. The court rejected the defendant's argument, finding that ''[t]he [2023 amendment] does not reflect a substantial change to the pleadings in effect at the time that the default was entered'' and, therefore, that ''[t]he [2023] amendment does not interject material new issues.'' (Internal quotation marks omitted.)

On appeal, the defendant claims that "[t]he court's interpretation of the amended complaint is simply wrong and is an abuse of its discretion." In support of her claim, she essentially reiterates her argument that the 2023 amendment interjected a "quantifiably new material issue" into the present case because the increase in the amount of damages alleged constituted an "obvious and substantial change [to] the nature of the claim" against her. We disagree.

"[I]n determining whether the filing of an amended complaint following a finding of default effectively extinguished the default and afforded a defendant an opportunity to plead in response, the dispositive inquiry is whether the amendment reflected a substantial change to the pleadings in effect at the time that the default was entered. . . . [A] primary consideration in this inquiry [is] whether the amendment interjected material new issues in the case." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 742. "If the effect of an amendment of a complaint . . . is to substantially change the cause of action originally stated, the defendant is entitled to file new or amended pleadings and present further evidence. Also, if the amendment interjects material new issues, the adversary is entitled to reasonable opportunity to meet them by pleading and proof." (Internal quotation marks omitted.) Id., 745; see also, e.g., *Spilke* v. *Wicklow*, 138 Conn. App. 251, 270, 53 A.3d 245 (2012) (filing of four amended complaints did not extinguish default where, "[a]lthough the complaints differed in some respects from the original complaint, the substantive allegations remained the same"), cert. denied, 307 Conn. 945, 60 A.3d 737 (2013); *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 68, 38 A.3d 1212 (2012) (filing of amended complaint for

sole purpose of "remedy[ing] a typographical error" did not extinguish default).

"Although we have characterized our general inquiry in these types of cases as a review of the trial court's exercise of discretion . . . [t]he interpretation of pleadings is always a question [of law] for the court . . . . Our review of a trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 743. "The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." (Internal quotation marks omitted.) Id.

We do not find persuasive the defendant's assertion that the 2023 amendment constituted a substantial change from the allegations set forth in the original complaint. The only change to the pleadings pursuant to the 2023 amendment was the inclusion of an additional three years' worth of claimed water liens. In seeking to foreclose on those additional liens, the plaintiff did not interject new material factual allegations apart from the years of the liens, and it did not rely on any new legal theories. The substantive allegations against the defendant, namely, that she had failed to pay the plaintiff's properly levied water charges, remained the same. The 2023 amendment merely reflected the fact that water charges continued to accrue while the litigation was pending and the defendant failed to pay them.[12]

[12] The defendant concedes that she remained in possession of both Juniper Road properties and, thus, presumably, continued to receive water from the community water system, throughout the pendency of the litigation.

Thus, there was no substantial change to the cause of action in the present case.

Nonetheless, the defendant argues that the quantitative increase in damages reflected by the 2023 amendment constitutes a new material issue under *Scroggin*.[13] We disagree. In *Scroggin*, the plaintiff sought additional monetary damages pursuant to the two new claims against the defendant in its amended complaint; however, this court's analysis of whether the amendment interjected new material issues focused only on *the nature* of those claims and *the legal theories* on which the plaintiff relied in claiming those additional damages. See *Chase Home Finance, LLC* v. *Scroggin*, supra, 178 Conn. App. 743–44. Nothing in this court's analysis indicates that it attached any significance to the difference in the *amount* of damages claimed in each complaint. The defendant does not cite, nor could we find any, authority to support her contention that an increase in the amount of damages claimed by the plaintiff, in and of itself, constitutes a new material issue, particularly when, as here, the allegations giving rise to the additional damages are substantively identical to those set forth in the original complaint. Accordingly, we conclude that the court correctly determined that the 2023 amendment did not interject new material issues into the case and, therefore, did not extinguish the defendant's default.

B

Alternatively, the defendant claims that, even if the 2023 amendment did not extinguish the default, the

[13] We note that, in her brief to this court, the defendant claims, inconsistently, that the 2023 amendment "triple[d] the water charges being claimed" and "quadrupl[ed] . . . the plaintiff's debt claim." Neither assertion is supported by the record. In the operative pleadings at the time default was entered, the plaintiff alleged unpaid water fees in the total amount of $5178.64. In its 2023 amendment, the plaintiff alleged additional unpaid water fees in the total amount of $3856.

court abused its discretion by not setting aside the default for good cause shown pursuant to Practice Book § 17-42.

Practice Book § 17-42 provides in relevant part: "A motion to set aside a default where no judgment has been rendered may be granted by the judicial authority for good cause shown upon such terms as it may impose. . . ." It is well established that "[the] determination of whether to set aside [a] default is within the discretion of the trial court . . . [and] such a determination will not be disturbed unless that discretion has been abused or where injustice will result." (Internal quotation marks omitted.) *Johnson* v. *Raffy's Café I, LLC*, 173 Conn. App. 193, 203, 163 A.3d 672 (2017). "In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *Sessa* v. *Province*, 98 Conn. App. 564, 566, 910 A.2d 992 (2006), cert. denied, 281 Conn. 912, 916 A.2d 51 (2007). "In the exercise of its discretion, the trial court may consider not only the presence of mistake, accident, inadvertence, misfortune or other reasonable cause . . . factors such as [t]he seriousness of the default, its duration, the reasons for it and the degree of contumacy involved . . . but also, the totality of the circumstances, including whether the delay has caused prejudice to the nondefaulting party." (Internal quotation marks omitted.) *Johnson* v. *Raffy's Café I, LLC*, supra, 203.

As we previously stated, in her motion to set aside the default, the defendant took the position that the default had been effectively extinguished by the filing of the 2023 amendment. She argued in the alternative, however, that, if the court were to conclude otherwise, it nonetheless should set aside the default for good

cause shown. In arguing that good cause existed, the defendant asserted in her motion only that the plaintiff was not prejudiced by her delay in pleading because the plaintiff could have moved for judgment "in 2021 or 2022 . . . but chose not to." The court, in denying the defendant's motion, made no express findings with respect to the defendant's alternative argument.

On appeal, the defendant claims that the court abused its discretion in failing to set aside the default pursuant to Practice Book § 17-42 because, she argues, "it should have been clear" to the court that the "circumstances . . . warranted the opening of the default" for good cause shown. In asserting that good cause existed to set aside the default, the defendant reiterates on appeal her argument before the trial court that the plaintiff was not prejudiced by the delay in pleading.[14] We are not persuaded.

[14] The defendant also argues in her appellate brief that good cause existed to set aside the default because "there [was] no contumacy on the defendant's part . . . she simply wanted to get the backup for the charges," which we interpret as an argument that she delayed responding to the plaintiff's complaint only because she was waiting on documentation to substantiate the water charges. The defendant's counsel, however, did not raise such an argument either in the defendant's motion to set aside the default or during oral argument before the trial court. Rather, the defendant's counsel appeared to take an entirely different position during argument before the trial court, as he suggested that the delay was because the defendant did not feel that the damages sought by the plaintiff prior to the 2023 amendment were worth litigating. Thus, the trial court was not apprised of the defendant's position, raised for the first time on appeal, that the reason for the delay was due to the plaintiff's alleged failure to provide her with supporting documentation for its water charges, and the plaintiff was not given the opportunity to respond to this argument before the trial court. See *Duso* v. *Groton*, 228 Conn. App. 390, 419–20, 325 A.3d 295 ("to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party" (internal quotation marks omitted)), cert. granted, 350 Conn. 933, 327 A.3d 385 (2024). Moreover, apart from the defendant's unsupported assertion in her special defense that she made "numerous demands" for written documentation, the record is devoid of any evidence demonstrating that she actually made such a request or that she ever indi-

Although the defendant was defaulted for failure to plead in April, 2021, she did not take any action to address that default until December 15, 2023, when she filed a motion to set it aside, just three days before the scheduled hearing on the plaintiff's motion for judgment. The defendant failed to offer any meaningful explanation, either before the trial court or on appeal, regarding her initial failure to plead or why she waited nearly three years after the default was entered to file a motion to set it aside. Accordingly, even assuming the defendant is correct that her delay in pleading did not cause prejudice to the plaintiff,[15] her claim fails

cated to the plaintiff or the court that such documentation was necessary for her to respond to the pleadings. Because we are in no position to assess the defendant's factual assertions when there is no evidence in the record to support them, we conclude that we cannot address this argument because of an inadequate record. See *Duso* v. *Groton*, supra, 420.

The defendant's appellate brief also asserts, without further explanation, that the circumstances establishing good cause included the fact that she had a pending counterclaim and that new counsel had filed an appearance one week prior. The defendant, however, offers no legal authority for her contention that such factors are controlling to a court's consideration of whether to set aside a default. Moreover, the defendant fails to engage in any substantive analysis regarding how those alleged facts established good cause to set aside the default, which was entered more than two years prior to the filing of both the defendant's counterclaim and her new counsel's appearance. "[W]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required . . . ." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 748, 183 A.3d 611 (2018). Accordingly, we decline to consider these issues in our review of the defendant's claim. See, e.g., *State* v. *Hines*, 165 Conn. App. 1, 23 n.15, 138 A.3d 994 (declining to review defendant's argument where he failed to offer any legal authority to support argument), cert. denied, 321 Conn. 920, 137 A.3d 764 (2016).

[15] The plaintiff contends that it was prejudiced by the delay in pleading in light of "the time, fees, and costs associated" with its "significant efforts to craft a global settlement from the time the default entered . . . until the plaintiff filed its motion for judgment . . . ." During oral argument before this court, however, the plaintiff's counsel acknowledged that, because there was an annual 18 percent statutory interest rate on the unpaid water liens, the defendant's claim that the delay did not prejudice the plaintiff "admittedly . . . might be true . . . ." See General Statutes § 49-72.

simply because her motion did not allege any facts demonstrating that good cause existed to set aside the default that she had failed to address for nearly three years. See, e.g., *U.S. Bank National Assn.* v. *Weinbaum*, 219 Conn. App. 597, 612–13, 295 A.3d 1045 (2023) (court did not abuse its discretion in denying motion to set aside default when defendant "did not provide any meaningful explanation for her failure to plead on time" and therefore failed to demonstrate good cause); *Chevy Chase Bank, F.S.B.* v. *Avidon*, 161 Conn. App. 822, 833–34, 129 A.3d 757 (2015) (defendant failed to demonstrate good cause to open default when defendant's counsel "did not provide any explanation for the defendant's initial failure to plead . . . or give a reason as to why [he] waited almost seven months to file a motion to open the default"); *Snowdon* v. *Grillo*, 114 Conn. App. 131, 141–42, 968 A.2d 984 (2009) (court did not abuse its discretion in denying motion to set aside default filed day of hearing in damages, and four months after default was entered, when "[t]he only reason for failing to plead offered by the [defendant] . . . did not rise to the level of good cause"); *Merritt* v. *Fagan*, 78 Conn. App. 590, 595–96, 828 A.2d 685 (court did not abuse its discretion in denying motion to set aside default filed on day of scheduled hearing in damages and four months after default was entered), cert. denied, 266 Conn. 916, 833 A.2d 467 (2003).

The defendant has not provided a meaningful explanation for her initial failure to plead or for the lengthy delay in addressing the default; therefore, she has failed to demonstrate that good cause existed to set aside the default. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion to set aside the default.

II

The defendant next claims that the trial court improperly relied on the plaintiff's affidavit of debt in rendering

the judgments. The defendant argues that because she objected to the amount of debt, the court was precluded from relying on the plaintiff's affidavit pursuant to Practice Book § 23-18 (a).

Practice Book § 23-18 (a) provides in relevant part that, in any foreclosure action, "where no defense as to the amount of the . . . debt is interposed, such debt may be proved by . . . the affidavit of the plaintiff or other person familiar with the indebtedness . . . ." "[Section] 23-18 (a) provides plaintiffs with an efficient method of meeting their burden to establish the amount of the debt if no defense is interposed. Although it is the defendant's burden to sufficiently interpose a defense to the claimed amount of the debt, once a defense is interposed, the burden remains on the plaintiff to prove the amount of the debt. . . . In other words, once the defendant has sufficiently interposed a defense as to the amount of the debt, the plaintiff is required to satisfy its burden under the Connecticut Code of Evidence, without the benefit of § 23-18 (a)." *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 176, 296 A.3d 157 (2023). "[A] trial court's legal determination of whether . . . § 23-18 (a) applies is a question of law over which our review is plenary." (Internal quotation marks omitted.) Id., 164.

It is well established, however, that a mere pro forma objection to the amount of debt is insufficient to render Practice Book § 23-18 (a) inapplicable. "[T]o preclude the admission of an affidavit of debt pursuant to . . . § 23-18 (a) to establish the amount of . . . debt, a defense to the . . . debt must concern the *amount* of the debt. . . . [Our] case law [makes] clear that a defense challenging the amount of the debt must be actively made to prevent the application of § 23-18 (a). . . . A defense is insufficient if it focuses on matters that are ancillary to the amount of the debt, such as whether the loan is in default, which is a matter of

liability, or [matters] that attack the credibility of the affiant or defects in the execution of the affidavit itself. . . . Additionally, a defense to the amount of the debt must be based on some articulated legal reason or fact. . . . A defendant not only must object to the amount of the debt but must specifically object as to why the amount of the debt is incorrect: for example, whether late charges should have been waived or money had been advanced for taxes." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 164–65; see also, e.g., *Bank of America, N.A.* v. *Chainani*, 174 Conn. App. 476, 487–88, 166 A.3d 670 (2017) (claim of insufficient knowledge to admit or deny amount of debt, and denial that debt was in default, which went to liability, were not defenses to amount of debt).

On appeal, the defendant argues that she objected to the amount of the debt in her disclosure of defense, special defense, and at the December 18, 2023 hearing. The defendant's argument is belied by the record, which reveals that the defenses she interposed to the debt did not specifically challenge the *amount* of the debt.[16] The alleged objections in her disclosure of defense and special defense were more analogous to claims of insufficient knowledge to admit or deny the amount of debt

[16] In her disclosure of defense, the defendant asserted, inter alia, that the "plaintiff's bills for water are arbitrary and capricious" because she was not a member of the plaintiff and, therefore, "not privy" to how the charges were calculated. Similarly, in her special defense, the defendant asserted that the water charges were "imposed . . . in an arbitrary and capricious manner" on the basis that she "never received written documentation supporting or substantiating the charges."

We note additionally that the defendant's other disclosed defenses challenged the plaintiff's standing to foreclose on the water liens and, in filing her answer and special defense, the defendant denied all liability with respect to the unpaid fees. The defendant's counsel repeatedly represented to the court at the December 18, 2023 hearing that the defendant's disclosed defenses and special defense went to the merits of the case, rather than to the amount of damages. See, e.g., *Busconi* v. *Dighello*, 39 Conn. App. 753, 771–72, 668 A.2d 716 (1995) (defense to liability for debt is not defense to amount), cert. denied, 236 Conn. 903, 670 A.2d 321 (1996).

than specific objections, based on some articulated legal reason or fact, as to why the amount of the debt was incorrect. And, although the defendant's counsel objected to the plaintiff's affidavit of debt at the December 18, 2023 hearing, he merely stated that the defendant "do[es] object to the debt, obviously." The defendant's counsel did not elaborate on his objection or explain why the plaintiff's affidavit was incorrect, and he did not request an opportunity to be heard further on the matter.

The defendant, in conclusory fashion, asserts on appeal that those objections precluded the court from relying on the plaintiff's affidavit of debt pursuant to Practice Book § 23-18 (a). The defendant, however, fails to provide any substantive or legal analysis regarding whether those objections were sufficient to render § 23-18 (a) inapplicable under the controlling precedent.[17]

This court "repeatedly ha[s] stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly

[17] In addition, the defendant fails to address, let alone adequately brief, whether she could properly challenge the amount of the debt by way of her disclosed defense and special defense, particularly when she was in default for failure to plead and asserted her special defense in an answer that was not timely filed. See *JPMorgan Chase Bank, National Assn.* v. *Malick*, supra, 347 Conn. 170 n.5 (acknowledging this court's holding in *Bank of America, N.A.* v. *Chainani*, supra, 174 Conn. App. 486, that defendant may challenge amount of debt by way of special defense but noting disagreement among trial courts and expressly declining "to address the validity of pleading a special defense related to the amount of mortgage debt owed"); see also, e.g., *Chevy Chase Bank, F.S.B.* v. *Avidon*, supra, 161 Conn. App. 836–37 (holding that trial court, in its discretion, may refuse to give effect to defendant's untimely filed answer and special defenses).

and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *Ramos* v. *State*, 230 Conn. App. 524, 530, 330 A.3d 278 (2025). Accordingly, we conclude that the defendant's claim is inadequately briefed, and we therefore decline to review it.

The judgments are affirmed and the case is remanded for the purpose of setting new sale dates.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SAMUEL A. RIVAS, JR.
(AC 47400)

Alvord, Westbrook and Wilson, Js.

Syllabus

Convicted, following a conditional plea of nolo contendere, of the crime of operating a motor vehicle while under the influence of alcohol or drugs, the defendant appealed. He claimed, inter alia, that the trial court improperly denied his motion to dismiss because the state's seven month delay in executing its arrest warrant violated his right to due process. *Held*:

The trial court properly denied the defendant's motion to dismiss, as the defendant failed to present the court with a sufficient factual record to demonstrate that he suffered actual, substantial prejudice as a result of the state's preaccusation delay and, thus, a violation of his right to due process..

The prosecution of the defendant for operating a motor vehicle while under the influence of alcohol or drugs did not violate his prior plea agreement with the state as to a charge of interfering with an officer that arose out of the same criminal incident, the defendant having presented no evidence to establish a reasonable belief that the plea agreement had terminated all of his criminal liability flowing from his conduct during that same incident.

Argued April 14—officially released July 1, 2025

Procedural History

Information charging the defendant with the crime of operating a motor vehicle while under the influence

of alcohol or drugs and with improper use of a registration, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, where the court, *Hon. Arthur C. Hadden*, judge trial referee, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court, *Hon. Arthur C. Hadden*, judge trial referee, on a conditional plea of nolo contendere to the charge of operating a motor vehicle while under the influence of alcohol or drugs; judgment of guilty; subsequently, the state entered a nolle prosequi as to the remaining charge, and the defendant appealed to this court. *Affirmed.*

Ruth Burke, deputy assistant public defender, with whom, on the brief, was *Jennifer Bourn*, chief of legal services, for the appellant (defendant).

Rebecca R. Zeuschner, deputy assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Sarah Bowman*, assistant state's attorney, for the appellee (state).

Opinion

WESTBROOK, J. The defendant, Samuel A. Rivas, Jr., appeals from the judgment of conviction rendered following his conditional plea of nolo contendere to the charge of operating a motor vehicle while under the influence of alcohol or drugs in violation of General Statutes § 14-227a.[1] On appeal, he claims that the trial court improperly denied his motion to dismiss the

[1] General Statutes § 14-227a provides in relevant part: "(a) . . . No person shall operate a motor vehicle while under the influence of intoxicating liquor or any drug or both. A person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle (1) while under the influence of intoxicating liquor or any drug or both, or (2) while such person has an elevated blood alcohol content. . . ."

The defendant also was charged with improper use of a registration in violation of General Statutes § 14-147 (c). The state entered a nolle prosequi as to that charge.

charge because (1) the state's delay in executing the warrant for his arrest (preaccusation delay) violated his right to due process, and (2) the prosecution violated an earlier plea agreement he had entered into with the state.[2] We disagree and, accordingly, affirm the judgment of the court.

The following facts, as stated by the prosecutor at the time that the defendant entered his conditional plea of nolo contendere, and procedural history are relevant to this appeal. "[On] March [3, 2022], [at] approximately 10:30 p.m., officers . . . observed a gray Lexus stuck sideways . . . in the middle of the roadway. A check revealed that the registration did not belong to that type of vehicle. Emergency lights were initiated . . . [and] officers approached the operator side of the vehicle. They observed a male later identified as this defendant seated in the driver's seat, keys in the ignition, [and the] engine on. Officers knocked on the driver's side window. The [defendant] opened the door. He looked at the police officers. Officers observed his eyes to be bloodshot and glossy.

"[The] defendant started to exit the vehicle. Immediately, officers asked him to stay in the driver's seat. He continued to stand up and get out of the vehicle. Officers observed the defendant to be off balance and confused, [he] stated, what, and puffed out his chest [and] then made a fist with both of his hands. His speech was slow, slurred, and incoherent at times. Officers attempted to talk to the defendant and gather details of what was

[2] In his principal appellate brief, the defendant sets forth three claims: the trial court improperly (1) declined to rely on representations by counsel and information in the court file in considering whether the preaccusation delay violated his due process rights; (2) failed to conclude that the preaccusation delay violated his due process rights; and (3) determined that the prosecution did not violate the defendant's prior plea agreement. Because the first two claims are sufficiently interrelated, for ease of discussion, we address those claims together.

going on; however, the defendant was very agitated [and] appeared to stare off in the distance. Again, the defendant put his hands in the front pocket of his hooded sweatshirt. He was asked to remove his hands. He did not comply.

"The defendant walked toward the officers, stood immediately in front of [one officer], appeared disoriented, and had difficulty with speech. At that time, he then stated to the officer . . . I run this shit, made a fist with his hands, and swung at the officer in an attempt to punch the officer in his face. At that time, other officers attempted to subdue this defendant. The defendant continued to resist the officers as he tensed his body when being placed in the cruiser; a struggle did ensue.

"While en route to the police station, the defendant fell asleep in the cruiser. Upon being asked to exit the cruiser on arrival, he was agitated, tensed his body, perspiring, had a dry mouth, and then appeared to become lethargic again, and [his] eyes glazed over. He had a blank stare and dazed appearance. After several minutes, the defendant stood up out of the vehicle and became paranoid. He was staring off and saying, no, no. several times. [He] [a]ppeared to be hallucinating, as he was not talking to any of the officers as he was saying that.

"The defendant was assisted into the booking area. [The officers] attempted to communicate with him but, due to his current state at that time, they were unable to perform standard field sobriety tests. They determined at that time, due to his level of impairment, he would be transported to [a hospital]. At the . . . emergency room, the defendant slipped in and out of consciousness, was confused and lethargic, unaware of his surroundings, and could not provide basic information. . . . [At] approximately 3:30 a.m., the defendant

became alert and was able to take part in normal conversation. Officers at that time determined he was able to provide information, [they] read him his [*Miranda*][3] rights and asked him questions according to that time.

"The defendant stated that he had used [phencyclidine (PCP)] earlier in the night, [but he] did not give an exact time or location. The officer was a trained drug recognition expert. PCP is a dissociative anesthetic, and [the officer] recognized [that] the signs of impairment that the defendant was exhibiting were in fact signs of that drug. They did order a urine record or test; however, one of the medical professionals at [the hospital] cancelled that." (Footnote added.)

While the defendant remained at the hospital, the state charged him with one count of interfering with an officer in violation of General Statutes § 53a-167a[4] on the basis of his conduct during the arrest on March 3, 2022. He was released on a nonsurety bond. Subsequently, in a separate case, the state charged the defendant with, inter alia, interfering with an officer on the basis of an incident on March 5, 2022. On March 7, 2022, the defendant appeared in court on both cases. See *State* v. *Rivas*, Superior Court, judicial district of New London, geographical area number twenty-one, Docket Nos. K-21-NCR-22-0165591-S and K-21-NCR-22-0165592-S. The court, *K. Murphy*, *J.*, released the defendant on a conditional promise to appear.

[3] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] General Statutes § 53a-167a provides in relevant part: "(a) A person is guilty of interfering with an officer when such person obstructs, resists, hinders or endangers any peace officer or firefighter in the performance of such peace officer's or firefighter's duties. . . ."

Although § 53a-167a (a) has been amended since the events at issue; see Public Acts 2022, No. 22-117, § 12; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

On April 1, 2022, the state sought an arrest warrant, which is the subject of the present matter, charging the defendant with operating a motor vehicle while under the influence of alcohol or drugs in violation of § 14-227a and improper use of a registration in violation of General Statutes § 14-147 (c)[5] in connection with the March 3, 2022 incident. On April 4, 2022, the court issued a warrant for the defendant's arrest on these charges. The police, however, did not execute the arrest warrant at that time.

It is undisputed that, on September 20, 2022, the defendant, pursuant to a plea agreement, pleaded guilty to two counts of interfering with an officer in violation of § 53a-167a for his conduct on March 3 and 5, 2022 (plea agreement). The court, *Papastavros*, *J.*, accepted the defendant's pleas and sentenced him to a total effective term of seven months of incarceration. It is also undisputed that, at the time of the sentencing, the defendant had other criminal charges pending against him in several jurisdictions in Connecticut.

On November 23, 2022, the defendant was released from custody. That same day, the police executed the April 4, 2022 warrant and arrested the defendant on charges of operating a motor vehicle while under the influence of alcohol or drugs and improper use of a registration.

On December 8, 2023, the defendant filed a motion to dismiss the charges. In the motion, he first argued that the police had unreasonably delayed the execution of the April 4, 2022 arrest warrant in violation of his due process rights. He additionally argued that the charges violated the earlier plea agreement, which he claimed

[5] Although § 14-147 (c) has been amended since the events at issue; see Public Acts 2023, No. 23-40, § 16; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

encompassed all criminal liability flowing from the March 3, 2022 incident. In opposition to the defendant's motion to dismiss, the state argued that, considering the defendant's then pending cases in other jurisdictions in Connecticut, the preaccusation delay was neither unreasonable nor prejudicial. The state additionally argued that the charges of operating a motor vehicle while under the influence of alcohol or drugs and improper use of a registration did not violate the earlier plea agreement because those motor vehicle charges were separate from and unrelated to the earlier charges for interfering with an officer.

On January 18, 2024, following oral arguments, the court, *Hon. Arthur C. Hadden*, judge trial referee, denied the defendant's motion to dismiss on the record. The court stated: "There's been no evidentiary hearing, there's been no evidence presented. Given that, the court cannot make any factual findings. Keep in mind that the statements of counsel, either verbal or in writing, in a memorandum of law, are not evidence and cannot be the basis for the court making findings of facts. So, all of the comments that have been made regarding the facts of this case have never been established to this court. So, the court cannot make findings of fact, and therefore cannot apply the law to the facts, because, as things stand at this moment, there are no facts before this court. So, the motion must be dismissed on that basis alone.

"In the alternative . . . based on the arguments that counsel have provided, the precedents that have been cited [related to preaccusation delay] do not appear to apply to this particular case, which does not involve a statute of limitations issue. As far as the plea agreement and the claim of lack of due process, and the claim that there was a single plea agreement, that is also not appropriate in this instance. . . . [T]he defendant was charged with interfering with a police officer based

upon his conduct subsequent to a motor vehicle stop, both at the scene of [the] stop and later on at the police station. That's totally separate and distinct from the operation of the motor vehicle and the offense[s] that arose from the operation of the motor vehicle. . . . They are separate incidents at separate times. . . .

"So, [the] motion is denied based upon the fact that I have no factual basis, [and] I have no ability to make findings of fact. In the alternative, I would also indicate that I do not believe the precedent set by the cases cited applies to this case because it is not a case where the statute of limitations is involved, and it is also not a case where there was a single incident."

Later that day, the defendant entered a conditional plea of nolo contendere to operating a motor vehicle while under the influence of alcohol or drugs. The court subsequently sentenced him to six months of incarceration, execution suspended after the mandatory forty-eight hours to serve, followed by one year of probation. This appeal followed.

As a threshold matter, we set forth the standard of review governing our resolution of this appeal. "Because a motion to dismiss effectively challenges the jurisdiction of the court, asserting that the state, as a matter of law and fact, cannot state a proper cause of action against the defendant, our review of the court's legal conclusions and resulting denial of the defendant's motion to dismiss is de novo. . . . Factual findings underlying the court's decision, however, will not be disturbed unless they are clearly erroneous." (Internal quotation marks omitted.) *State* v. *Schimanski*, 344 Conn. 435, 447, 280 A.3d 92 (2022).

I

The defendant first claims that the trial court improperly denied his motion to dismiss because the preaccusation delay violated his right to due process. We conclude that the defendant did not present a sufficient factual basis to demonstrate a due process violation.

The following legal principles are relevant to our resolution of this claim. "The role of due process protections with respect to preaccusation delay has been characterized as a limited one. . . . [T]he [d]ue [p]rocess [c]lause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . This court need only determine whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions . . . and which define the community's sense of fair play and decency . . . . The due process clause has not replaced the applicable statute of limitations . . . [as] . . . the primary guarantee against bringing overly stale criminal charges. . . .

"[T]o establish a due process violation because of preaccusation delay, the defendant must show both that actual substantial prejudice resulted from the delay and that the reasons for the delay were wholly unjustifiable, as where the state seeks to gain a tactical advantage over the defendant. . . . [P]roof of prejudice is generally a necessary but not sufficient element of a due process claim . . . . [Additionally] the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." (Internal quotation marks omitted.) *State* v. *Coleman*, 199 Conn. App. 172, 180, 235 A.3d 655, cert. denied, 335 Conn. 966, 240 A.3d 281 (2020).

In the present case, the defendant argues that the court "erred in declining to rely on uncontested representations of counsel about the procedural history of the case and information in the court file as the factual basis for the legal arguments relevant to the motion to dismiss." He contends that "the preaccusation delay of seven months that ran concurrent with . . . the eight month prosecution of [the defendant] for crimes arising

out of the same criminal episode caused actual, substantial prejudice in his ability to negotiate and knowingly enter his [earlier] guilty plea without notice that [his] conduct [on March 3, 2022] . . . was subject to a separate, pending prosecution." He further asserts that "[t]he prejudice suffered in this case manifested as a disadvantage in [his] bargaining power, contradicted his reasonable expectation that his [September 20, 2022] plea severed all subsequent criminal liability, and damaged his ability to defend himself in both the initial and the subsequent prosecution." We are not persuaded that the defendant has presented sufficient evidence to support his allegations of prejudice.

Our case law is clear that the defendant bears the burden of "develop[ing] a record showing the reasons for the delay and that he suffered actual prejudice because of the delay. Only after the defendant has made some indication on the record that the delay was wholly unjustifiable and that he suffered actual prejudice because of the delay can [this court] review the defendant's claim to determine whether, in fact, a constitutional violation exists." *State* v. *Gay*, 87 Conn. App. 806, 813–14, 867 A.2d 26, cert. denied, 273 Conn. 930, 873 A.2d 999 (2005). Conclusory statements concerning the cause or effect of the preaccusation delay are insufficient to "substantiate either of these requirements." *State* v. *Morrill*, 197 Conn. 507, 522, 498 A.2d 76 (1985); id. (holding that trial court properly denied defendant's motion to dismiss because there was "a complete absence of proof concerning the cause or effect of the [preaccusation] delay"); see also *State* v. *Haynes*, 8 Conn. App. 361, 364, 513 A.2d 160 (1986) (holding that trial court properly denied defendant's motion to dismiss because "[n]o facts or evidence were ever presented to the court to substantiate" claim that preaccusation delay "prejudiced the defendant or was, in any

way, connected to obtaining a tactical advantage over him by the state").

The defendant in the present case presented no evidence to the trial court to demonstrate that he had suffered actual substantial prejudice as a result of the preaccusation delay. Although defense counsel argued before the trial court that the delay prejudiced his ability to negotiate the earlier plea agreement and that evidence relevant to the present case was ordered destroyed at the September 20, 2022 proceeding,[6] "mere representations by counsel are not evidence." *State* v. *Hanna*, 19 Conn. App. 277, 278, 562 A.2d 549 (1989). Thus, the trial court properly concluded that the defendant had failed to present a factual record to demonstrate that the preaccusation delay violated his right to due process.

[6] The defendant argues that he suffered prejudice as a result of the preaccusation delay because evidence relevant to the present case was destroyed after he pleaded guilty to interfering with an officer. To establish that evidence was destroyed, the defendant requests that this court take judicial notice of the transcript from his September 20, 2022 proceeding, during which he pleaded guilty to interfering with an officer. "The doctrine of judicial notice is not a hard and fast one. It is modified by judicial discretion. . . . Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved and the apparent justice of the case." (Emphasis omitted; internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 264, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012). "As a general rule, this court will not take judicial notice of facts that were not available to the trial court," including transcripts of separate proceedings that the defendant failed to bring to the attention of the trial court. *State* v. *Siano*, 20 Conn. App. 369, 375, 567 A.2d 1231 (1989), aff'd, 216 Conn. 273, 579 A.2d 79 (1990).

In the present case, although the defendant raised this argument during the motion to dismiss hearing, he never presented the transcript to the trial court. We, therefore, decline to take judicial notice of the transcript on appeal for the purpose of supplementing the factual record, including whether evidence was destroyed. See id., 376 ("[b]ecause the trial court was unaware of this transcript and because it did not contain generally known facts, we will not take judicial notice of it"); see also *Moore* v. *Commissioner of Correction*, 227 Conn. App. 487, 519, 321 A.3d 470 (declining to take judicial notice of transcripts and court file from underlying

II

The defendant alternatively claims that the trial court improperly denied his motion to dismiss because the prosecution for operating a motor vehicle while under the influence of alcohol or drugs violated his earlier plea agreement. He argues that the state, in reaching the earlier plea agreement, "induced the defendant to reasonably believe that no further criminal liability would flow from the same incident" and that the court improperly determined that the present case is distinguishable from *State* v. *Nelson*, 23 Conn. App. 215, 579 A.2d 1104, cert. denied, 216 Conn. 826, 582 A.2d 205 (1990), cert. denied, 499 U.S. 922, 111 S. Ct. 1315, 113 L. Ed. 2d 248 (1991). We disagree that the prosecution for operating a motor vehicle while under the influence of alcohol or drugs violated the earlier plea agreement.

We begin our analysis by setting forth the relevant legal principles governing plea agreements. "Plea agreements are an essential and necessary part of the administration of justice . . . . This essential tool of the criminal justice system will lose its efficacy if the state's performance of the agreement is contrary to the reasonable expectations of the defendant. . . . Because a defendant waives several constitutional rights when [she] elects to plead guilty to a criminal offense, the choice of a guilty plea is of profound significance. . . . If the state makes promises to the defendant in order to induce a guilty plea, those promises must be fulfilled . . . and [t]he breaking of a promise made by the prosecutor as a result of plea negotiations is sufficient to invalidate a conviction." (Citations omitted; internal quotation marks omitted.) Id., 218–19.

"It is well settled that [p]rinciples of contract law and special due process concerns for fairness govern

criminal case because "we cannot . . . take judicial notice of materials for the purpose of weighing evidence and inferring facts"), cert. granted, 350 Conn. 924, 326 A.3d 247 (2024).

our interpretation of plea agreements. . . . [T]he primary goal of contract interpretation is to effectuate the intent of the parties . . . . In ascertaining that intent, we employ an objective standard and look to what the parties reasonably understood to be the terms of the plea agreement on the basis of their words and conduct, and in light of the circumstances surrounding the making of the agreement and the purposes they sought to accomplish." (Citations omitted; internal quotation marks omitted.) *State* v. *Kallberg*, 326 Conn. 1, 14–15, 160 A.3d 1034 (2017).

In *Nelson*, "the defendant was driving . . . when she lost control of her vehicle . . . and struck . . . [the] victim . . . . The defendant . . . was subsequently charged, inter alia, with assault in the second degree with a motor vehicle . . . . [Before trial] defense counsel, the state's attorney and . . . the attorney who represented the victim and his family, met in a pretrial conference with the trial judge in his chambers to discuss a plea agreement. At that conference, [the attorney for the victim and his family] informed all present that the victim was still hospitalized in grave condition and that he might not live. At the conclusion of the conference, the trial judge indicated that he would accept the plea. The defendant then pleaded guilty to the assault charge pursuant to the agreement." *State* v. *Nelson*, supra, 23 Conn. App. 216. "The victim [subsequently] died from his injuries . . . [and] a warrant was issued for the defendant's arrest on the charge of manslaughter in the second degree with a motor vehicle. The defendant moved to dismiss the information on the grounds that . . . the state had waived any rights to bring additional charges when it agreed to the [earlier] plea bargain. . . . The [trial] court concluded that it would not hold the state to predicting the victim's death, and it denied the motion to dismiss." Id., 217.

On appeal, "the defendant argue[d] that the agreement under which she pleaded guilty to assault barred her reprosecution on a manslaughter charge because, in bargaining for the plea, the state induced in her a reasonable belief that no further charges would be brought if the victim were to die. She argue[d] that the second prosecution thus violated her due process guarantees." Id., 217–18. In considering this claim, this court stated: "Where, as here, there is a dispute as to the terms of a plea agreement, our analysis turns on the real intent of the parties, and most significantly, of [the defendant] . . . . The defendant argues that she reasonably believed that the plea agreement terminated all her criminal liability flowing from the accident. Despite the state's silence as to what would happen if the victim died, its conduct strongly implied that it shared the defendant's interpretation of the plea agreement. The trial court found that the parties were aware of the victim's precarious condition. While it is true that at the sentencing hearing the victim's mother spoke of his eventual recovery, the state and the defendant had to be aware that this was by no means a certainty. *Under the circumstances*, it was incumbent upon the state to enunciate what was and was not covered by the agreement lest the defendant be allowed to go to plea under the impression that the criminal portion of this tragic episode was closed. If the state was reserving a right to reprosecute in the event of the victim's death, it could have, and should have, said so. It did not even remotely imply that this was its intent.

"We take particular note of the fact that, at the conclusion of the [earlier] sentencing, the state moved to have certain evidence in the case destroyed. . . . The destruction of any evidence seized at a crime scene is consistent with a belief that no further charges will be brought and lends credence to the defendant's claim that she reasonably believed her plea ended her criminal

liability. Furthermore, we think it significant that the parties agreed to a specific term of imprisonment. We question whether the defendant would have given her assent to a prison term if she thought that additional, more serious charges could be brought later." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 219–20. The court concluded that, "[u]nder the facts of this case . . . it would be unjust to the defendant for us to vacate her plea when she has already been punished for the crime to which [she] confessed." (Internal quotation marks omitted.) Id., 220–21. This court, therefore, reversed the defendant's judgment of conviction of manslaughter in the second degree with a motor vehicle. Id., 221.

The defendant argues that the present case is similar to *Nelson* because, (1) "at the time of the interfering guilty plea, the state moved for evidence to be destroyed"; (2) "the parties agreed to a specific term of seven months of imprisonment at the initial plea"; and (3) "the state, during the prosecution of the interfering charge and negotiation of the plea, never implied or indicated to the court or defense counsel that it was its intent to bring additional charges arising from the incident." We are not persuaded.

In the present case, the defendant's conduct during the March 3, 2022 incident gave rise to different types of criminal liability. The charge of operating a motor vehicle while under the influence of alcohol or drugs was based on, inter alia, the following observations of the police officers present on March 3, 2022: the defendant's vehicle was stopped in the middle of a roadway; the defendant was in the driver's seat of the vehicle with the ignition turned on; the defendant admitted to an officer that he had used PCP earlier that evening; and the defendant exhibited behavior and symptoms consistent with PCP use. Additionally, the defendant had previously pleaded guilty to two counts

of interfering with an officer, one of which was premised on, inter alia, the following observations of the officers present on March 3, 2022: the defendant did not comply with the officers' orders to remain in his vehicle and to remove his hands from his pocket; the defendant made fists with his hands and puffed out his chest; the defendant stated, "what," and, "I run this shit," to the officers; the defendant attempted to punch an officer in the face; and the defendant struggled against the officers while they placed him in the patrol car and when they asked him to exit the patrol car at the station. As this court indicated in *Nelson*, the issue of whether the subsequent prosecution violated the earlier plea agreement turns on the intent of the defendant and the state in entering into the agreement.

Unlike the defendant in *Nelson*, the defendant in the present case has not presented any evidence to suggest that he reasonably believed that his earlier plea agreement, which concerned only interfering with an officer, terminated *all* his criminal liability flowing from his conduct on March 3, 2022. He has not, for example, identified any statements or conduct by the state during the plea negotiations implying that it would not separately prosecute the defendant for additional criminal liability related to his operation of the motor vehicle. Although the defendant asserts that the state moved to destroy evidence related to the present case at the time that he pleaded guilty to interfering with an officer, the defendant has not provided a sufficient factual basis for this allegation. See footnote 6 of this opinion. Even if the fact that the defendant agreed to a specific term of imprisonment supports a belief that the earlier plea agreement covered all criminal liability arising from the March 3, 2022 incident, the defendant has failed to present any evidence that the state induced that belief. Moreover, the fact that the state did not enunciate its intention to prosecute the defendant for additional

criminal liability does not, by itself, give rise to a reasonable belief that it would not do so. See *In re Keijam T.*, 226 Conn. 497, 507, 628 A.2d 562 (1993) (rejecting as overbroad defendant's argument that, pursuant to *Nelson*, "the state is estopped from charging a greater offense than that pleaded to in relation to a particular incident if the state has failed to reserve the right to future prosecution in a plea agreement").

Because the defendant has not presented any evidence to establish a reasonable belief that the earlier plea agreement terminated all his criminal liability flowing from his conduct on March 3, 2022, we conclude that the prosecution for operating a motor vehicle while under the influence of alcohol or drugs did not violate the earlier plea agreement. Therefore, the trial court properly denied the defendant's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.