STEPHANIE NETTER *v.* DONALD NETTER
(AC 46484)

Alvord, Suarez and Bear, Js.

Syllabus

The defendant appealed from the trial court's judgment dissolving his marriage to the plaintiff and granting certain other relief. He claimed, inter alia, that the court improperly treated certain trust assets as part of the marital estate subject to distribution pursuant to statute (§ 46b-81). *Held*:

The trial court's finding that a spendthrift trust created by the defendant's father prior to the parties' marriage was part of the marital estate and subject to distribution pursuant to § 46b-81 was clearly erroneous, as the trust agreement provided that all trust distributions to the defendant had to be approved by a disinterested trustee, and, accordingly, the defendant had no presently enforceable right to receive his interest in the trust and the court should not have considered it an asset of the marital estate that it was authorized to divide pursuant to § 46b-81.

The trial court properly determined that three trusts created by the defendant during the parties' marriage and funded with marital assets constituted divisible marital property, as, although the trusts were created as self-settled spendthrift trusts under South Dakota law, at the time the trusts were created Connecticut did not recognize the validity of self-settled trusts and, even if the trusts had satisfied the requirements of the Connecticut Qualified Dispositions in Trust Act (§ 45a-487j et seq.), enacted in 2019, they would nonetheless be void as a matter of public policy by virtue of the fact that sustaining them and excluding their assets from distribution would unfairly prejudice the plaintiff.

This court, having concluded that the trial court improperly treated the assets from one of the trusts as marital property, determined that, on remand,

the entirety of the mosaic of financial orders, excluding the personal property distribution order, must be refashioned, as it was uncertain whether the trial court's other financial orders would remain intact after reconsidering the property distribution orders in a manner consistent with this court's opinion.

The trial court did not abuse its discretion in awarding sole legal custody of the parties' minor children to the plaintiff, as the court's findings, which were either unchallenged or based on its credibility determinations and which were consistent with the testimony and recommendations of the guardian ad litem, supported the award of sole legal custody to the plaintiff.

The trial court did not abuse its discretion with respect to its order that the plaintiff have access to the former marital residence to retrieve her personal belongings, as the order was sufficiently clear and explicit and was appropriately tailored to the facts and circumstances of this case.

Argued March 18—officially released October 21, 2025

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Heller*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Appeal dismissed in part*; *reversed in part*; *new trial.*

Kevin F. Collins, for the appellant (defendant).

James P. Sexton, with whom were *Aidan R. Welsh* and *John R. Weikart*, for the appellee (plaintiff).

Opinion

BEAR, J. The defendant, Donald Netter, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Stephanie Netter, and from certain financial orders, an order awarding the plaintiff sole legal custody of the parties' two children, who were both then minors, and an order permitting the plaintiff access to the marital residence in order to retrieve her personal

belongings.[1] On appeal, the defendant claims that the court improperly (1) treated trust assets from four separate trusts as marital property under General Statutes § 46b-81[2] and ordered the defendant to make a lump sum property distribution to the plaintiff using funds from those trusts, (2) calculated his earning capacity and relied on that "astronomical" calculation to set "unachievable child support and alimony orders," (3) ordered the defendant to secure and maintain a $5,000,000 life insurance policy, (4) ordered the defendant to pay $3,300,000 in attorney's fees to the plaintiff, (5) valued

[1] The trial court previously had issued a nearly identical pendente lite access order, in a June 9, 2021 memorandum of decision, from which the defendant appealed. See *Netter* v. *Netter*, 220 Conn. App. 491, 493, 298 A.3d 653 (2023). While that appeal was pending, the court issued its memorandum of decision dissolving the parties' marriage. Id., 497. This court thereafter dismissed as moot the portion of that appeal that challenged the pendente lite access order upon concluding "that there is no practical relief that we may afford the defendant as to the pendente lite access order because it was superseded by the access order contained within the final dissolution judgment." Id., 498.

[2] General Statutes § 46b-81 provides: "Assignment of property and transfer of title. (a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either spouse, when in the judgment of the court it is the proper mode to carry the decree into effect.

"(b) A conveyance made pursuant to the decree shall vest title in the purchaser, and shall bind all persons entitled to life estates and remainder interests in the same manner as a sale ordered by the court pursuant to the provisions of section 52-500. When the decree is recorded on the land records in the town where the real property is situated, it shall effect the transfer of the title of such real property as if it were a deed of the party or parties.

"(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

the assets within the marital estate, including, but not limited to, the trust assets, (6) faulted him for the breakdown of the marriage and awarded the plaintiff sole legal custody of the parties' two, then minor, children, and (7) issued a vague and imprecise order that allows the plaintiff unrestricted access to the parties' former marital residence in order to retrieve her personal property in violation of his constitutional rights. Because we conclude that the court improperly determined that trust assets from one of the four trusts—i.e., the spendthrift trust the defendant's father created for the defendant's benefit, prior to the marriage—constituted divisible marital property, and ordered the defendant to make distributions to the plaintiff from that trust, we reverse the judgment of the trial court with respect to all the financial orders and remand this case for a new trial on all financial issues consistent with this opinion, with the exception of the personal property distribution order that gives rise to the property access order. We affirm the judgment of the court as to the custody order insofar as it pertains to the parties' remaining minor child and as to the property access order.[3]

The following facts and procedural history are relevant to our resolution of the present appeal. The parties were married on July 9, 2005, in New York, New York. The parties have two daughters; the first was born in October, 2006, and the second was born in May, 2009.[4] On March 1, 2017, the plaintiff commenced this action

[3] Because we remand the matter for a new trial on all financial orders, we need not reach the defendant's claims that the court improperly (1) calculated his earning capacity and relied on that "astronomical" calculation to set "unachievable child support and alimony orders," (2) ordered the defendant to secure and maintain a $5,000,000 life insurance policy, (3) ordered the defendant to pay $3,300,000 in attorney's fees to the plaintiff, and (4) valued the assets within the marital estate, including, but not limited to, the trust assets.

[4] Although both children were minors at the time of judgment in this case, the parties' older daughter has since reached the age of majority.

seeking the dissolution of her marriage to the defendant, alleging that it had broken down irretrievably and seeking, inter alia, joint legal custody of the parties' two then minor children. On May 25, 2017, the defendant filed an answer and cross complaint in which he sought, inter alia, sole legal custody of the children. The plaintiff then amended her complaint on February 2, 2018, to seek sole legal custody of the children.

The proceedings in this matter have been highly contentious and protracted. The trial itself took place on fifty-seven nonconsecutive days, over the course of seventeen months, between May 5, 2021, and September 12, 2022.[5] Many pendente lite motions were filed, and the resolution of two such motions gave rise to a prior appeal by the defendant to this court. See *Netter* v. *Netter*, 220 Conn. App. 491, 493, 298 A.3d 653 (2023). On January 23, 2023, while that appeal was pending, the trial court, *Heller*, *J.*, rendered judgment dissolving the parties' marriage. See footnote 1 of this opinion. In its memorandum of decision, the court found that "[t]he plaintiff is fifty-five years old. She attended Syracuse University and graduated in 1990 from New York University. After she graduated from New York University, she took some classes locally from Ramapo College.

"The plaintiff received a master's degree in physical therapy in 1998 from the Institute for Physical Therapy, which is now part of the University of St. Augustine for Health Sciences. She worked in Mississippi and Alabama as a contract physical therapist after graduation.

"The plaintiff became a licensed physical therapist in New Jersey. She worked as a physical therapist at

[5] The defendant represented himself at trial and the court found that his "litigation and discovery misconduct contributed to the case taking more than four years to come to trial and the trial itself lasting" as long as it did. Sixteen witnesses testified at the trial, including the plaintiff, the defendant and the plaintiff's expert, Elizabeth Ciccone, who specialized primarily in business valuation and forensic accounting with Marcum, LLP, and both parties introduced exhibits that were admitted into evidence.

the Kessler Institute for Rehabilitation and at Twin Boro Physical Therapy. She was working at Twin Boro when she and the defendant were married in July, 2005. Her annual income was approximately $65,000 in 2005, when she last worked outside of the home.

"The plaintiff is in good health. . . .

"The defendant is sixty-one years old. He is in good health. He received a bachelor of science degree in economics from the Wharton School of the University of Pennsylvania in 1983.

"The defendant has over thirty years of professional investment experience, according to his curriculum vitae, or CV. He has served on the boards of four public companies. As described in his CV, the defendant was a founder of Dolphin Limited Partnerships. He served as a senior managing director of Dolphin Holdings Corp., a co-senior managing director of Dolphin Holdings Corp. II, and senior managing director of Dolphin Holdings Corp. III, all entities under the Dolphin umbrella. The three Dolphin limited partnerships—Dolphin Limited Partnership, LP (DLP I), Dolphin Domestic Fund II, LP, and Dolphin Master Fund II, LP (collectively, DLP II), and Dolphin Limited Partnership III, LP—and Dolphin Financial Partners, LLC (DFP), were described as sizable investors in over twenty public companies on the defendant's CV.

"The defendant was employed by Geneve Corporation (Geneve) at the time of the marriage. Geneve is a subsidiary of Geneve Holdings, Inc. (Geneve Holdings), a private financial holding company controlled by his family. Geneve Holdings' assets are comprised primarily of insurance companies. The defendant's father, Edward Netter, was the head of Geneve. The defendant earned compensation of approximately $50,000 in 2005 from Geneve. The defendant also managed the various Dolphin entities from his Geneve office.

"Edward Netter died from cancer on February 16, 2011. The defendant's mother, Barbara Netter, became the majority shareholder of Geneve Holdings. The defendant's relationship with Geneve deteriorated. In early 2013, he was either terminated or he resigned from his position with Geneve. He relocated the business operations of the Dolphin entities to the marital residence, located at 623 Round Hill Road, Greenwich, Connecticut (the Round Hill Road property). The defendant has managed his business interests from the pool house at the Round Hill Road property since that time." (Footnotes omitted.)

The court explained that "[t]he parties enjoyed an affluent lifestyle during the marriage" and further indicated that "[t]he defendant brought significant assets to the marriage." The court noted, among other things, that "[t]he defendant was the primary beneficiary and trustee of The Donald Netter Family Trust." Regarding the defendant's income, the court found that his "financial affidavit reflects net monthly income of $3599" and, "[c]onsidering the defendant's years of experience in finance and as a fund manager, his professional credentials, and his prior earnings, [determined] that the defendant has a present earning capacity of at least $2,500,000 annually." Moreover, the court found that the "defendant controls assets worth in excess of $175,000,000."

The court determined that the defendant was responsible for the breakdown of the marriage. It deemed the plaintiff's testimony credible and explained that she "testified that there were six main reasons for the breakdown of the marriage: the defendant's paranoia and suspicious behavior; his controlling and abusive conduct; his sexually coercive behavior; his inability to get along with others; his conviction that [the plaintiff] was anorexic; and his gaslighting her and telling her she was crazy." Among other things, "[t]he defendant constantly accused the plaintiff of being after his money." He

"would not provide information to the plaintiff regarding their finances. He refused to discuss any financial matters with her. Without the plaintiff's knowledge, the defendant transferred most of the marital assets into irrevocable South Dakota trusts . . . ."

To this end, the court stated that the defendant had "identifie[d] four South Dakota trusts as assets on his financial affidavit: The Six Cataracts Trust, The DASSA Trust, The Scout Resources Trust, and The Ann Holdings Trust" and it made certain findings pertaining to each one. (Footnote omitted.) The court explained that, "[*o*]*ther than The Six Cataracts Trust*, the trusts are self-settled trusts,[6] formed by the defendant after the date of the marriage with marital assets." (Emphasis added; footnote added.)

The court further explained that "The Six Cataracts Trust, formerly The Donald Netter Family Trust,[7] was

[6] "Under Connecticut law, a trust is self-settled if a settlor places his or her assets into trust for his or her own benefit." *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 456, 165 A.3d 1137 (2017).

[7] The Donald Netter Family Trust Agreement was admitted into evidence, as plaintiff's exhibit 473, during Elizabeth Ciccone's direct testimony at trial. See footnote 5 of this opinion. Although the defendant did not object to its admission into evidence, he did request, immediately after it was admitted, that it "be filed under seal." The plaintiff's counsel voiced no objection to the defendant's request, and the court issued an order dated November 4, 2021, sealing plaintiff's exhibit 473.

We note that the defendant did also file thereafter, at the court's request, a motion to seal "certain business records" and that motion had been posted in the Superior Court clerk's office in order to give the public notice of the sealing request. Several months later, following numerous requests by the court and in response to the final deadline the court imposed, the defendant filed a more specific list of the documents he sought to have sealed. The court had explained, when setting that deadline, that it was "certainly open to sealing specific documents. I do take the view that confidential business information, particularly, in the nature of trade secrets or other confidential information that would be harmful to the party if it were disclosed because it could have business and financial consequences, I will seal that.

"But I need to know what it is and I need to know why you want it sealed because I need to make a finding that the individual interest and maintaining the confidence of that information outweighs any public . . . interest [in] having that information disclosed.

created by Edward Netter in 1992 for the benefit of the defendant and his descendants. The defendant was named the Family Trustee of The Donald Netter Family Trust.

"Under The Donald Netter Family Trust Agreement, *the trustees, other than the defendant, have the power to pay or apply so much of the net income of the trust or the principal of the trust fund to or for the use of the defendant and his issue as they in their sole discretion determine to be advisable* for the comfort, support and maintenance of the defendant and his issue.

"The defendant, as the Family Trustee, has the power to appoint additional trustees, to designate successor trustees, and to revoke the designation of any successor trustee. The defendant also has the power to remove any acting trustee, provided that he may not exercise such power more than three times in any ten year period and that at least one half of the trustees shall be disinterested trustees immediately after he has exercised such power. The defendant exercised this power on March 18, 2013, when he appointed the South Dakota Trust Company, LLC (South Dakota Trust), as Disinterested Trustee, as defined in the trust agreement.

"We've never had that hearing because you've never told me which specific documents in the record you wish to have sealed." Although we cannot ascertain, on the basis of the record before us, whether that hearing ultimately took place, we are satisfied, nonetheless, with the court's compliance with the procedures set forth in Practice Book § 25-59A, which governs the sealing of documents in family matters. Moreover, our review of the record does not reveal that plaintiff's exhibit 473 was unsealed and, thus, we are bound by the sealing order for purposes of our review of the claims on appeal. See Practice Book §§ 77-2 and 77-4. We are therefore limited in this respect to the findings the court made as to the terms of The Donald Netter Family Trust Agreement. Neither party has challenged as part of this appeal the court's findings in these respects, or the propriety of the court's having made them. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 ("claims of error not briefed are considered abandoned" (internal quotation marks omitted)), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

"The defendant and South Dakota Trust created a new entity, SDAS, LLC,[8] *into which all of the assets of The Donald Netter Family Trust were transferred*. The Donald Netter Family Trust was renamed The Six Cataracts Trust on May 13, 2018.

"The Six Cataracts Trust owns SDAS, LLC. The defendant is the sole manager of SDAS, LLC. He is also the Investment Trust Advisor of The [Six Cataracts] Trust. [The plaintiff's expert] Marcum [LLP (Marcum)] reported that, based on its review of documents produced by or on behalf of the defendant in discovery, the defendant is the sole signatory for SDAS, LLC, when making investments. As manager of SDAS, LLC, the defendant can unilaterally vote the shares of Geneve Holdings that The Six Cataracts Trust holds through its ownership of SDAS, LLC.

"Marcum determined that The Six Cataracts Trust, through its ownership of SDAS, LLC, held assets with

[8] The record reflects that the defendant appointed South Dakota Trust as a Disinterested Trustee of The Donald Netter Family Trust on March 15, 2013, and that South Dakota Trust accepted the appointment on March 18, 2013. The defendant and South Dakota Trust also executed, on March 15 and 18, 2013, respectively, "The Donald Netter Family Trust Resolution by Trustees to Form LLC and Fund LLC with All Trust Assets" (trust resolution). The trust resolution authorized (1) "[t]he formation of SDAS, LLC in the State of South Dakota"; (2) "[t]he transfer of all assets in the name of the Trust to SDAS, LLC"; (3) "[the appointment of the defendant] as the Initial Investment Trust Advisor . . . of the Trust to be the Manager of SDAS, LLC" and (4) "[the defendant, as] Manager of SDAS, LLC and as the Initial Investment Trust Advisor . . . to take any and all necessary actions to change title of Trust assets to SDAS, LLC and to retain the Trust's taxpayer identification number in the name of SDAS, LLC treated as a disregarded entity for income tax purposes." The plaintiff's expert, Elizabeth Ciccone; see footnote 5 of this opinion; testified that the trust resolution, among other things, gave "South Dakota, as opposed to Connecticut, control over the LLC and the trust itself." The court credited "Ciccone's testimony over twelve days of trial and the two Marcum expert reports, including the exhibits to the reports, that were admitted into evidence: the Marcum Valuation Report of [the defendant's] Closely Held Business Interests (the Marcum Business Interests Valuation Report) and the Marcum report of the Value of the Underlying Assets Held by Trusts for the Benefit of [the defendant] (the Marcum Trusts Assets Valuation Report)." (Footnote omitted.)

a total fair market value of $122,678,483, comprised of two brokerage accounts and investments in Trefoil, Hawkes Bay, Geneve Holdings, and The Ann Holdings, LLC, as of the valuation dates.[9]" (Emphasis added; footnotes added; footnote in original; footnotes omitted.)

The court described the other three trusts, The DASSA Trust, The Scout Resources Trust and The Ann Holdings Trust, as "self-settled trusts that the defendant formed during the marriage with marital assets and without the plaintiff's knowledge." The defendant "secretly created" these three trusts, the court found, "as the marriage deteriorated." The court further explained that the terms of the self-settled trust agreements were "substantially similar" to each other. Among other things, the defendant is the investment trust advisor to and the sole beneficiary of each self-settled trust. Moreover, under each trust agreement, "the trustees, *other than the defendant*, have the power to pay or apply so much of the net income of the trust or the principal of the trust fund to or for the use of the defendant as they *in their sole discretion* determine to be advisable for the health, education, comfort, support and maintenance of the defendant" and distributions "may only be made to the defendant with the unanimous written approval of (i) the Disinterested Trustee(s), (ii) each Family Trustee, if any; and (iii) each Current Adult

[9] "Marcum detailed the following holdings of The Six Cataracts Trust through its ownership of SDAS, LLC, with a total value of $122,678,483: Merrill Lynch #621 Brokerage, $1,067,685; UBS #8E Brokerage, $22,277,587; 0.70 percent interest in Trefoil-Garnet Capital Partners, LP, $1,095,557; 0.17 percent interest in Hawkes Bay Partners, LP, $991,380; 19 percent interest in Geneve Holdings, $97,229,993; 0.25 percent interest in The Ann Holdings, LLC, $16,282."

Elizabeth Ciccone testified that, with the "possible exception" of the Ann Holdings interest, she was "not aware of any other asset being transferred from [the defendant] individually into The Six Cataracts Trust." Ciccone "only [had] documentation that shows [that] [the Ann Holdings interest] is in there" but she did not "know how it came to be in there."

Beneficiary, if any."[10] (Emphasis added.) The defendant, as the sole beneficiary of each trust, did have the right to appoint additional beneficiaries in the event of his death, including his "Current Spouse." At the time the trusts were created, however, despite the fact that the parties had been married since 2005, the plaintiff did not qualify as a "Current Spouse" as that term was defined in the respective trust agreements.[11] The court found that, as of the date of their respective valuations, The DASSA Trust, through its ownership of DASSA, LLC,[12] held assets with a total fair market value of $34,660,977, The Scout Resources Trust, through its ownership of Scout Resources, LLC,[13] held assets with a total fair market value of $2,727,548, and The Ann Holdings Trust, through its ownership of Ann Holdings, LLC, held a brokerage account[14] with a value of $7,589,211.

[10] The court noted that each of these terms was defined in the respective trust agreement and identified the defendant as the "Current Adult Beneficiary" of each trust. The court also expressly identified the defendant as the "Family Trustee" of The DASSA Trust, South Dakota Trust as the "Disinterested Trustee" of The DASSA and Ann Holdings Trusts, and South Dakota Trust as the "trustee" of The Scout Resources Trust.

[11] The DASSA Trust Agreement and The Scout Resources Trust Agreement, which were both entered into in 2013, each define "Current Spouse" in relevant part as a "spouse that, as applicable, (i) has been married to [the defendant] . . . for no less than [twelve] years, (ii) has been generally living with [the defendant] at the time of his death . . . and (iii) shall not have been estranged from him . . . at the time of death." The Ann Holdings Trust Agreement, which was entered into in 2015, is identical except for the requirement that the current spouse has to have been married to the defendant "for no less than [fifteen] years."

[12] The defendant is the sole member of DASSA, LLC, a South Dakota limited liability company he formed on July 19, 2013. He transferred marital assets to DASSA, LLC, thereafter.

[13] The defendant is the sole member of Scout Resources, LLC, a Delaware limited liability company formed in 2011 and converted to a South Dakota limited liability company on October 30, 2013. Scout Resources, LLC, holds the former marital residence, the Round Hill Road property, as its primary asset.

[14] The defendant is the sole member of The Ann Holdings, LLC, which was initially formed on September 8, 2009, as The Ann, LLC, a Delaware limited liability company. After changing its name and converting to an Ohio

The court ultimately concluded that "[t]he trust assets [from each of the four trusts] are part of the marital estate." Applying Connecticut law and addressing the four trusts collectively,[15] the court reasoned that "[t]he defendant is the sole beneficiary of the three self-settled trusts that he secretly created with marital assets as the marriage deteriorated. He is the primary beneficiary of The Six Cataracts Trust. With respect to each of the trusts, he has the power to appoint additional trustees, to designate successor trustees, and to revoke the designation of any successor trustee. He also has the power to remove the current trustee up to three times in a ten year period—a power he exercised in 2013 in connection with The Six Cataracts Trust." The court further determined that "[n]o one other than the defendant has the power to control the trusts and direct the disposition of the trust assets" and proceeded to conclude "that the defendant has a presently existing property interest in the trusts and not a 'mere expectancy.' . . . The trust assets are properly included in the marital estate and subject to equitable distribution pursuant to . . . § 46b-81." (Citation omitted.)

The court also found that "[i]n the almost six years of litigation, the plaintiff has incurred attorney's fees

limited liability company, The Ann Holdings, LLC, ultimately became a South Dakota limited liability company in 2015. The brokerage account held the remaining proceeds from the November, 2015 sale of a condominium apartment located in New York City. A limited liability company controlled by the defendant had purchased that property nineteen days after the parties were married in 2005.

[15] The court had stated earlier in its decision that, "[a]lthough the court's construction of the trust agreements is governed by the law of the state of South Dakota, 'the ultimate question of whether the value of the entire trust corpus [is] properly attributable to the defendant's estate must be determined under the law of this state.' *Tremaine* v. *Tremaine*, 235 Conn. 45, 61 n.16, 663 A.2d 387 (1995)." We note, however, that the court did not cite to or apply South Dakota law in its decision. The extent to which the court construed the terms of the trust agreements prior to addressing the "ultimate question" as to whether the trust assets from the four trusts were part of the marital estate is therefore unclear.

and expert fees totaling approximately $3.5 million. Approximately $65,000 of those fees were incurred in prosecuting motions for contempt." (Footnote omitted.) It further found that "the attorney's fees charged to the plaintiff in this dissolution action are reasonable in view of the circumstances of this case . . . ." See footnote 5 of this opinion.

In its orders, the court awarded sole legal custody and primary physical custody of the then minor children to the plaintiff and ordered the defendant to pay the plaintiff $15,000 per month in child support. The court further ordered the defendant to pay the plaintiff $40,000 per month as periodic alimony. Both of these awards were predicated, at least in part, on the court's finding that the defendant had an annual earning capacity of $2,500,000.

In awarding the plaintiff sole legal custody of the children, the court found the seventh factor of the seventeen factors listed in General Statutes § 46b-56 (c)[16] to be "particularly compelling." The court determined that "the plaintiff has consistently supported the relationship between the children and the defendant, including purchasing cards and gifts for him from the children," whereas the defendant "has done nothing to 'facilitate and encourage' the children's relationship with the plaintiff. He has made clear . . . that he believes that the plaintiff is not a capable parent, that she is mentally ill, suffers from anorexia, and lacks judgment, and that she engages in unusual conduct." The court expressly noted, however, that "[t]here is no

[16] General Statutes § 46b-56 (c) provides in relevant part: "In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so, may consider, but shall not be limited to, one or more of the following factors . . . (7) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders . . . ."

support in the record for the defendant's allegations regarding the plaintiff. Neither Dr. [Arnold] Shienvold [the court appointed evaluator] nor the guardian ad litem share his views."

As part of its financial orders, the court ordered the defendant to "make a lump sum property distribution to the plaintiff in the total amount of $50,000,000," payable from the four trusts as follows: "*(1) Payment from The Six Cataracts Trust*: The defendant shall pay the plaintiff $15,000,000 from The Six Cataracts Trust no later than February 23, 2023. Commencing on January 1, 2024, and continuing on January 1 every other year thereafter, the defendant shall pay $500,000 from The Six Cataracts Trust to the plaintiff until he has paid a total of $25,000,000 to the plaintiff from the trust. . . .

"*(2) Payment from The DASSA Trust, The Scout Resources Trust, and The Ann Holdings Trust:* The defendant shall pay the plaintiff $15,000,000 from the three self-settled trusts—The DASSA Trust, The Scout Resources Trust, and The Ann Holdings Trust—no later than February 23, 2023. Commencing on January 1, 2024, and continuing on January 1 every other year thereafter, the defendant shall pay $500,000 from the three self-settled trusts to the plaintiff until he has paid a total of $25,000,000 to the plaintiff from these trusts." (Emphasis in original.)

"Except for the lump sum property distribution to the plaintiff . . . the defendant shall retain his interest in The Six Cataracts Trust, The DASSA Trust, The Scout Resource[s] Trust, and The Ann Holdings Trust."

With respect to personal property, the court awarded the plaintiff "all personal property located in her apartment on Greenwich Avenue, her personal property located in the Round Hill Road property, and any other personal property that is otherwise in her possession" and reiterated its previous order of June 9, 2021; see

footnote 1 of this opinion; that "the plaintiff shall have access to the Round Hill Road property between the hours of 9 a.m. and 5 p.m. for two days to remove her personal property from the Round Hill Road property." As part of its order, the court explained how the parties should arrive at the two dates and who could be present on those days.

Specifically, "[t]he plaintiff shall be accompanied by an off-duty Greenwich police officer when she is at the Round Hill Road property to remove her personal property. The Greenwich police officer shall remain at the Round Hill Road property at all times while the plaintiff is at the property. The plaintiff shall pay for the services of the Greenwich police officer. The plaintiff may be accompanied by up to two other individuals to assist her in removing her belongings, neither of whom shall be Barbara Netter. These individuals shall be permitted to enter the Round Hill Road property with the plaintiff.

"The defendant may be present while the plaintiff is at the Round Hill Road property. The children shall not be present under any circumstances." Moreover, "[t]he defendant shall not photograph, record, or monitor by security camera or other means of surveillance the plaintiff's removal of her personal property from the Round Hill Road property. The defendant shall not interfere with the plaintiff's access to the Round Hill Road property or to her personal property. The defendant shall not remove, move, or hide any of the plaintiff's personal property to prevent her from removing it from the Round Hill Road property."[17]

[17] "The court's order largely mirrored its pendente lite access order, except that it permitted the defendant to 'be present while the plaintiff is at the Round Hill Road property.' " *Netter* v. *Netter*, supra, 220 Conn. App. 498. "The pendente lite access order provided: 'If the defendant is at home while the plaintiff is retrieving her belongings from the Round Hill Road property, he must remain in the pool house and shall not be in the residence.' " Id., 498 n.6.

Finally, the court ordered that "[t]he defendant shall obtain, pay for, and maintain a term life insurance policy in the face amount of $5,000,000 for as long as the defendant has a court-ordered obligation to pay alimony, child support, and/or postsecondary educational expenses" for the parties' daughters, and it awarded the plaintiff $3,300,000 in attorney's fees pursuant to General Statutes § 46b-62,[18] stating that "to order otherwise would undermine these financial orders."

The defendant filed a motion for reargument, a second motion for reargument and an amended motion for reargument, each of which the plaintiff opposed. The court denied the defendant's motions for reargument. The plaintiff filed a motion for clarification of the court's decision with respect to child support, which the court granted. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court improperly determined that the assets held by the four trusts were part of the marital estate and subject to distribution pursuant to § 46b-81. He argues that each trust is a South Dakota spendthrift trust that is controlled by "South Dakota laws . . . which are very protective against the claims of creditors" and is not part of the marital estate because he does not have the authority to distribute, or compel the distribution of, funds therefrom.

The plaintiff disagrees. Although she posits that "a spendthrift trust is not considered an asset of the marital estate that the court may divide under . . . § 46b-81, because distributions to the beneficiary are at the

[18] General Statutes § 46b-62 provides in relevant part: "(a) . . . [T]he court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

trustee's sole discretion," she argues that the "three self-settled trusts . . . are not spendthrift trusts" and that, even though "The Six Cataracts Trust, is not a self-settled trust . . . it nevertheless carries almost all of the same provisions as the defendant's three self-settled trusts." The plaintiff does not argue, however, that The Six Cataracts Trust is not a spendthrift trust. Rather, she maintains that the defendant "retains significant legal authority over all four of the trusts, power sufficient for him to use a variety of procedures to access the trust assets . . . [such that] the trusts are not mere expectancies; they are part of the marital estate for purposes of § 46b-81." Alternatively, she argues that, "even if the trusts were cognizable, the trial court retained the power to enforce the compelling public policies that were controlling law in Connecticut when the three self-settled trusts were formed" by including them in the marital estate for distribution.

We agree with the defendant that The Six Cataracts Trust is a spendthrift trust that does not constitute marital property for purposes of § 46b-81. We also agree with the defendant that the three self-settled trusts are spendthrift trusts, but we agree with the plaintiff that, as *self-settled spendthrift trusts*, they violate the well established public policy of Connecticut that applies under the facts and circumstances of this case and, consequently, we conclude that the court properly determined that they are divisible marital property under § 46b-81.

We begin by setting forth our standard of review and the legal principles that are germane to our analysis. Our Supreme Court recently clarified the standard of review "that governs a trial court's determination that a particular asset or interest constitutes marital property for purposes of § 46b-81, which presents a mixed question of law and fact." *D. S.* v. *D. S.*, 351 Conn. 1, 9, 328 A.3d 111 (2025). To this end, "the standard of

review of a trial court's determination whether an asset is classified as property is de novo.

"The trial court's underlying factual findings, however, are reviewable under a clearly erroneous standard and will be reversed only if they find no support in the record or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Lastly, the question of how these determinations as to any particular asset fit into the mosaic of all the trial court's financial orders is reviewable for abuse of discretion. . . .

"Section 46b-81 provides in relevant part: (a) At the time of entering a decree annulling or dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the estate of the other spouse.

* * *

(c) In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

"Our legislature has not defined the term property in § 46b-81, leaving courts to define it. In determining the equitable distribution of resources under the statute, courts should engage in a three step process, determining (1) whether the resource is property (classification), (2) what is the appropriate method for

determining the value of the property (valuation), and, (3) what is the most equitable distribution of that property between the parties (distribution). . . .

"[Our Supreme Court] has articulated and refined a two part test by which trial courts may determine, on a case-by-case basis, whether a potential interest constitutes divisible marital property under § 46b-81. In the first part of the . . . test, we ask whether the holder has a *presently* enforceable right [to receive the interest] . . . based on contractual principles or a statutory entitlement . . . . If the party has such a right, the interest is part of the marital estate and is distributable as property." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 10–12. The second part of the test "involves a more fact intensive analysis" that focuses "on the likelihood that the holder *eventually* will acquire an enforceable right in the interest, that is, whether the interest will likely vest or whether the holder will otherwise acquire a definitive right to it." (Emphasis in original.) Id., 12–13. In this case, the court determined that "the defendant has a presently existing property interest in the trusts and not a 'mere expectancy' " and that they were "properly included in the marital estate and subject to equitable distribution pursuant to . . . § 46b-81."

To assess the propriety of the trial court's determination in this regard, we must first set forth certain legal principles with regard to trusts. "A trust which creates a fund for the benefit of another, secures it against the beneficiary's own improvidence, and places it beyond the reach of his creditors is a spendthrift trust. *Zeoli* v. *Commissioner of Social Services*, 179 Conn. 83, 88, 425 A.2d 553 (1979); see also General Statutes § 52-321.[19] [A] spendthrift trust is one that restricts both the

[19] "General Statutes § 52-321 (a) provides: 'If property has been given to trustees to pay over the income to any person, without provision for accumulation or express authorization to the trustees to withhold the income, and the income has not been expressly given for the support of

beneficiary's ability to alienate his interest in the fund and his creditor's ability to seize the property in satisfaction of his debts; in contrast to other types of protective trusts, a spendthrift trust in the technical sense exists where there is an express provision forbidding anticipatory alienations and attachments by creditors. 76 Am. Jur. 2d, [Trusts § 121 (1992)]. Where by statute or the trust terms it is provided that the interest of a beneficiary is not to be available to his creditors, and the court decisions in the state hold the provision valid without limit or qualification, obviously creditors have no rights or remedies as far as the trust property and the beneficiary's interest in it or the income thereof are concerned. They are limited to collection from sums after payment to the beneficiary, and to the products of such payments and to nontrust property. G. Bogert, Trusts & Trustees (2d Ed. Rev. 1992) § 227, p. 499.

"The well-settled rule in this state is that the exercise of discretion by the trustee of a spendthrift trust is subject to the court's control only to the extent that an abuse has occurred . . . . Furthermore, Connecticut bars creditors from reaching a distribution except, and until, it be in the hands of the beneficiary. . . . No title in the income passes to [the beneficiary] unless and until it is appropriated to him by the trustee, and then only to the amount determined by [the trustee]." (Citations omitted; footnote in original; internal quotation marks omitted.) *Spencer* v. *Spencer*, 71 Conn. App. 475, 484–86, 802 A.2d 215 (2002).

Our Supreme Court has stated, as a general proposition, that "a spendthrift trust . . . is not considered an asset of the marital estate that the court may divide under . . . § 46b-81." *Powell-Ferri* v. *Ferri*, 326 Conn.

the beneficiary or his family, the income shall be liable in equity to the claims of all creditors of the beneficiary.' " *Spencer* v. *Spencer*, 71 Conn. App. 475, 485 n.4, 802 A.2d 215 (2002).

457, 465, 165 A.3d 1124 (2017). If a spendthrift trust is *self-settled*, however, the Connecticut Qualified Dispositions in Trust Act (Connecticut act), General Statutes § 45a-487j et seq., governs its validity. Enacted in 2019; see Public Acts 2019, No. 19-137, § 99 through 108; the Connecticut act sets the parameters for establishing a valid self-settled spendthrift trust, and authorizes the use of such trusts, in Connecticut. Prior to this legislation, self-settled spendthrift trusts violated the public policy of Connecticut and would not be allowed to shield a settlor's assets from his creditors. See *Greenwich Trust Co.* v. *Tyson*, 129 Conn. 211, 219–20, 27 A.2d 166 (1942).[20] "Moreover, Connecticut will not '. . . enforce the law of another jurisdiction nor the rights arising thereunder, which . . . contravene [Connecticut] public policy.' *Dick* v. *Dick*, 167 Conn. 210, 223–[24],

[20] In *Greenwich Trust Co.* v. *Tyson*, supra, 129 Conn. 211, our Supreme Court explained that "[t]he attempt of a man to place his property in trust for his own benefit under limitations similar to those which characterize a spendthrift trust is a departure from the underlying basis for the creation of such trusts. That aside, the public policy which sustains such trusts when created for the benefit of another is, where the settlor is himself the beneficiary, overborne by other considerations. In *Johnson* v. *Connecticut Bank*, 21 Conn. 148, [158 (1851)], where we were considering the right of the creditor of a beneficiary of a trust to secure satisfaction from the latter's right to the income, we stated: It is the policy of our law, that all the property of a debtor should be responsible for his debts. And his equitable estate may be taken, as well as his legal, provided it is subject to his [control]; and, subject to definite limitations, that has always been the policy of our law. . . . To admit the validity of such trusts would open too wide an opportunity for a man to evade his just debts to be permissible unless sanctioned by statutory enactment. This is the reason why the overwhelming weight of authority holds ineffective attempts to establish them. . . . But when a man settles his property upon a trust in his own favor, with a clause retaining his power of alienating the income, he undertakes to put his own property out of the reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is, that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts. . . . If such trusts were sustained, the owner need only select as trustee a near kinsman or tried friend, on whom he may rely for liberality, and thus indirectly accomplish what he cannot do directly."

355 A.2d 110 (1974)." *In re Brooks*, 217 B.R. 98, 101 (Bankr. D. Conn. 1998).

Under the Connecticut act, however, a qualified disposition made by way of a written irrevocable trust with at least one qualified trustee that specifies that Connecticut law applies to the trust's validity, construction and administration and mandates spendthrift provisions for the transferor or other beneficiaries may be considered valid. See General Statutes § 45a-487k (10). Moreover, the provisions of the Connecticut act may be applied retroactively to "all trusts created before, on or after January 1, 2020." General Statutes § 45a-487t (a) (1). If, however, "the court in which the judicial proceeding [concerning trusts commenced before January 1, 2020] is pending finds that application of a particular provision of [the Connecticut act] would substantially . . . prejudice the rights of the parties . . . [the Connecticut act will] not apply and the superseded law applies." General Statutes § 45a-487t (a) (3). Thus, if a self-settled spendthrift trust agreement does not satisfy the Connecticut act's requirements, or if a court finds that sustaining a self-settled spendthrift trust would substantially prejudice the rights of the parties, the law as it existed in Connecticut prior to the legislation is applicable; see General Statutes § 45a-487t (a) (3); and the trust will be void as a matter of public policy.

With these principles in mind, we must construe the terms of the respective trust instruments; see *Spencer* v. *Spencer*, supra, 71 Conn. App. 481–82; and determine whether the court properly considered the four trusts to be assets of the marital estate that it had the authority to divide under § 46b-81. "Because resolution of this issue turns on construing trust language and applying legal principles, it is subject to plenary review." (Internal quotation marks omitted.) *Marzaro* v. *Marzaro*, 231

(Citations omitted; emphasis omitted; internal quotation marks omitted.) *Greenwich Trust Co.* v. *Tyson*, supra, 219–20.

Conn. App. 85, 98, 333 A.3d 134, cert. denied, 351 Conn. 925, 333 A.3d 795 (2025).

A

We turn first to The Six Cataracts Trust, formerly known as The Donald Netter Family Trust, which was established by The Donald Netter Family Trust Agreement.[21] Ordinarily, we would begin by construing the terms of the trust agreement itself. See id.; *Spencer* v. *Spencer*, supra, 71 Conn. App. 481–82. As we have previously noted, however, The Donald Netter Family Trust Agreement is subject to a sealing order issued by the trial court and, thus, we are not at liberty to do so. See footnote 7 of this opinion.

We are guided, therefore, by the court's unchallenged findings that "The Six Cataracts Trust, formerly The Donald Netter Family Trust, was created by [the defendant's father] Edward Netter in 1992 for the benefit of the defendant and his descendants"; (footnote omitted); and that "[u]nder The Donald Netter Family Trust Agreement, the trustees, *other than the defendant*, have the power to pay or apply so much of the net income of the trust or the principal of the trust fund to or for the use of the defendant and his issue *as they in their sole discretion determine to be advisable for the comfort, support and maintenance of the defendant and his issue*." (Emphasis added.) These findings support the conclusion the defendant advocates and the plaintiff does not dispute, namely, that The Six Cataracts Trust

[21] We note that the court initially described each individual trust in four separate subsections of its decision. The court then addressed the trusts collectively in a fifth subsection entitled "*The trust assets are part of the marital estate*"; (emphasis in original); and articulated there its conclusion that "the defendant has a presently existing property interest in the trusts and not a 'mere expectancy.' " We have determined, however, that the fact that The Six Cataracts Trust is not self-settled, and The DASSA, Scout Resources and Ann Holdings Trusts are self-settled, is a dispositive distinction that warrants separate consideration and analysis.

is a spendthrift trust. More specifically, these findings reflect that the settlor of The Donald Netter Family Trust, the defendant's father, Edward Netter, by expressly authorizing the income of the trust to be given for the support of the defendant beneficiary and his family, intended to create an irrevocable spendthrift trust that could not be reached by the defendant's creditors.[22] See *Spencer* v. *Spencer*, supra, 71 Conn. App. 484–85; see also General Statutes § 52-321. "Because the plaintiff obtained a judgment against the defendant [in this dissolution action], her status is that of a creditor. . . . Thus, the plaintiff can reach neither the income nor the principal [of The Six Cataracts Trust] until it is distributed and in the hands of the defendant." (Citations omitted; footnote omitted.) *Spencer* v. *Spencer*, supra, 486; see also, e.g., *Cooley* v. *Cooley*, 32 Conn. App. 152, 169, 628 A.2d 608 (judgment in dissolution action established plaintiff's status as creditor), cert. denied, 228 Conn. 901, 634 A.2d 295 (1993).

Although the defendant argued in his corrected post-trial brief that "The [Six Cataracts Trust] has significant spendthrift provisions, subject to a paid Disinterested Trustee with sole authority to withhold beneficiary distributions" and that "[a]s an *expectancy*, The Six Cataracts Trust is not a marital asset"; (emphasis in original); the court, apart from recognizing that The Six Cataracts

[22] The defendant argues that, although Connecticut law governs the ultimate question as to whether the trust assets are part of the marital estate, South Dakota law, which is "very protective against the claims of creditors," should govern the construction of the trust agreement. The court appeared to agree. See footnote 15 of this opinion. We cannot ascertain, given the restricted record, whether this is accurate. See footnote 7 of this opinion. Even so, we note that in South Dakota, as in Connecticut, "[w]hen interpreting a trust instrument, [the court] must ensure that the intentions and wishes of the [settlor] are honored." (Internal quotation marks omitted.) *Plains Commerce Bank, Inc.* v. *Beck*, 986 N.W.2d 519, 528 (S.D. 2023); see also *Spinnato* v. *Boyd*, 231 Conn. App. 460, 472, 333 A.3d 818 (2025) ("[t]he cardinal rule of construction of all trusts . . . is to find and effectuate the intent of the testator or settlor" (internal quotation marks omitted)).

Trust is not a self-settled trust, did not address the nature of the trust or the settlor's intent. Instead, the court focused on the defendant's roles and actions as investment trust advisor and sole manager of SDAS, LLC, and found that "[n]o one other than the defendant has the power to control [The Six Cataracts Trust] and direct the disposition of the trust assets." The court then relied on this finding to conclude that "the defendant has a presently existing property interest in [The Six Cataracts Trust] and not a 'mere expectancy.' "

The court's unchallenged finding, however, that The Donald Netter Family Trust Agreement establishes that "*the trustees*, *other than the defendant*, have the power to pay or apply so much of the net income of the trust or the principal of the trust fund to or for the use of the defendant and his issue as they *in their sole discretion* determine to be advisable for the comfort, support and maintenance of the defendant and his issue"; (emphasis added); belies its conclusion, as does the testimony of Elizabeth Ciccone, whose testimony the court credited "over twelve days of trial," that all trust "distributions have to be approved by the disinterested trustee," South Dakota Trust. As such, the finding on which the court based its conclusion that The Six Cataracts Trust is part of the marital estate is a clearly erroneous finding that is not supported by, and in fact contradicts, the record, and it cannot stand. See *D. S.* v. *D. S.*, supra, 351 Conn. 10.

The Six Cataracts Trust, which the defendant's father established nearly thirteen years prior to the parties' marriage, is a spendthrift trust that provides a fund for the benefit of the defendant and his descendants. As a spendthrift trust, it expressly affords the trustees *other than the defendant* the sole discretion as to whether and when to distribute funds and places those funds

beyond the reach of his creditors, including the plaintiff.[23] See *Zeoli* v. *Commissioner of Social Services*, supra, 179 Conn. 88. The defendant has no presently enforceable right to receive the interest in the trust and the court should not have considered it an asset of the marital estate that it was authorized to divide under § 46b-81. See *Powell-Ferri* v. *Ferri*, supra, 326 Conn. 465.

B

We now turn to the "three self-settled trusts that [the defendant] secretly created with marital assets as the marriage deteriorated." The DASSA Trust Agreement, The Scout Resources Trust Agreement and The Ann Holdings Trust Agreement each specify that "[t]he validity, construction and administration of this Trust shall be governed and construed by the laws of the State of South Dakota, and the courts thereof shall have exclusive jurisdiction to adjudicate all claims, actions or proceedings relating to this Trust Agreement."[24] As such, we agree with the defendant that South Dakota law governs our interpretation of these trust agreements. We emphasize, however, that, although our construction of the three self-settled trust agreements is governed by South Dakota law, the ultimate question of whether they constitute property that is properly attributable to the marital estate must be determined by applying Connecticut law.[25] See *Tremaine* v. *Tremaine*, 235 Conn. 45, 61 n.16, 663 A.2d 387 (1995).

[23] Although we note that Ciccone testified at trial that the trust resolution; see footnote 8 of this opinion; "create[d] the role of the current adult beneficiary which gives that person the power to approve or veto distributions" and that the defendant assumed that role, the trust resolution itself, which was entered into evidence at trial, reflects no such thing. Regardless, as we have stated previously, Ciccone also testified that all trust distributions must be approved by the disinterested trustee, South Dakota Trust.

[24] We note that, unlike The Donald Netter Family Trust Agreement, the three self-settled trust agreements were not subject to sealing orders at trial.

[25] In his principal brief to this court, the defendant expressly recognizes the interpretation of the trust agreements under South Dakota law as "a predicate [to] determining whether the trusts are includable in the marital

Under South Dakota law, "[t]he interpretation of a trust instrument is a question of law reviewed de novo. . . . When interpreting a trust instrument, [the court] must ensure that the intentions and wishes of the [settlor] are honored. . . . To do so, [the court] first look[s] to the language of the trust instrument" and, "[i]f the language of the trust instrument makes the intention of the [settlor] clear, it is [the court's] duty to declare and enforce it." (Citations omitted; internal quotation marks omitted.) *Plains Commerce Bank, Inc.* v. *Beck*, 986 N.W.2d 519, 527–28 (S.D. 2023).

The defendant created The DASSA Trust on September 19, 2013, The Scout Resources Trust on December 14, 2013, and The Ann Holdings Trust on June 2, 2015. The defendant is the sole beneficiary of each irrevocable trust and he is also the Investment Trust Advisor. South Dakota Trust is the Disinterested Trustee of each trust. Although the defendant had the authority to appoint additional beneficiaries in the event of his death, including his "Current Spouse," and, although the defendant created the trusts more than eight years into the marriage, the plaintiff did not qualify as a "Current Spouse" as that term was defined in the trust agreements.

As the court found, "[u]nder [each] trust agreement, the trustees, *other than the defendant*, have the power to pay or apply so much of the net income of the trust or the principal of the trust fund to or for the use of the defendant as they in their sole discretion determine to be advisable for the health, education, comfort, support, and maintenance of the defendant. [Each] trust agreement provides that distributions may only be made to the defendant with the unanimous written approval of (i) the Disinterested Trustee(s), (ii) each Family

estate subject to equitable distribution as a marital asset pursuant to Connecticut law."

Trustee, if any; and (iii) each Current Adult Beneficiary, if any." (Emphasis added.)

In addition, each trust agreement includes a "Restrictions on Alienation" clause that states, in relevant part, that "[n]either the [n]et [i]ncome nor the principal of any trust hereunder shall be alienable by any current [b]eneficiary, either by anticipation, assignment or any other method and the same shall not be subject to be taken by his or her creditors (other than the Trustees) by any process whatsoever . . . ." Finally, each trust agreement expressly states that "[t]his Trust is intended to be a South Dakota 'Qualified Disposition Trust' and all transfers made to the Trust are intended to be 'qualified dispositions' pursuant to Chapter 55-16 of South Dakota Codified laws,[26] now and as hereafter amended from time to time and all provisions of this Trust shall be interpreted, construed and administered pursuant to this intention." (Footnote added.)

The plain and unambiguous terms of these trust agreements establish that the defendant intended to create three South Dakota self-settled spendthrift trusts. At the time the defendant established them, however, self-settled spendthrift trusts violated Connecticut public policy as a matter of course and would not be sustained. See *Greenwich Trust Co.* v. *Tyson*, supra, 129 Conn. 219–20; *In re Brooks*, supra, 217 B.R. 101. Moreover, although the Connecticut act sets parameters for establishing valid self-settled trusts, authorizes their use in Connecticut, and provides that its provisions may be applied retroactively to "all trusts created before, on or after January 1, 2020"; General Statutes

[26] South Dakota's Qualified Dispositions in Trust Act has authorized the use of self-settled spendthrift trusts in South Dakota since its enactment in 2005. See S.D. Codified Laws §§ 55-16-1 to 55-16-16 (2025); M. Krogstad & M. Van Heuvelen, "Domestic Asset Protection Trusts: Examining the Effectiveness of South Dakota Asset Protection Trust Statutes for Removing Assets from a Settlor's Gross Estate," 61 S.D. L. Rev. 378, 378–79 (2016).

§ 45a-487t (a) (1); the Connecticut act nonetheless affords courts the discretion to apply the law it superseded if the "application of a particular provision of [the Connecticut act] would substantially . . . prejudice the rights of the parties. . . ." General Statutes § 45a-487t (a) (3).

In the present case, the court ultimately concluded that the three self-settled spendthrift trusts were assets of the marital estate after finding that "[n]o one other than the defendant has the power to control the trusts and direct the disposition of the trust assets" and that the defendant had a presently existing property interest in them. As with The Six Cataracts Trust, however, the disinterested trustee, South Dakota Trust, must approve any and all distributions from the trusts, and, thus, the court's finding that the defendant has exclusive control over the three self-settled trusts and the distributions therefrom cannot be sustained. See *D. S.* v. *D. S.*, supra, 351 Conn. 10. Nevertheless, on the basis of our plenary review of the record, we conclude that the court's ultimate determination that the three self-settled spendthrift trusts constitute divisible marital property withstands scrutiny. See id.

At the outset, we note that the respective trust agreements do not satisfy the requirements set forth in § 45a-487k (10) because each agreement provides that the laws of South Dakota, not Connecticut, govern their validity, construction and administration. As such, they are not valid trust instruments within the context of the Connecticut act.

Moreover, even if they were, the defendant established each self-settled South Dakota trust during the marriage and well before January 1, 2020, at a time when Connecticut did not recognize the validity of self-settled trusts. The court found that the defendant did so "secretly . . . with marital assets as the marriage

deteriorated." In fact, the court emphasized this finding throughout its decision by stating three times that the defendant had formed each self-settled trust "during the marriage with marital assets and without the plaintiff's knowledge." The court also made it clear that the defendant had actually used "most of the marital assets" in doing so. The court further explained that "[t]he defendant constantly accused the plaintiff of being after his money. He left her notes with a large '0' on them. He would wake her up while she was sleeping and whisper in her ear, 'How much do you want?' He told her that she would get nothing."[27]

Our review of the trial court's decision, and these unchallenged findings in particular, reveals that the trial court was particularly concerned about the defendant's duplicitous efforts to place most of the marital assets beyond the plaintiff's reach by putting them in the three self-settled South Dakota spendthrift trusts he created when he knew the marriage was in trouble and that a divorce was imminent. See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, 320 Conn. 332, 355, 133 A.3d 402 (2016) (interpretation of trial court judgment is question of law). This concern is well founded, and it guides our analysis.

It is well settled in Connecticut that "a trial court may consider evidence that a spouse dissipated marital assets prior to the couple's physical separation, for purposes of determining an equitable distribution of property under § 46b-81, so long as the actions constituting dissipation occur either: (1) in contemplation of divorce or separation; or (2) while the marriage is in serious jeopardy or is undergoing an irretrievable breakdown.

[27] The defendant does not challenge these factual findings as part of this appeal. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339 ("claims of error not briefed are considered abandoned" (internal quotation marks omitted)), cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

. . . [D]issipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage." (Citation omitted; internal quotation marks omitted.) *Finan* v. *Finan*, 287 Conn. 491, 499, 949 A.2d 468 (2008); see also id., 500 n.6 ("dissipation is [t]he use of an asset for an illegal or inequitable purpose, such as a spouse's use of community property for personal benefit when a divorce is imminent" (internal quotation marks omitted)).

Although the court based its ultimate conclusion that the three self-settled trusts were part of the marital estate on its determination that the defendant controlled them and had a presently existing property interest in them, the court also plainly considered the defendant's preseparation dissipation of marital assets when fashioning its orders and rendering its decision. In our view, this dissipation supports the conclusion that even if the trusts satisfied the requirements of the Connecticut act, which they do not, they would nonetheless be void as a matter of public policy by virtue of the fact that sustaining them and excluding their assets from distribution would unfairly prejudice the plaintiff. See General Statutes § 45a-487t (a) (3). For these reasons, we conclude that the court properly determined that the three self-settled trusts constitute divisible marital property. See *Dorfman* v. *Liberty Mutual Fire Ins. Co.*, 227 Conn. App. 347, 425, 322 A.3d 331 (2024) ("[i]t is axiomatic that [an appellate court] may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)), cert. denied, 351 Conn. 907, 330 A.3d 881 (2025), and cert. denied, 351 Conn. 907, 330 A.3d 882 (2025).

C

In light of our conclusion that the trial court improperly treated the assets from The Six Cataracts Trust as

marital property and ordered that distributions therefrom should be used to satisfy one half of the $50,000,000 lump sum property distribution payment it ordered the defendant to make to the plaintiff with funds from all of the trusts, we turn to the question of the appropriate relief. "Individual financial orders in a dissolution action are part of the carefully crafted mosaic that comprises the entire asset reallocation plan. . . . Under the mosaic doctrine, financial orders should not be viewed as a collection of single disconnected occurrences, but rather as a seamless collection of interdependent elements. Consistent with that approach, our courts have utilized the mosaic doctrine as a remedial device that allows reviewing courts to remand cases for reconsideration of all financial orders even though the review process might reveal a flaw only in the alimony, property distribution or child support awards. . . .

"Every improper order, however, does not necessarily merit a reconsideration of all of the trial court's financial orders. A financial order is severable when it is not in any way interdependent with other orders and is not improperly based on a factor that is linked to other factors. . . . In other words, an order is severable if its impropriety does not place the correctness of the other orders in question. . . . Determining whether an order is severable from the other financial orders in a dissolution case is a highly fact bound inquiry." (Internal quotation marks omitted.) *Wald* v. *Cortland-Wald*, 226 Conn. App. 752, 775, 319 A.3d 769 (2024).

In the present case, the court found that the "defendant controls assets worth in excess of $175,000,000," and it fashioned its financial orders accordingly. Those assets included the fair market value of the assets held by the trusts which, collectively, was $173,551,753. The assets of The Six Cataracts Trust comprised $122,678,483 of that amount. We have concluded in part I A of this

opinion, however, that The Six Cataracts Trust is a valid spendthrift trust and that the defendant has no presently enforceable right to receive the interest it holds. In other words, the defendant does not control $122,678,483 of the $175,000,000 that formed the basis for the financial orders in this case.

"In dissolution proceedings, the court must fashion its financial orders in accordance with the criteria set forth in . . . § 46b-81 (division of marital property), [General Statutes] § 46b-82 (alimony) and [General Statutes §] 46b-84 (child support). All three statutory provisions require consideration of the parties' *amount and sources of income* in determining the appropriate division of property and size of any child support or alimony award." (Emphasis in original; internal quotation marks omitted.) *Valentine* v. *Valentine*, 149 Conn. App. 799, 802–803, 90 A.3d 300 (2014). Because it is uncertain whether the court's other financial orders will remain intact after reconsidering the property distribution orders in a manner consistent with this opinion, we conclude that the entirety of the mosaic must be refashioned. See *Renstrup* v. *Renstrup*, 217 Conn. App. 252, 285, 287 A.3d 1095, cert. denied, 346 Conn. 915, 290 A.3d 374 (2023). Accordingly, the court must consider all the financial orders on remand, including the alimony, child support[28] and attorney's fees awards, but excluding the personal property distribution order for the reasons set forth in part III of this opinion.

II

We next address the defendant's claim that the court abused its discretion by awarding the plaintiff sole physical and legal custody of the parties' two then minor children. Specifically, the defendant argues that the

[28] We note, in this regard, that, on remand, child support is to be determined for both children, as both were minors at the time of the judgment and thus both subject to the child support order the court issued at that time.

court "incorrectly assigned unilateral fault to the [defendant] and ignored [the plaintiff's] parental deficiencies by awarding sole legal custody of the minor children to the [plaintiff] . . . ."[29] We disagree.

We begin by noting that, although both children were minors at the time of judgment in this case, the parties' older daughter has since reached the age of majority. The propriety of the court's order as it pertains to her, therefore, is not at issue on appeal. See, e.g., *A. A.-M.* v. *M. Z.*, 225 Conn. App. 46, 54, 313 A.3d 1288 (2024) (appeal challenging custody orders and access to child was rendered moot when child attained age of eighteen); *Nowacki* v. *Nowacki*, 144 Conn. App. 503, 508–509, 72 A.3d 1245 (noting that orders with respect to parties' older child were not at issue on appeal because he reached age of majority while appeal was pending), cert. denied, 310 Conn. 939, 79 A.3d 891 (2013).

We now set forth the legal principles regarding a trial court's custody determination. "Orders regarding the custody and care of minor children . . . are governed by . . . § 46b-56, which grants the court broad discretion in crafting such orders. . . . [Section] 46b-56 (a) provides in relevant part: In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make . . . any proper order regarding the custody, care, education, visitation and support of the children if it has jurisdiction . . . . Subject to the provisions of section 46b-56a, the court may assign parental responsibility for raising the child

[29] In making this claim, the defendant references, without citation, "the memorandum of decision finding that [he] was a loving, attentive, responsible and respectful parent capable of arriving at joint child related decisions with the [plaintiff] and capable of performing effective crisis management." Our review of the court's memorandum of decision reveals no such finding or any language that can reasonably be construed to support such a finding. See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355 (interpretation of trial court judgment is question of law).

to the parents jointly, or may award custody to either parent or to a third party, according to its best judgment upon the facts of the case and subject to such conditions and limitations as it deems equitable. . . . (b) In making . . . any order as provided in subsection (a) of this section, the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. Such orders may include . . . (3) the award of sole custody to one parent with appropriate parenting time for the noncustodial parent where sole custody is in the best interests of the child . . . . [Section] 46b-56 (c) directs the court, when making any order regarding the custody, care, education, visitation and support of children, to consider the best interests of the child, and in doing so [the court] may consider, but shall not be limited to, one or more of [seventeen enumerated] factors. . . . The court is not required to assign any weight to any of the factors that it considers. . . .

"In reaching a decision as to what is in the best interests of a child, the court is vested with broad discretion and its ruling will be reversed only upon a showing that some legal principle or right has been violated or that the discretion has been abused. . . . As our Supreme Court recently reiterated, [t]he authority to exercise the judicial discretion [authorized by § 46b-56] . . . is not conferred [on] [the state's appellate courts], but [on] the trial court, and . . . we are not privileged to usurp that authority or to substitute ourselves for the trial court." (Citations omitted; footnote omitted; internal quotation marks omitted.) *N. R.* v. *M. P.*, 227 Conn. App. 698, 714–16, 323 A.3d 1142 (2024); see also *F. S.* v. *J. S.*, 223 Conn. App. 763, 787–88, 310 A.3d 961 ("[i]t is a rare case in which a disappointed litigant will

be able to demonstrate abuse of a trial court's broad discretion in [child custody] matters" (internal quotation marks omitted)), cert. denied, 350 Conn. 903, 323 A.3d 344 (2024).

The primary basis of the defendant's claim on appeal is that "[t]here was incontrovertible evidence that the [plaintiff] was untruthful in her trial testimony and that she behaved inappropriately with one or both of the minor children at times" and that "[t]here were no similar allegations leveled against [the defendant], yet the court awarded sole legal custody to the [plaintiff]." The court, however, expressly credited the plaintiff's testimony and the six main reasons she gave for the breakdown of the marriage, which were "the defendant's paranoia and suspicious behavior; his controlling and abusive conduct; his sexually coercive behavior; his inability to get along with others; his conviction that [the plaintiff] was anorexic; and his gaslighting [the plaintiff] and telling her she was crazy." See *Kohl's Dept. Stores, Inc.* v. *Rocky Hill*, 219 Conn. App. 464, 485, 295 A.3d 470 (2023) ("It is axiomatic that, [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.)).

In addition, the court found the seventh factor of the seventeen factors listed in § 46b-56 (c) to be "particularly compelling." As previously noted, this factor concerns "the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders . . . ." General Statutes § 46b-56 (c) (7). The court determined that "the plaintiff has consistently supported the relationship between the children and the defendant, including purchasing cards and gifts for

him from the children," whereas the defendant "has done nothing to 'facilitate and encourage' the children's relationship with the plaintiff. He has made clear . . . that he believes that the plaintiff is not a capable parent, that she is mentally ill, suffers from anorexia, and lacks judgment, and that she engages in unusual conduct." The court expressly found, however, that there was "no support in the record for the defendant's allegations regarding the plaintiff." Moreover, the court found that the issue of the defendant's " 'compliance with any court orders' " warranted a separate discussion and detailed that he had "repeatedly failed" in this regard. The defendant has not challenged these findings on appeal. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, 221 Conn. App. 475, 485, 302 A.3d 339, cert. denied, 348 Conn. 923, 304 A.3d 445 (2023).

The court also found that the first, second and third factors of § 46b-56 (c)[30] were relevant. "While the plaintiff demonstrated throughout this litigation that she has the capacity and disposition to understand and meet the temperament and developmental needs of the children and to protect their physical and emotional safety, the defendant regularly disregarded their interests by failing to respond to the plaintiff on a timely basis regarding dates for medical and orthodontic appointments, even appointments that were time sensitive." The defendant also has not challenged these findings on appeal. See *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 221 Conn. App. 485.

Finally, the court considered the testimony of the guardian ad litem, who "testified that the defendant suffered from 'paralysis by analysis,' " in that the defendant would "analyze something to the point where we

[30] The first three factors listed in § 46b-56 (c) concern "(1) [t]he physical and emotional safety of the child; (2) the temperament and developmental needs of the child; [and] (3) the capacity and the disposition of the parents to understand and meet the needs of the child . . . ."

don't get a decision, or we get a decision that is so greatly delayed that it adversely impacts the [children],"[31] and expressed concerns about the "defendant's ability to be actively involved in the children's lives . . . ." Moreover, the guardian ad litem recommended that the court award sole legal custody of the children to the plaintiff.

These findings by the court, which are either unchallenged or based on its credibility determinations, and which are consistent with the testimony and recommendations of the guardian ad litem; see *N. R.* v. *M. P.*, supra, 227 Conn. App. 729–30; support the award of sole legal custody to the plaintiff. "The defendant essentially requests that we reweigh the evidence in his favor. [W]e do not retry the facts or evaluate the credibility of witnesses. . . . Accordingly, we are not persuaded that the court abused its discretion in its custody orders." (Citation omitted; internal quotation marks omitted.) *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 128–29, 300 A.3d 1175 (2023).

III

The defendant next claims that the court's order that the plaintiff shall be afforded access to the former marital home to retrieve her personal property therefrom is "overly broad" and that it "must either be vacated or constrained to be specifically limited to the kitchen, [the plaintiff's] desk area, and her personal closet."[32]

[31] The court explained that the guardian ad litem "described the yearlong delay in obtaining essential medical treatment for [the parties' elder daughter] that was caused by the defendant." To this end, "[t]he plaintiff testified that the defendant would become overly involved in the children's health matters. She said they would see one specialist, then the defendant would not like that specialist and demand a second opinion. After the defendant became involved, he would insist on finding a specialist that he liked. According to the plaintiff, it was absolutely the defendant's way or the highway."

[32] We note that the defendant does not challenge the substantive propriety of the court's personal property distribution order itself. Rather, his claim pertains solely to the parameters the court put in place for the plaintiff to

He argues that the order constitutes a "warrant" that fails to "describe with particularity the places within the residence to be searched and the items the [plaintiff] may take" and thus violates his rights under the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution. We disagree.

Although the defendant clothes his claim in constitutional garb, "[p]utting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." (Internal quotation marks omitted.) *Rosenfeld* v. *Rosenfeld*, 115 Conn. App. 570, 579, 974 A.2d 40 (2009). Our plenary review of the court's order reveals nothing more than a personal property distribution order that establishes the parameters by which the plaintiff is to remove her personal property from the former marital residence. See *Wheelabrator Bridgeport, L.P.* v. *Bridgeport*, supra, 320 Conn. 355. As such, we review the defendant's claim under an abuse of discretion standard.[33] See *D. S.* v. *D. S.*, supra, 351 Conn. 10.

"[U]nder Connecticut law, courts are empowered to deal broadly with property and its equitable division incident to dissolution proceedings." (Internal quotation marks omitted.) *Powers* v. *Hiranandani*, 197 Conn. App. 384, 409, 232 A.3d 116 (2020). "As our

access the former marital home in order to retrieve her personal belongings. Thus, the defendant has abandoned any challenge to the substance of the personal property distribution order; see *JPMorgan Chase Bank, National Assn.* v. *Essaghof*, supra, 221 Conn. App. 485; and the court's exercise of its discretion in distributing personal property to the plaintiff as part of its financial orders is not at issue on appeal. See *Casey* v. *Casey*, 82 Conn. App. 378, 389, 844 A.2d 250 (2004) (personal property distribution orders are part of financial orders).

[33] We note, nonetheless, that, although the defendant cites article first, § 7, of the constitution of Connecticut in his brief, he has not included a separate state constitutional analysis. Therefore, any separate state constitutional claim would be abandoned. See *State* v. *Lueders*, 225 Conn. App. 612, 634 n.21, 317 A.3d 69, cert. denied, 349 Conn. 920, 321 A.3d 402 (2024).

Supreme Court has repeatedly stated, judicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . Moreover, the power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage." (Internal quotation marks omitted.) *Fitzsimons* v. *Fitzsimons*, 116 Conn. App. 449, 458–59, 975 A.2d 729 (2009); see also *Powers* v. *Hiranandani*, supra, 400. "In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Internal quotation marks omitted.) *Maturo* v. *Maturo*, 296 Conn. 80, 88, 995 A.2d 1 (2010).

The defendant claims that the court's personal property distribution order is overly broad because it "does not describe or constrain the areas within the residence" the plaintiff can access and thus allows her to "enter any portion of the residence [she] want[s]." He argues that "[t]he evidence before the . . . court was that the items [the plaintiff] seeks to retrieve are located in the residence's kitchen, in, on or around her desk and in whatever closet her clothes were in when she left" and that the scope of the order should have been limited to those areas. He further maintains that the order "fails to particularly describe the items" that constitute the plaintiff's personal property.

In its decision, however, the court credited the plaintiff's testimony "that the defendant gaslighted her by, for example, moving items in the kitchen from where she had left them, taking her jewelry out of its boxes, putting a tricycle on her desk, and leaving odd notes for her around the house. Even after this action was

commenced, the defendant deposited the plaintiff's alimony payment in her UBS account rather than in her First Republic account without telling her. He directed the guardian ad litem not to mention it, even though the plaintiff thought that her alimony payment had not been made." Also, the court noted, the case had been pending for "almost six years" by the time the court ultimately rendered its decision. As such, even if it is true that the locus of all of the plaintiff's personal property had at one time been confined to the areas the defendant describes in his brief, it would not have been reasonable, given his noted proclivities and the passage of time, to conclude that those would be the only areas in the residence where the plaintiff's property currently exists. In fact, the evidence presented in this case suggests that the opposite is true, and the court's order necessarily accounts for this by specifying that "[t]he defendant shall not interfere with the plaintiff's access to the Round Hill Road property or to her personal property. The defendant shall not remove, move, or hide any of the plaintiff's personal property to prevent her from removing it from the Round Hill Road property."

With respect to specificity, the court awarded the plaintiff all her "personal property located in her apartment on Greenwich Avenue, her personal property located in the Round Hill Road property, and any other personal property that is otherwise in her possession." This included the plaintiff's "own clothing, jewelry, and personal items such as books and memorabilia" as well as the family photographs. These orders are sufficiently clear and explicit, and they are appropriately tailored to the facts and circumstances of this case.

We also note that the court properly balanced its order by setting limits as to the time of access and allowing the defendant to select the two dates he preferred from a list of six. Moreover, the plaintiff must

pay for the off-duty Greenwich police officer to be there and the defendant's mother, Barbara Netter, with whom the defendant has a strained relationship, cannot accompany the plaintiff to assist with the removal of her belongings. Finally, whereas the court had relegated the defendant to the pool house in its nearly identical pendente lite access order; see footnote 17 of this opinion; in its final order, it permitted the defendant to be present, inside the residence, when the plaintiff collects her property. We are not persuaded that the court abused its discretion with respect to the parameters of its order that the plaintiff have access to the former marital residence to retrieve her personal belongings.

The judgment is reversed only as to the financial orders and the case is remanded for a new trial on all financial issues consistent with this opinion; the appeal is dismissed as to the custody order insofar as it pertains to the parties' older child; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RANDY A. WRIGHT *v.* COMMISSIONER OF CORRECTION
(AC 46768)

Elgo, Moll and Clark, Js.

Syllabus

The petitioner, who had been convicted of sexual assault in the first degree and other crimes, appealed, on the granting of certification, from the habeas court's judgment denying in part his petition for a writ of habeas corpus. He claimed, inter alia, that the court improperly rejected his claim that his criminal trial counsel, F, rendered ineffective assistance by advising him to flee the state during trial or by leading him to believe that it was in his best interest to do so. *Held*:

The habeas court did not err in concluding that the petitioner failed to establish that F rendered ineffective assistance with respect to his alleged advice about fleeing the state, as the court's factual findings, including its

finding that F did not advise the petitioner to flee, were well supported by the evidence, which this court would not reweigh in a manner that undermined the habeas court's conclusions.

This court could not conclude that the habeas court's incorrect ruling, which precluded the petitioner from testifying as to alleged statements F made about fleeing the state, was so fundamentally unfair as to deny the petitioner his due process right to a fair trial, as, although the proffered testimony was admissible nonhearsay that was offered not for its truth but to prove the nature of F's advice and the effect it had on the petitioner, the habeas court permitted the petitioner to testify at length as to the substance of that advice, his understanding of that advice, and the actions he took in reliance thereon, even if he was not permitted to recount the exact words F used.

The petitioner's contention that the habeas court improperly failed to consider certain evidence that supported his claim that F rendered ineffective assistance in connection with his trial performance was unavailing, as the court did not err in concluding that the petitioner failed to establish that he was prejudiced by F's cross-examination of a physician who testified for the state, which did not amount to, as the petitioner claimed, an admission that he engaged in unlawful sexual contact with the victim or that it gave the prosecutor an opportunity to graphically explain to the jury the anatomy of sexual penetration, and there was no basis to support the petitioner's claim that the victim's statement to the police, which F had offered into evidence at the criminal trial but which was not offered into evidence at the habeas trial, was so prejudicial that it impacted the jury's verdict or that the state relied heavily on it to support its case.

This court declined to review the petitioner's unpreserved claims that the habeas court improperly failed to address F's statements and actions after the petitioner failed to appear in court in determining whether F rendered ineffective assistance or had a conflict of interest and that F rendered ineffective assistance at the petitioner's sentencing proceeding, as none of those claims were presented to the habeas court.

(*One judge concurring in part*)

Argued November 21, 2024—officially released October 21, 2025

Procedural History

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

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

Danielle Koch, assistant state's attorney, with whom, on the brief, were *Anne F. Mahoney*, state's attorney, *Angela Macchiarulo*, supervisory assistant state's attorney, and *Susan Campbell*, assistant state's attorney, for the appellee (respondent).

Opinion

CLARK, J. In the criminal trial underlying this habeas corpus matter, the petitioner, Randy A. Wright, was convicted and sentenced in absentia after he absconded during trial following the first day of evidence. Following the granting of his petition for certification to appeal, the petitioner appeals from the judgment of the habeas court denying in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred by (1) rejecting his claim that he was deprived of his right to the effective assistance of counsel when his trial counsel allegedly advised him to flee the state during trial, (2) precluding him from testifying as to the substance of that alleged advice, (3) failing to consider certain evidence relevant to his claim that trial counsel rendered ineffective assistance in connection with his handling of the trial, (4) failing to address whether trial counsel's alleged concealment from the trial court of his role in the petitioner's decision to flee constituted ineffective assistance of counsel and/or a conflict of interest, and (5) failing to address whether he was deprived of his right to the effective assistance of counsel at sentencing. We affirm the judgment of the habeas court.

The following facts and procedural history, as set forth by this court in the petitioner's direct appeal and as found by the habeas court, are relevant to our resolution of this appeal. "The victim[1] was born on September

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline

14, 1998, and the [petitioner] was born on September 24, 1973. The [petitioner] was a friend of the victim's father, T, and the victim had known the [petitioner] for her entire life. T and the victim's mother, G, are divorced. Following the divorce, T moved out of the family home, and the victim and her sister continued to reside with G. The [petitioner] began a romantic relationship with G and moved into the home, at which point in time the victim was approximately nine years old. Beginning when she was nine years old, and at least once per week for several years after that, the [petitioner] touched the victim inappropriately when the two of them were in her bedroom. The touching began as a back massage during which the [petitioner] removed the victim's bra, but eventually progressed to touching the victim's breasts and clitoris.

"Although the victim and the [petitioner] were largely alone when this touching occurred, on one occasion a family friend, A, who was residing in the home, walked in on the two of them and observed the [petitioner] without a shirt on, laying on the victim's bed with the victim in a 'cuddling position.' A ran out of the room and downstairs to tell G what she had seen, but the [petitioner] ran out after her and denied wrongdoing; an argument ensued. G did not believe A and did not call the police. On another occasion, the victim told her former boyfriend, C, that the [petitioner] had touched her breasts and 'fingered' her but made C promise not to tell anyone. The [petitioner's] touching of the victim continued until approximately September, 2012, at

to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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.

which point the victim moved out of the home and went to live with T. The following month, the victim told T that the [petitioner] had touched her inappropriately, and T subsequently took the victim to the police station so that she could make a statement. In her statement, the victim described an occasion on which the [petitioner] had given her a back massage, undone her bra, and touched her vagina. She also stated that the [petitioner] had removed her bra on several occasions in the past." (Footnote in original; footnote omitted.) *State* v. *Wright*, 235 Conn. App. 143, 146–48, A.3d (2025).

The petitioner subsequently was arrested and charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The petitioner retained Attorney Vincent Fazzone to represent him at trial. "[The petitioner's] criminal trial began on November 5, 2014. The next day, [the petitioner] filed a motion for [a] mistrial and to fire [Fazzone] and asked for a continuance of thirty days to hire new counsel. [The trial court, *Swords*, *J.*] denied his motions for [a] mistrial and continuance [and informed the petitioner that if he did not want Fazzone to continue to represent him, he could represent himself, with Fazzone as standby counsel]. The matter was continued to November 10, 2014, to give [the petitioner] time to [decide whether he wanted to represent himself and, if so, to prepare his defense]. . . .

"On November 10, 2014, [the petitioner] failed to appear in court. [Fazzone] moved for a mistrial, which was denied by Judge Swords, who also deemed [the petitioner's] presence waived. The trial proceeded without [the petitioner], and, on that same day, he was found guilty by the jury. On January [6], 2015, Judge Swords

sentenced [the petitioner] in absentia [to twenty years of incarceration followed by twenty-five years of special parole]. [The petitioner] was apprehended in January, 2015, in Virginia and brought back to Connecticut to serve his sentence."

The petitioner commenced this action by filing a self-represented petition for a writ of habeas corpus on November 4, 2016. On October 7, 2019, the petitioner filed the operative amended petition, which contained two counts. In count one, the petitioner alleged that Fazzone had provided ineffective assistance by advising him to flee the state to avoid prosecution and that the trial would stop in his absence. In count two, the petitioner alleged that Fazzone had provided ineffective assistance in various ways in connection with his conduct of the trial, and by failing to file an application for sentence review and an appeal from the judgment of conviction.

On May 3, 2023, the habeas court, *Bhatt*, *J.*, held a trial on the petition, at which the petitioner testified on his own behalf and presented the testimony of Fazzone. The petitioner also introduced several exhibits, including the transcripts and the courthouse clerk's file from his underlying criminal trial. The respondent, the Commissioner of Correction, called no witnesses, introduced no exhibits, and did not file a posttrial brief. The petitioner filed a posttrial brief on June 2, 2023.

On June 6, 2023, the habeas court issued a memorandum of decision granting the petition as to the petitioner's claims that Fazzone had provided ineffective assistance by failing to file an application for sentence review and an appeal but denying all other claims. The court rendered judgment restoring the petitioner's right to file an application for sentence review and to appeal from the judgment of conviction and denying the

remaining claims.[2] The petitioner subsequently filed a petition for certification to appeal, which the court granted.[3] The petitioner filed the present appeal on August 7, 2023. Additional facts and procedural history will be set forth as necessary.

Before addressing the petitioner's individual claims on appeal, we begin by setting forth the general legal principles relevant to the petitioner's ineffective assistance of counsel claims. "The sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. U.S. Const., amend. VI. This right is incorporated to the states through the due process clause of the fourteenth amendment. See U.S. Const., amend. XIV, § 1; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)." *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). Most ineffective assistance of counsel claims are governed by the two part test established by *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "Under the two-pronged *Strickland* test, a [petitioner] can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient,

[2] After the habeas court restored the petitioner's right to appeal, on August 3, 2023, the petitioner appealed from his conviction to our Supreme Court, which transferred the matter to this court on February 15, 2024. Following oral argument in the present appeal, we entered an order sua sponte staying this appeal pending final resolution of the petitioner's direct appeal from his conviction. We issued our decision in the petitioner's direct appeal on September 16, 2025; see *State* v. *Wright*, supra, 235 Conn. App. 144; after which we entered an order lifting the stay in the present appeal.

[3] The habeas court initially denied the petition for certification to appeal on June 20, 2023. On November 9, 2023, the petitioner filed a motion for rectification and articulation regarding various aspects of the court's memorandum of decision. On November 30, 2023, after a hearing on that motion, the court vacated its previous denial and granted the petition for certification to appeal.

and (2) the deficient performance resulted in actual prejudice. . . . To demonstrate deficient performance, a [petitioner] must show that counsel's conduct fell below an objective standard of reasonableness for competent attorneys. . . . To demonstrate actual prejudice, a [petitioner] must show a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors." (Citations omitted.) *Davis* v. *Commissioner of Correction*, supra, 555.

"*Strickland* recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In [*United States* v. *Cronic*, 466 U.S. 648, 659–60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)] . . . which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so. . . . In *Cronic*, the court reasoned that such situations indicate that there has been a denial of [s]ixth [a]mendment rights that makes the adversary process itself presumptively unreliable." (Citation omitted; internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 697–98, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019). "Our state jurisprudence has recognized that *Cronic* must be interpreted narrowly and applied rarely." *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 649, 153 A.3d 1264 (2017). As our Supreme Court has explained, the *Strickland* standard applies in cases involving "specific errors in representation, for which counsel can provide some reasonable explanation," whereas *Cronic* applies when counsel "complete[ly] fail[s] to advocate for a defendant . . .

such that no explanation could possibly justify such conduct . . . .'' *Davis* v. *Commissioner of Correction*, supra, 319 Conn. 556.

I

We first address the petitioner's claims relating to count one of his amended habeas petition.[4] The petitioner claims that the habeas court erred in concluding that he failed to establish that Fazzone had rendered ineffective assistance by either advising the petitioner to flee the state or leading him to believe that it was in his best interest to flee. The petitioner also claims, in the alternative, that the court violated his right to due process by precluding him from testifying as to the substance of Fazzone's alleged advice. The petitioner therefore argues that, if we reject his claim that the court erred in concluding that he failed to establish that Fazzone rendered ineffective assistance as alleged under count one of the amended petition, we should remand the case for a new trial on that count. We disagree with both of the petitioner's claims.

The following additional facts and procedural history are relevant to the petitioner's claims pertaining to count one of his amended habeas petition. In support of count one, the petitioner alleged that, after a hearing on a motion he made to remove Fazzone as counsel, Fazzone had ''advised [him] that the case was not proceeding in a manner consistent with the petitioner's best interests,'' ''gave the petitioner his case file and gave back $500 of the money [that] the petitioner had paid [Fazzone],'' and ''told the petitioner that he would need his case file because 'you need it for a new attorney.' '' The petitioner further alleged that Fazzone had ''instructed the petitioner to flee the [state] so as to avoid further prosecution and his possible conviction,''

[4] We address the petitioner's claims in a different order than they appear in his principal appellate brief.

and "advised the petitioner that the court would stop the trial if he fled . . . [and] that the delay caused by [his] flight would give the petitioner the necessary time to retain another lawyer to represent him at a succeeding trial on the same charges." The petitioner also alleged that Fazzone had gone to the petitioner's house the following day, where he "gave [the petitioner] an additional amount of cash," "discussed the petitioner fleeing during his trial," and "suggested to the petitioner that he purchase a 'burner phone' and change his hair color." The petitioner alleged that he "followed Fazzone's advice and left Connecticut . . . under the belief that the trial would stop, and [that] he would have the ability in the [future] to hire new counsel," and that Fazzone's advice had amounted to ineffective assistance of counsel.

At the habeas trial, Fazzone testified about his interactions with the petitioner between November 6, 2014, when the court heard the petitioner's motion to remove Fazzone as counsel, and November 10, 2014, when the petitioner failed to appear for trial. Fazzone testified that, after the hearing on November 6, he met with the petitioner in a courthouse conference room and outside the courthouse, where the petitioner expressed dissatisfaction with Fazzone's performance and the progress of the trial. Fazzone acknowledged that the topic of the petitioner fleeing was discussed during that meeting but testified that he "did not in any way advise [the petitioner] to flee . . . ." Fazzone also testified that, at some point during that meeting, he refunded the petitioner $500 from the amount the petitioner had paid toward his fee. He testified that the petitioner recently had paid him $500 and that he "didn't feel that it was fair that I . . . should keep any money that [the petitioner] had just given me for . . . future representation if [he was] going to hire new counsel." Fazzone testified that he refunded the petitioner that money so he could

use it "as a retainer for another attorney." Fazzone also testified that he gave the petitioner "as much . . . of the discovery as I could in the event that [the petitioner] wanted to meet with another attorney and have . . . at least a copy."

Fazzone also acknowledged that, sometime between November 6 and 10, 2014, he had gone to the petitioner's home to retrieve some paperwork that had been mixed in with the files he gave to the petitioner and that the topic of the petitioner fleeing the state was discussed again at that time. Fazzone testified that the petitioner "had mentioned . . . that he was intending maybe to just get out of town" and that he advised the petitioner "not to do that." He also testified that, while at the petitioner's apartment, he noticed that the petitioner was packing his belongings, and that the petitioner had told him that he was packing because he "wanted to be prepared" and "was just getting everything together, all of his belongings in the event that he had to do jail time . . . ." Fazzone also testified that he gave the petitioner an additional $100 at that time because the petitioner had told him "[t]hat he had contacted several attorneys, but they wanted . . . more money than [the] $500 [that Fazzone had already given him]."

Fazzone also was questioned about prior deposition testimony he had given in a legal malpractice action that the petitioner had filed against him.[5] In that deposition, Fazzone was asked whether he " 'may have inadvertently' " led the petitioner to believe " 'that his absence from . . . court might be in his best interest . . . .' " Fazzone testified in the deposition: "Well, yeah, perhaps inadvertently because the money was given back to [the petitioner] after . . . he was discussing fleeing on his case. . . . [H]e was very upset. He was tired. I'd say even crying. I felt sympathy for him. So, I said I

[5] The petitioner subsequently withdrew the legal malpractice action.

understand . . . you thinking that way, but I strongly advise you against it. So, is it possible? You know, maybe. . . . I said the police are going to be looking for you, your cell phone. They're going to be talking to your family members and your friends, and . . . they're very good at finding fugitives, particularly with these charges. So, maybe . . . inadvertently . . . but I did make it clear that I strongly advise against it."

The petitioner testified that, after the hearing on his motion to remove Fazzone as counsel, he met with Fazzone in the conference room at the courthouse. When the petitioner's habeas counsel asked the petitioner what he and Fazzone discussed during that meeting, however, the respondent's counsel objected on hearsay grounds. The following colloquy ensued:

"[The Respondent's Counsel]: Your Honor, I'm going to object. This is hearsay.

"[The Petitioner's Counsel]: . . . [F]irst of all, I think some of these things have already been said by [Fazzone]. Second, these are conversations between the attorney and client . . . so that . . . [the petitioner] is explaining what he was discussing with his attorney. And this is . . . directly leading into the conversations about the advice regarding his flight.

"[The Respondent's Counsel]: It's still hearsay, Judge. He can ask him what his impression was after their conversations . . . .

"[The Petitioner's Counsel]: I think his impression without knowing what was said—

"The Court: You can ask him what his understanding was . . . or what he felt about the progress of the trial, [Fazzone's] performance, advice he was given.

"[The Petitioner's Counsel]: Yes, Your Honor. I can phrase it that way."

Thereafter, the petitioner's counsel conformed his questioning to the habeas court's ruling that he could ask the petitioner about his understanding of Fazzone's advice. Regarding the meeting with Fazzone in the conference room, the following colloquy occurred:

"[The Petitioner's Counsel]: . . . [C]oming back to the conversation in the conference room. You had a discussion with [Fazzone] about how the trial was going. Is that right?

"[The Petitioner]: Yes.

"[The Petitioner's Counsel]: Okay. How long was this conversation . . . ?

"[The Petitioner]: Probably a good half hour or so. . . . Or longer.

"[The Petitioner's Counsel]: After the conversation ended, what was your impression of what was happening in the case?

"[The Petitioner]: That it wasn't going well.

"[The Petitioner's Counsel]: Okay. Did you discuss any plans for your future representation?

"[The Petitioner]: Yes. . . .

"[The Petitioner's Counsel]: When you were discussing the plan for your future representation [Fazzone] gave you some advice. Is that right? . . .

"[The Petitioner]: Yes.

"[The Petitioner's Counsel]: . . . Okay. After he gave you that advice, what was the impression you were left with? Don't say exactly what he said, but what is it that you understood from that conversation?

"[The Petitioner]: My impression, what I understood from that conversation was that, when I left, the trial would stop, and that would give me a chance to get a

new attorney to go back to it, but it would stop. . . . [T]here wouldn't be anything going on after that."

Regarding the conversation with Fazzone outside the courthouse, the following colloquy occurred:

"[The Petitioner's Counsel]: . . . Were you given advice during the conversation [outside the courthouse]?

"[The Petitioner]: Yes.

"[The Petitioner's Counsel]: All right. What was your impression of the advice you were given?

"[The Petitioner]: My impression was to leave, get the burner [phone], change the hair, and everything would stop."

Regarding the reason for Fazzone giving him $600 and a copy of the discovery from his file, the following colloquy occurred:

"[The Petitioner's Counsel]: . . . [W]hat is your understanding as to why he gave you the money?

"[The Petitioner]: Part of my understanding . . . of why he gave me the money, partly so I could have gas money just to go, to leave.

"[The Petitioner's Counsel]: Okay. And what is your understanding as to why he gave you the file?

"[The Petitioner]: It's my understanding he gave me the file because, when my trial stopped, I could give that file to the new attorney."

Regarding Fazzone's advice during the conversation at the petitioner's apartment, the following colloquy occurred:

"[The Petitioner's Counsel]: Did you have any further discussions about your case?

"[The Petitioner]: Yes.

"[The Petitioner's Counsel]: Okay. . . . [A]fter those discussions, what impressions were you left with about your case?

"[The Petitioner]: That it was a good idea that I left."

Finally, regarding the steps the petitioner took to avoid apprehension and his reasons for taking those steps, the following colloquy occurred:

"[The Petitioner's Counsel]: . . . Were you present [in court on Monday, November 10, 2014]?

"[The Petitioner]: No.

"[The Petitioner's Counsel]: Where were you?

"[The Petitioner]: Halfway across the United States.

"[The Petitioner's Counsel]: Okay. Were you eventually arrested for the case?

"[The Petitioner]: Yes. . . .

"[The Petitioner's Counsel]: Okay. Where were you arrested?

"[The Petitioner]: In Virginia. . . .

"[The Petitioner's Counsel]: All right. Had you done anything about your appearance?

"[The Petitioner]: Lost some weight, changed the hair.

"[The Petitioner's Counsel]: Why did you do those things?

"[The Petitioner]: I was told to."

On cross-examination, the petitioner was questioned further about Fazzone's alleged advice, the petitioner's reasons for fleeing the state, and what he thought would happen if he fled:

"[The Respondent's Counsel]: . . . So, it was your [impression] . . . that [Fazzone] told you to flee, take your file . . . go to California, earn some money, come back, hire a new attorney and fight these charges. Was that the plan?

"[The Petitioner]: The plan was that the trial was going to stop. . . . And I would be given a new trial where I could hire a new lawyer that could handle the case better because he was failing at it, and he was out of his depth. . . .

"[The Respondent's Counsel]: Okay. . . . [I]f the trial was going to stop, right, according to you, why were you then under the impression that you then would be able to hire a new attorney? Why weren't you just going to be dragged back to Connecticut and we were going to pick right up where we left off?

"[The Petitioner]: [Fazzone] told me, gave me the impression that if I left, under his advisement, that the trial would stop. Then it would be done. He would be out of it, and then I could get a new lawyer, and it would start all over again with somebody that's competent.

"[The Respondent's Counsel]: Okay. So, he didn't just tell you [that] you should flee. He had this whole plan that, for whatever reason, you couldn't show up [on] Monday with a new lawyer. But if you fled, then when you came back, we wouldn't just continue to proceed with trial . . . you would get a do-over. Right?

"[The Petitioner]: Essentially."

On redirect examination, the petitioner's counsel again asked the petitioner about his understanding of Fazzone's alleged advice:

"[The Petitioner's Counsel]: Can you tell the court what it is you understood the plan for leaving the state to be?

"[The Petitioner]: The plan that I understood to leave the state was just to leave to buy time to get an attorney and then court would stop, and then it would give me a chance to get an attorney and then it would start back over from square one.

"[The Petitioner's Counsel]: Okay. And who . . . did you have a discussion with [when] that plan came up?

"[The Petitioner]: [Fazzone]."

In his posttrial brief, the petitioner argued that Fazzone's alleged advice that the petitioner should flee the state to avoid further prosecution entitled him to a new trial under either the *Cronic* or *Strickland* standard. In its memorandum of decision, the habeas court first rejected the petitioner's claim under *Cronic*, finding that "[t]here is no credible evidence that . . . Fazzone told [the petitioner] to flee the jurisdiction." With respect to the petitioner's claim under *Strickland*, the court found that "the credible evidence establishes that . . . Fazzone did not tell [the petitioner] to flee the jurisdiction to obtain a delay in his trial" and that the petitioner "has not proven how the outcome of the trial would have been different had he not fled the state . . . ." Accordingly, the court concluded that the petitioner had failed to establish his entitlement to relief under the *Cronic* or *Strickland* standard.

On November 9, 2023, while the present appeal was pending, the petitioner filed a motion for rectification and articulation. As relevant to this claim, the petitioner argued that, by instructing the petitioner's counsel "to only elicit the impressions that Fazzone's statements gave to [the petitioner] . . . the court effectively sustained the respondent's hearsay objection." (Citation omitted.) The petitioner further argued that he "was not offering Fazzone's statements for their truth, but for the fact that they were made to him," and requested that the court "articulate its ruling" on the respondent's

hearsay objection. On December 1, 2023, the court issued an order in which it articulated that it had sustained the respondent's hearsay objection because, "[a]t no time did [the petitioner's] habeas counsel explain that the testimony sought was not for the truth of the matter, as he now claims." The court further explained that it had "permitted [the petitioner] to testify about what his understanding of the conversation with . . . Fazzone was. Typically, evidence that is hearsay, but not offered for the truth of the matter, is offered to show the impact on the listener or to explain any actions taken by the listener. Here, the court permitted [the petitioner] to testify—and he did—about his understanding of what . . . Fazzone said to him and what that led him to do."

A

We first address the petitioner's claim that the habeas court erred in concluding that Fazzone did not render ineffective assistance in connection with his alleged advice regarding whether to flee the jurisdiction. In support of that claim, the petitioner argues that "[t]he undisputed evidence of Fazzone's conduct and 'winking' approval of [the petitioner's] flight [from the jurisdiction] was sufficient to prove" his claim under count one. We are not persuaded.

"Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 205 Conn. App. 837, 856–57, 257 A.3d 343, cert. denied, 339 Conn. 905, 260 A.3d 484 (2021). Here, the

petitioner challenges the court's factual finding that Fazzone did not advise him to flee. Specifically, he argues that, in making that finding, the court "overlook[ed] the glaring evidence of deficient performance by Fazzone," "failed to fairly assess the evidence," and "ignor[ed] substantial circumstantial evidence of Fazzone's failure to provide effective assistance of counsel . . . ." The petitioner further argues that his testimony concerning his understanding of Fazzone's advice constituted "undisputed evidence" that Fazzone led him to believe that it was in his best interest to flee.

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . [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. . . . 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.) *Brown* v. *Commissioner of Correction*, 230 Conn. App. 384, 399, 330 A.3d 134, cert. denied, 351 Conn. 921, 333 A.3d 103 (2025).

The habeas court's finding that Fazzone did not advise the petitioner to flee is well supported by the evidence. As the court noted in its memorandum of decision, "Fazzone testified that he did not, in any way, advise [the petitioner] to flee the trial and instead advised him not to do so . . . ." The petitioner does not dispute that the court accurately recounted Fazzone's testimony on that point but instead relies on other testimony that, he claims, undercuts the court's finding.

Specifically, the petitioner argues that Fazzone's testimony that he gave the petitioner $600 and a portion of his file, advised the petitioner that the police would be able to track his cell phone, and saw that the petitioner was packing his belongings indicated that Fazzone was aware of and facilitated the petitioner's flight, and that the court erred by discounting that evidence. The petitioner also relies on his own testimony that he understood Fazzone's advice to be that it was in his best interest to flee and argues that Fazzone's deposition testimony supported the petitioner's understanding of that advice.

In making that argument, the petitioner essentially faults the habeas court for not construing the evidence in the light most favorable to him and improperly asks this court to reweigh the evidence in a manner that undermines the habeas court's conclusions. It is well established, however, that the habeas court, as the finder of fact, is "the sole arbiter of the credibility of witnesses, and the weight to be given to their specific testimony. . . . It is the right of the trier of fact to draw reasonable and logical inferences from the facts that it finds to be proved." (Citations omitted.) *Tyson* v. *Warden*, 24 Conn. App. 729, 737, 591 A.2d 817, cert. denied, 220 Conn. 909, 597 A.2d 340 (1991). "It is axiomatic that the fact finder is free to accept or reject any of the evidence it chooses, and it is not the role of this court to reassess or reweigh that evidence." *Roman* v. *Commissioner of Correction*, 223 Conn. App. 111, 123 n.7, 307 A.3d 934 (2023), cert. denied, 348 Conn. 952, 308 A.3d 1039 (2024). Thus, the court was free to weigh the competing testimony, assess the relative credibility of the witnesses, and determine which testimony it deemed to be credible.

Our review of the record indicates that the habeas court properly considered all of the testimony presented and that its factual findings were supported by

the evidence. Fazzone testified that he gave the petitioner $600 not to assist in his flight, but for the petitioner to put that money toward a retainer for a new attorney. Although the petitioner contends that Fazzone "[gave] his entire file to [the petitioner] . . . [which] demonstrated that he did not expect to continue trying the case," Fazzone testified that he gave the petitioner only a copy of the discovery "in the event that he wanted to meet with another attorney . . . ." Moreover, although Fazzone testified in his deposition that the petitioner may have inadvertently interpreted Fazzone's advice to mean that it was in his best interest to flee, Fazzone also testified in no uncertain terms that he "did make it clear that [he] strongly advise[d] against it." The court's factual findings regarding Fazzone's advice to the petitioner were supported by the evidence, and we are not left with a definite and firm conviction that the court made a mistake in reaching those findings. Accordingly, we conclude that the court did not err in its conclusion that the petitioner failed to establish his claim under count one of the amended petition.

B

We next address the petitioner's claim that the habeas court violated his right to due process by precluding him, on hearsay grounds, from testifying as to the substance of Fazzone's alleged advice that he flee the jurisdiction to avoid further prosecution. The petitioner argues that the court's hearsay ruling was erroneous because his testimony about Fazzone's advice was not offered to prove that the statements contained therein were true but, rather, to prove that Fazzone advised him to flee and that he fled on the basis of that advice. The petitioner argues that we should reverse the judgment as to count one and remand the matter for a new trial, at which he would be permitted to testify as to Fazzone's alleged advice. The respondent argues, inter alia, that the petitioner has not established that the

court's hearsay ruling violated his right to due process.[6] We agree with the respondent.

The petitioner does not claim that he preserved his due process claim at trial but, rather, seeks review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[7] "[T]his court is not required to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . . It is well established, however, that an unpreserved claim is reviewable under *Golding* when (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the

[6] The respondent also argues that the petitioner waived his due process claim by "acquiesc[ing]" to the habeas court's hearsay ruling or, in the alternative, that he failed to brief that claim adequately. Because we conclude that the petitioner cannot prevail on the merits of his claim, we need not address these arguments.

[7] In his principal brief to this court, the petitioner also asserts, in passing, that his claim is reviewable under the plain error doctrine. See Practice Book § 60-5. The only reference to the plain error rule in the petitioner's brief, however, is contained in a single sentence, which states in its entirety: "This claim is also reviewable despite habeas counsel's failure to preserve it, as it involves a violation of the petitioner's constitutional right to due process and to testify on his own behalf, and meets the criteria set out in [*Golding*] or the plain error doctrine." The petitioner's brief does not set forth the standard of review for determining whether a claim satisfies the plain error doctrine or explain why the alleged error in the present case warrants reversal under that doctrine.

"[W]e will not review an underlying claim for plain error unless the request for relief under that doctrine has been adequately briefed. . . . A party claiming plain error must engage in a separate analysis under that doctrine to demonstrate that plain error has occurred under the circumstances of [the] case. . . . Indeed, a mere conclusory assertion of plain error is insufficient to allow this court to reach the merits of an unpreserved claim under that doctrine." (Internal quotation marks omitted.) *State* v. *Carlson*, 226 Conn. App. 514, 540, 318 A.3d 283, cert. denied, 350 Conn. 911, 324 A.3d 143 (2024). Because the petitioner has not provided any analysis to support his claim that reversal is warranted under the plain error doctrine, we conclude that his claim is inadequately briefed and, therefore, decline to review it.

violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [petitioner] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Citation omitted; internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 673, 224 A.3d 129 (2020). "The first two [prongs of *Golding*] involve a determination of whether the claim is reviewable; the second two . . . involve a determination of whether the [appellant] may prevail; (internal quotation marks omitted) *State* v. *Gray*, 342 Conn. 657, 668, 271 A.3d 101 (2022); and the party seeking review under *Golding* "bear[s] the burden of establishing their entitlement to such review . . . ." (Internal quotation marks omitted.) *State* v. *Beaulieu*, 118 Conn. App. 1, 7, 982 A.2d 245, cert. denied, 294 Conn. 921, 984 A.2d 68 (2009). "We are free to respond to the [petitioner's] claim by focusing on whichever *Golding* prong is most relevant, as the inability to meet any one prong requires a determination that the [petitioner's] claim must fail." (Internal quotation marks omitted.) *Williams* v. *Commissioner of Correction*, 226 Conn. App. 617, 634, 319 A.3d 242, cert. denied, 350 Conn. 912, 324 A.3d 143 (2024).

It is well established that, as a general matter, a party "cannot raise a constitutional claim by attaching a constitutional label to a purely evidentiary claim or by asserting merely that a strained connection exists between the evidentiary claim and a fundamental constitutional right. . . . Thus, [o]nce identified, unpreserved evidentiary claims masquerading as constitutional claims will be summarily [rejected]." (Internal quotation marks omitted.) *In re A. H.*, 226 Conn. App. 1, 27, 317 A.3d 197, cert. denied, 349 Conn. 918, 317 A.3d 784 (2024). "Nevertheless, [our Supreme Court] has recognized that an unpreserved evidentiary claim may be constitutional in nature if there is a resultant

denial of fundamental fairness or the denial of a specific constitutional right . . . .'' (Internal quotation marks omitted.) *State* v. *Turner*, supra, 334 Conn. 674. ''This is consistent with federal jurisprudence, which recognizes that an evidentiary error may be of constitutional magnitude if the error was so pervasive as to have denied [the petitioner] a fundamentally fair trial . . . .'' (Internal quotation marks omitted.) Id. An evidentiary error rises to the level of a due process violation only if it ''was so crucial, critical, and highly significant that [the petitioner] was denied a fair trial.'' *State* v. *Waters*, 214 Conn. App. 294, 314–15, 280 A.3d 601, cert. denied, 345 Conn. 914, 284 A.3d 25 (2022).

In the present case, the petitioner's due process claim is premised on an alleged evidentiary error, namely, that the habeas court's hearsay ruling was erroneous because his testimony as to Fazzone's advice was offered not to prove that what Fazzone told him was true but to establish his claim that Fazzone improperly advised him that it was in his best interest to flee. He contends that, although premised on evidentiary error, this is not ''a mere 'evidentiary' claim'' and that ''[t]he habeas court's hearsay ruling deprived [him] of the right to offer evidence that was central to his [case] and as such is an error of constitutional magnitude.'' The petitioner further argues that ''[t]his loss of the opportunity to prove his claims by reporting what was said to him by . . . Fazzone cost him a fair habeas trial.'' We agree with the petitioner that his proffered testimony about Fazzone's advice to him was not hearsay because it was not offered to prove the truth of Fazzone's out-of-court statements. We nevertheless conclude that the court's exclusion of that evidence did not violate the petitioner's right to due process.

'' 'Hearsay' means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter

asserted." Conn. Code Evid. § 8-1 (3). "If . . . a statement . . . is offered for a purpose other than establishing the truth of the matters contained in the statement, it is not hearsay." (Internal quotation marks omitted.) *Hardison* v. *Commissioner of Correction*, 152 Conn. App. 410, 422, 98 A.3d 873 (2014). "The test is whether the statement is offered to prove the truth of the matters in the statement. If it is, it is hearsay; if offered for some other purpose, it is not hearsay." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.1.2, p. 496. Additionally, to be admissible, the statement must be relevant to the nonhearsay purpose for which it is offered. See, e.g., *State* v. *Perkins*, 271 Conn. 218, 256, 856 A.2d 917 (2004). Thus, "if a conversation is sought to be admitted not for the truth of its content but to establish that such a conversation took place, it is not hearsay"; E. Prescott, supra, § 8.6, p. 511; but to be admissible, "the offeror [must] establish that the mere fact that the conversation itself took place is relevant to the case." Id.

In the present case, Fazzone's alleged advice was admissible nonhearsay because it was offered to prove the nature of the advice and the effect it had on the petitioner, not to prove that the statements Fazzone made during the conversation were actually true. In count one of the amended petition, the petitioner alleged that Fazzone improperly advised him that, if he fled the state, the trial would stop and he would have an opportunity to hire a new attorney to represent him at a new trial, and that he fled the state in reliance on Fazzone's advice. Thus, the petitioner was not seeking to prove that Fazzone's alleged statements to him about what would happen if he fled were true. He was not seeking to prove, for instance, that, if he fled, the trial would stop and he would have the opportunity to hire another attorney; to the contrary, the petitioner's claim

rests on the premise that Fazzone's advice was so misguided that no reasonably competent attorney would have provided that advice. Consequently, the petitioner's testimony about what Fazzone said to him was relevant to a nonhearsay purpose because, to prevail on the claim alleged in count one, the petitioner was required to prove that Fazzone gave him the alleged advice and that he fled the state in reliance on it, not that Fazzone's out-of-court statements to him about what would happen if he fled were true. See id., § 8.8.1, pp. 513–14 ("[w]hen the issue is whether a party acted on advice of his or her attorney, the party is entitled to show what that advice was"); see also, e.g., *Hardison* v. *Commissioner of Correction*, supra, 152 Conn. App. 422 (where petitioner alleged that counsel was ineffective in failing to advise about mandatory minimum sentence, testimony about counsel's advice was not hearsay because "that testimony was relevant to show that the statements were made, not that the statements made were true"). Accordingly, testimony about Fazzone's alleged advice was admissible nonhearsay, and the court should have permitted the petitioner to testify as to the substance of that advice. See, e.g., *United States* v. *Scully*, 877 F.3d 464, 474 (2d Cir. 2017) (where defendant claimed he acted on advice of counsel, court erred by precluding defendant's testimony about that advice; proffered testimony was not hearsay and defendant was entitled to testify as to substance of counsel's advice).

Our review of the entire record, however, convinces us that the habeas court's ruling was not "so crucial, critical, and highly significant that [the petitioner] was denied a fair trial." *State* v. *Waters*, supra, 214 Conn. App. 314–15. We reiterate that the petitioner claims only that the court's hearsay ruling deprived him of his right to due process. In considering that claim, our inquiry is not focused on the question of whether the court's evidentiary ruling was erroneous, but on whether the

petitioner established that "the erroneous exclusion of evidence was so prejudicial to the rights of the [petitioner] as to deprive him of a fair trial." (Internal quotation marks omitted.) *State* v. *Finley*, 34 Conn. App. 823, 830, 644 A.2d 371, cert. denied, 231 Conn. 927, 648 A.2d 880 (1994).

Despite the habeas court's initial ruling that the petitioner could not testify as to the substance of what Fazzone had said to him, the record indicates that the petitioner testified at length regarding his understanding of Fazzone's advice and why he allegedly believed, on the basis of that advice, that it was in his best interest to flee. For example, the petitioner testified that, "what I understood from [the] conversation [with Fazzone in the courthouse conference room] was that, when I left, the trial would stop, and that would give me a chance to get a new attorney . . . ." Regarding Fazzone's giving the petitioner $600 and a copy of the discovery from his file, the petitioner testified that Fazzone "gave me the money partly so I could have gas money just to . . . leave" and "gave me the file because, when my trial stopped, I could give that file to the new attorney." On cross-examination, the petitioner further explained: "*Fazzone told me*, gave me the impression that, if I left *under his advisement*, that the trial would stop. Then it would be done. He would get out of it, and then I could get a new lawyer and it would start all over again with somebody that's competent." (Emphasis added.) Subsequently, the petitioner expressly testified that Fazzone came up with the plan for the petitioner "to leave the state . . . to buy time to get an attorney and then court would stop, and then it would give me a chance to get an attorney and then it would start back over from square one." The petitioner further testified that, on the basis of his conversation with Fazzone on the courthouse steps, his impression was that he should "leave, get the burner [phone], change the hair, and

[that] everything would stop." When asked why he lost weight and changed his hair color after fleeing, the petitioner testified that he did those things because "I was told to."

Thus, contrary to the petitioner's contention, the habeas court did not deprive the petitioner of the opportunity to prove his claims. Although the court initially instructed the petitioner that he could testify only as to his understanding of Fazzone's advice, the petitioner ultimately testified that Fazzone came up with the plan for him to flee; that Fazzone told him that, if he fled, the trial would stop and he would be able to retain a new lawyer to represent him at a new trial; that Fazzone told him to get a burner phone and change his hair color; that Fazzone gave him $600 to aid in his flight; and that Fazzone gave him his file so that he could give it to a new attorney. Accordingly, despite the court's initial ruling, the petitioner did testify as to the general substance of Fazzone's advice, even if he was not permitted to recount the exact words that Fazzone used. Perhaps more importantly, the petitioner testified repeatedly and in detail as to his understanding of Fazzone's advice and what actions he took on the basis of that understanding. The court's memorandum of decision indicates that the court considered all of the testimony, found Fazzone's version of events to be credible and, on the basis of its credibility assessment, concluded that the petitioner had failed to prove his claim. In light of the entire record, we cannot conclude that the court's hearsay ruling was so fundamentally unfair that it deprived the petitioner of a fair trial.

II

We next address the petitioner's claim that the habeas court erred by failing to consider certain evidence that, the petitioner contends, supported his claim in count two of his amended petition that Fazzone rendered

ineffective assistance in connection with his trial performance. Specifically, the petitioner contends that the court failed to consider "Fazzone's theory in [cross-examining] the state's expert on his idea that clitoral contact is not 'penetration' " within the meaning of the sexual assault statutes and "ignored the significant damage that Fazzone did to the defense by offering the [victim's] statement into evidence." The respondent contends that the petitioner's claim is not reviewable because these specific allegations of deficient performance were not alleged in the habeas petition or presented to the habeas court and, in the alternative, that the petitioner failed to prove that he was prejudiced by the alleged deficient performance. We conclude that, even if we assume that the petitioner properly presented these allegations to the habeas court, he cannot prevail on the merits of his claim.

The following facts and procedural history are relevant to this claim. As indicated previously, the state charged the petitioner with, inter alia, sexual assault in the first degree in violation of § 53a-70 (a) (2) and sexual assault in the second degree in violation of § 53a-71 (a) (1). Both statutes require the state to prove, inter alia, that the petitioner "engage[d] in sexual intercourse with another person . . . ."[8] General Statutes § 53a-65

[8] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

We note that § 53a-70 has been amended by the legislature since the events underlying the present case. See Public Acts 2015, No. 15-211, § 16. This amendment, however, has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

General Statutes § 53a-71 (a) provides in relevant part: "A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person . . . ."

(2) provides in relevant part that " '[s]exual intercourse' means vaginal intercourse . . . between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse . . . ."

At trial, the victim testified that the petitioner's sexual abuse of her started when he began removing her bra and massaging her back, and then progressed each time until eventually he rubbed her clitoris with his fingers. To support the allegation that the petitioner had engaged in sexual intercourse with the victim within the meaning of § 53a-65 (2), the state called Erica Kesselman, a physician with Day Kimball Healthcare, as an expert in the field of pediatric sexual assault examinations and pediatric female genitalia. On direct examination, Kesselman testified, inter alia, that the labia majora is considered the genital opening and that "[a]nything inside the labia majora is internal." She further testified that the clitoris is within the genital opening and that a person would have to penetrate the labia majora to touch the clitoris. On cross-examination, Fazzone challenged Kesselman about that aspect of her testimony, questioning whether "there's [any] way that . . . the clitoris . . . [can] be external at all in any way from the vagina" and whether "you can see the clitoris without having to do any type of penetration . . . ." Kesselman reiterated that the clitoris is internal and that a person could not touch it without penetrating the labia majora.

Subsequently, the state called C, the victim's former boyfriend, who testified on direct examination that the victim had called him on the phone and told him that the petitioner had "play[ed] with her breasts and fingered her." He further testified that the victim had made him promise not to tell anyone, but that eventually, after the victim reported the allegations, he told the police. On cross-examination, however, C acknowledged that he had told the police that the victim did

not call him to tell him about the allegations. Rather, he told the police that the victim's sister, B, had sent him a text message saying that the victim was hiding something and that the victim told him about the allegations after he called her to ask about B's text message. Thereafter, Fazzone sought to admit into evidence the victim's sworn statement to the police for the purpose of establishing an alleged inconsistency between that statement and C's testimony. Specifically, Fazzone explained to the court, outside of the jury's presence, that the victim's statement indicated that "she never told [B] about this incident," but C had testified that he "initially heard about this evidence from a text message from [B]. But if [the victim] never told [B], then how can [B] tell [C]?" The trial court responded: "My only concern is that by putting the statement in as a full exhibit . . . you're putting in another layer of corroboration of the victim's testimony for the jury to read in the jury deliberation room. . . . I mean, that's up to you. It's a strategic call, but it's a risky call." Fazzone then inquired whether the court could admit only the portion of the victim's statement that was relevant to show the alleged inconsistency, to which the prosecutor objected. After conferring with the petitioner, Fazzone indicated that he intended to offer the entire statement as a full exhibit, which the court admitted without any objection from the prosecutor.

After the jury returned to the courtroom, Fazzone resumed his cross-examination of C:

"[Fazzone]: Okay. So, just to . . . clarify for the jury, so, it's fair to say that you're testifying that [B] had texted you about the incident, but then later [the victim] told you about it?

"[C]: I guess, yeah.

"[Fazzone]: Okay. . . . And then, Your Honor, this is marked as a full exhibit from the Plainfield Police

Department. It is a statement from [the victim]. And I believe now that, because it's been offered in, Your Honor, I may read directly from the document?

"The Court: Yes.

"[Fazzone]: [The victim] states in quotes: 'I never told [B] about what [the petitioner] did to me.' And this document is dated [November 6, 2012]. So, with that said . . . isn't it fair to say that, if [the victim] never told [B] about what happened, then it would be impossible for [B] to text you?"

The prosecutor objected to Fazzone's question, and the court sustained the objection.

During the habeas trial, when the petitioner's counsel asked Fazzone why he cross-examined Kesselman about whether clitoral contact required penetration, Fazzone responded: "I don't know how it would relate to the defense. It was just—it was an allegation made by the prosecution, so." Regarding his decision to have the trial court admit the victim's statement into evidence as a full exhibit, Fazzone testified that he did not recall the strategy behind that decision but acknowledged that the trial court had described it as a "risky move because it added a layer of corroboration" to the victim's testimony. The petitioner did not introduce the victim's statement into evidence at the habeas trial.

In the portion of his posttrial brief addressing count two of his amended petition, the petitioner first argued that Fazzone's trial performance was so poor that prejudice should be presumed under *Cronic* because, "[w]hatever Fazzone was doing at trial, it was not putting the state's case through any meaningful adversarial testing." In support of that claim, the petitioner recounted a litany of alleged deficiencies in Fazzone's conduct of the trial, including that he "failed to properly introduce

evidence, such as witness testimony, by failing to adequately cross-examine the [victim] and her father and then failing to adequately establish why he should be allowed to re-call them"; that "he sought to bolster the state's case by allowing the jury to read the [victim's] statement and the arrest warrant affidavit" (emphasis omitted); that "[h]e sought to challenge well settled law in a manner inconsistent with his defense theory by trying to litigate the definition of 'penetration' "; that "[h]e failed to object to various instances of domestic violence with the [victim's] mother and, in several instances, elicited that evidence"; and that "[h]e never entertained consulting an expert to determine whether [the state's expert] was correct and how to challenge her broad statements that disclosure is often delayed, violence usually causes complainants' silence, or that teens typically delay truthful disclosures." The petitioner argued that Fazzone's "trial conduct constituted a total failure of representation for which prejudice should be presumed" under *Cronic*.

In the alternative, the petitioner claimed that Fazzone's conduct during the trial constituted ineffective assistance under the *Strickland* standard. With respect to the deficient performance prong of *Strickland*, the petitioner incorporated by reference the portion of his brief addressing his *Cronic* claim, arguing that "[t]he above *Cronic* analysis is essentially why, under *Strickland*, Fazzone rendered deficient performance." With respect to the prejudice prong of *Strickland*, the petitioner argued in full: "[The petitioner] essentially had no defense even though Fazzone came up with a theory. His failure to preclude objectionable evidence and his inexplicable proclivity for *introducing* objectional and prejudicial evidence *against* [the petitioner] wholly undermined his defense. His lack of knowledge with the law governing these types of cases, his unpreparedness to face an expert witness, and his glaring

inexperience with trial litigation all prevented him from getting his point across: that the witnesses had reasons to make this all up. As a result, [the petitioner] did not get the benefit of a competent and coherent defense at trial. Therefore, it must be said that the outcome of the trial, had Fazzone been able to present the defense effectively, would likely have been different." (Emphasis added.) Although the petitioner had referenced Fazzone's cross-examination of Kesselman and his introduction of the victim's statement in the *Cronic* portion of his posttrial brief (which he incorporated by reference in his argument that Fazzone's performance was deficient under *Strickland*), he did not present any specific argument explaining how those decisions by Fazzone would have impacted the jury's verdict.

In its memorandum of decision, the habeas court rejected the petitioner's *Cronic* and *Strickland* claims under count two of the petition. With respect to the *Cronic* claim, the court found that "Fazzone did not entirely fail to subject the prosecution's case to meaningful adversarial testing, nor did he completely fail to advocate for [the petitioner]. He was acting as a lawyer, and his performance did not constitute 'no representation at all.' . . . There is . . . ample evidence that . . . Fazzone performed as an attorney at trial: he had a coherent theory of defense, he cross-examined witnesses, he made objections and he argued that theory of the defense to the jury. To the extent that there is a *Cronic* claim, it is denied because . . . Fazzone did act as counsel for [the petitioner] and subjected the state's case to adversarial testing."

With respect to the *Strickland* claim, the habeas court focused on the prejudice prong, finding that, "even if . . . Fazzone is assumed to have performed deficiently . . . [the petitioner] has not proven prejudice. He has not proven how the outcome of the trial would have

been different . . . had . . . Fazzone objected to certain evidence or consulted with an expert. The state's case rested almost wholly on the testimony of the [victim]. She testified—and the jury believed her—that [the petitioner] sexually assaulted her on numerous occasions. Her testimony was corroborated in part by a third-party witness who walked in on [the petitioner] in bed with her." The court concluded that "[the petitioner's] general allegations—failure to properly investigate or failure to properly introduce evidence—are denied as lacking proof. [The petitioner] did not present any evidence of what an investigation would have uncovered and has not pointed to specific pieces of evidence that would have been excluded or what the impact of that was on the jury. He has also not presented any expert testimony at the habeas trial. Thus, all of his claims are denied as lacking proof. There is also no reasonable likelihood that the outcome of the trial would have been different."

In his motion for rectification and articulation, the petitioner requested that the habeas court "revise its [memorandum of decision] to state that [the] issue [pertaining to Fazzone's introduction of the victim's statement to the police] was raised in his [amended petition]."[9] The court denied that request, stating that "a reading of the amended petition does not support [the] position" that the petitioner had "raised a challenge to

[9] In its memorandum of decision, the habeas court, in recounting Fazzone's testimony, stated that Fazzone had "attempted to introduce the victim's statement to the police as evidence." In his motion for rectification and articulation, the petitioner requested that the court clarify that Fazzone in fact had introduced the statement into evidence, as opposed to merely attempting to introduce it. In its articulation order, the court clarified that the portion of the memorandum of decision in question "was meant to be a recitation of . . . Fazzone's testimony at the habeas trial. . . . To the extent that the court's recitation created an ambiguity, the court hereby articulates that the statement was, in fact, admitted as an exhibit at the criminal trial."

the introduction of the victim's statement at trial." The court then quoted from the portion of count two of the amended petition in which the petitioner had identified Fazzone's alleged instances of deficient performance and found that "the claim that . . . Fazzone was ineffective for introducing the victim's statement at trial . . . is not encompassed among those listed above. Thus, the court did not consider it or mention it."

On appeal, in challenging the habeas court's alleged failure to consider evidence concerning Fazzone's cross-examination of Kesselman and introduction into evidence of the victim's statement to the police, the petitioner does not argue that this evidence would have impacted the court's conclusion that he had failed to prove his *Cronic* claim. Instead, the petitioner focuses on the court's conclusion that he was not prejudiced by Fazzone's deficient performance, arguing that the court's conclusion that he "did not prove how the outcome would have been different . . . does [not] properly account for the effect of Fazzone's failures . . . ." The petitioner contends that Fazzone's "theory . . . that clitoral contact is not 'penetration' " was "misguided legally" and "rejected long ago" by our Supreme Court in *State* v. *Merriam*, 264 Conn. 617, 630, 835 A.2d 895 (2003).[10] He further contends that Fazzone's cross-examination of Kesselman "amounted to an admission of clitoral contact—that is, guilt on [the sexual assault counts] of the complaint," and "gave the state an opportunity to graphically explain the anatomy of sexual penetration and the manner in which it could be effected—with extremely prejudicial effect on the defense." The petitioner also argues that Fazzone's decision to introduce the victim's statement as a full exhibit "offered no benefit to the defense and bolstered the state's case"

[10] In *Merriam*, the court held that "the penetration element of [the sexual assault] statutes is satisfied by the penetration of the labia majora . . . ." *State* v. *Merriam*, supra, 264 Conn. 630.

because it "corroborated the [victim's] testimony with compelling details for the jury's sustained focus in the deliberation room." He further argues that the "harmful effect [of the victim's statement] was underscored by the state's repeated reference to it in the prosecutor's closing argument."

As discussed previously, to prevail on an ineffective assistance of counsel claim under the *Strickland* standard, a petitioner must prove both that counsel's performance was deficient and that it resulted in prejudice to the petitioner, and "[a] court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Internal quotation marks omitted.) *Figueroa* v. *Commissioner of Correction*, 202 Conn. App. 54, 64, 244 A.3d 149, cert. denied, 336 Conn. 926, 246 A.3d 986 (2021). "An evaluation of the prejudice prong involves a consideration of whether there is a reasonable probability that, absent the errors, the [fact finder] would have had a reasonable doubt respecting guilt. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . We do not conduct this inquiry in a vacuum, rather, we must consider the totality of the evidence before the judge or jury." (Internal quotation marks omitted.) *Hilton* v. *Commissioner of Correction*, 225 Conn. App. 309, 327, 315 A.3d 1135 (2024), cert. granted, 351 Conn. 916, 332 A.3d 293 (2025). Moreover, "[t]he likelihood of a different result must be substantial, not just conceivable. . . . Notably, the petitioner must meet this burden not by use of speculation but by demonstrable realities." (Internal quotation marks omitted.) Id., 328. "[O]ur review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks

omitted.) *Figueroa* v. *Commissioner of Correction*, supra, 63.

In the present case, the record does not support the petitioner's claims concerning Fazzone's cross-examination of Kesselman and introduction into evidence of the victim's statement to the police. With respect to the cross-examination of Kesselman, we begin by observing that nothing in the transcript supports the petitioner's contention that Fazzone's questioning on that point "amounted to an admission of clitoral contact . . . ." The trial transcript reveals that Fazzone repeatedly attempted to challenge Kesselman's testimony that the clitoris is internal and could not be touched without penetrating the labia majora, but nothing about that questioning even hinted at a concession that the petitioner had engaged in the alleged conduct.

The petitioner's argument that Fazzone's cross-examination of Kesselman "gave the state an opportunity to graphically explain the anatomy of sexual penetration and the manner in which it could be effected" also is not supported by the record. As the party bearing the burden of proof, the state was required to present evidence to support each element of the charged offenses, including that the petitioner had engaged in sexual intercourse with the victim. See, e.g., *State* v. *Sullivan*, 351 Conn. 798, 815–16, 334 A.3d 446 (2025) ("[i]t is axiomatic that the state [bears the burden of proving] all the essential elements of the crimes charged beyond a reasonable doubt in order to obtain a conviction" (internal quotation marks omitted)). Thus, Fazzone's cross-examination did not open the door to the state's introduction of evidence to establish that clitoral touching constitutes penetration; rather, the state was required to present that evidence to establish the penetration element of the sexual assault charges. In fact, the trial transcript reveals that the state elicited all of the relevant testimony from Kesselman during its direct examination

and did not ask any further questions after Fazzone's cross-examination. The petitioner did not present any testimony to support his claim that, but for Fazzone's cross-examination, the state would not have so "graphically explain[ed]" why the petitioner's touching of the victim's clitoris satisfied the penetration element of the sexual assault charges. Accordingly, we reject the petitioner's claim that the habeas court erred in concluding that the petitioner had failed to establish prejudice with respect to his claim of ineffective assistance concerning Fazzone's cross-examination of Kesselman.

The same is true with respect to Fazzone's introduction into evidence of the victim's statement to the police. First, we note that the petitioner did not offer the victim's statement as an exhibit or otherwise introduce the contents of the statement into evidence at the habeas trial. Without the statement in evidence, there is no basis in the record to support the petitioner's claim that the content of that statement was so prejudicial that it impacted the jury's verdict.

Moreover, the record does not support the petitioner's argument that the prosecutor made "repeated reference" to the victim's statement during closing argument in a way that was unduly prejudicial to the petitioner. Rather, the trial transcript reveals that the prosecutor referred to the victim's statement only twice during closing argument. First, in arguing that the jury should find that the petitioner had abused the victim when she was older than thirteen but younger than sixteen years of age, as required to find him guilty of sexual assault in the second degree; see footnote 8 of this opinion; the prosecutor referred to the date on which the victim gave her statement to the police.[11] Second, during his

[11] In his reply brief, the petitioner argues that there was insufficient evidence that he sexually assaulted the victim after she became thirteen years old and that Fazzone's failure to move for a judgment of acquittal of sexual assault in the second degree is "another example of Fazzone's deficient performance . . . ." We decline to address the merits of that claim because

closing argument, Fazzone argued that the jury should disbelieve the victim because, contrary to her trial testimony, she had reported only one instance of alleged abuse in her statement to the police. The prosecutor responded during rebuttal argument that the jury should consider "the context in which [the victim] gave this statement" and referenced the victim's trial testimony in which she explained that, when she gave the statement, "[her] dad was in the room, and [she] was really embarrassed and . . . didn't really want him to be there." These references do not support the petitioner's argument that the state relied heavily on the victim's statement in support of its case. Accordingly, we conclude that the court did not err in its determination that the petitioner failed to establish prejudice under the *Strickland* standard.[12]

"[i]t is . . . a well established principle that [claims] cannot be raised for the first time in a reply brief." (Internal quotation marks omitted.) *Dearing* v. *Commissioner of Correction*, 230 Conn. App. 145, 168 n.9, 329 A.3d 988, cert. denied, 351 Conn. 910, 331 A.3d 158 (2025). We note, however, that the petitioner raised an identical claim in his direct appeal, which was rejected on its merits because "there was sufficient evidence . . . that the defendant's abuse continued until after the victim turned thirteen, as required to sustain the defendant's conviction for sexual assault in the second degree . . . ." *State* v. *Wright*, supra, 235 Conn. App. 154.

[12] The petitioner also argues, in connection with his challenge to the habeas court's rejection of count two of his amended petition, that the court erred by not considering certain instances of alleged false testimony by Fazzone during the habeas trial in assessing his credibility. Specifically, he argues that "Fazzone falsely asserted that Judge Swords had warned [the petitioner] of the implications if he failed to appear," when, "[i]n fact, Judge Swords made no such admonition." The petitioner argues that "Fazzone clearly demonstrated a willingness to lie in court" and that the habeas court "plainly erred in failing to take into account this pattern of deception."

It is well established that, "[i]n 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.) *Hilton* v. *Commissioner of Correction*, supra, 225 Conn. App. 340. Moreover, as discussed previously, the habeas court rejected count two of the amended petition on the ground that the petitioner had failed to prove that he was prejudiced by Fazzone's allegedly deficient performance. That conclusion rested not on the court's

III

Finally, the petitioner raises three claims pertaining to the habeas court's alleged failure to address certain of his allegations that, he maintains, were raised in his amended habeas petition and presented to the court in his posttrial brief. First, the petitioner asserts that the court failed to address two separate but related claims pertaining to Fazzone's statements and actions after the petitioner failed to appear in court when trial resumed on November 10, 2014.[13] Second, the petitioner asserts that the court failed to address whether Fazzone rendered ineffective assistance during the petitioner's sentencing proceeding. We decline to review these claims because the petitioner failed to present them to the habeas court.

We begin by setting forth the legal principles and standard of review applicable to these claims. "The petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action. . . . The principle that a [petitioner] may rely only upon what he has alleged is basic. . . . It is fundamental in our law that the right of a [petitioner] to recover is limited to the allegations of his complaint." (Citation omitted; internal quotation marks omitted.) *Cole* v. *Commissioner of Correction*, 102 Conn. App. 595, 599, 925 A.2d 1231, cert. denied, 284 Conn. 924, 933 A.2d 723 (2007). Moreover, "[i]t is axiomatic that a party cannot submit a case to the trial

assessment of Fazzone's credibility but on its determination that the petitioner failed to present evidence to support his claim that Fazzone's performance affected the outcome of the trial. The petitioner's brief does not explain how the court's credibility determination affected its resolution of count two of the amended petition. Accordingly, we reject that aspect of the petitioner's claim.

[13] Although the petitioner raises these as two separate claims of error in his principal appellate brief, we address them together because they involve overlapping factual issues, and our resolution of them requires application of an identical standard of review.

court on one theory and then seek a reversal in the reviewing court on another. A party is not entitled to raise issues on appeal that have not been raised in the trial court." (Internal quotation marks omitted.) *Alexander* v. *Commissioner of Correction*, 103 Conn. App. 629, 640, 930 A.2d 58, cert. denied, 284 Conn. 939, 937 A.2d 695 (2007). "[T]he interpretation of pleadings is always a question of law for the court . . . . Our review of the [habeas] court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 607, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021).

A

The petitioner first contends that "on the morning of November [10, 2014] when [the petitioner] failed to appear for the resumption of trial . . . [Fazzone made] false statements to Judge Swords concealing his contacts with [the petitioner] and his role in [the petitioner's] failure to appear." He claims that Fazzone's alleged "concealment of his role in [the petitioner's] failure to appear" constituted ineffective assistance of counsel and/or a conflict of interest, and that the habeas court erred in failing to address those claims.

The following additional facts and procedural history are relevant to this claim. As discussed previously, on Thursday, November 6, 2014, after the petitioner moved to dismiss Fazzone as his counsel, the trial court continued the case until Monday, November 10. Fazzone testified at the habeas trial that he met with the petitioner on November 6 after court adjourned and again at the petitioner's apartment at some point during the weekend. When the petitioner did not appear in court on November 10, the court asked Fazzone if he knew the petitioner's whereabouts, to which Fazzone responded: "I saw [the petitioner] on Friday. I spoke with him, and

he made it clear to me that he wanted to consult other counsel. So, I said, 'well, I'll be in touch with you.' And I called him a couple of times last night; I was not able to get in touch with him." The court adjourned for approximately twenty minutes to allow the petitioner additional time to appear and to permit Fazzone to attempt to contact him.

When court reconvened, the court asked Fazzone if he "ha[d] anything to report" regarding the petitioner's whereabouts, to which Fazzone responded: "Yes, Your Honor. . . . I attempted to call [the petitioner] on his cell phone, and it went to voicemail . . . and I left him a message, explained to him that he has to be here immediately. I have not been able to contact him." Fazzone then orally moved for a mistrial, stating that he "would not want the jury to see [the petitioner's] absence as any indication of guilt in any way." The court denied the motion and adjourned for another twenty minutes to afford the petitioner a final opportunity to appear.

When court reconvened again and the petitioner still had not appeared, the court asked Fazzone if he had "heard from the [petitioner] since the last time we were on the record," to which Fazzone responded: "I did again attempt to locate [the petitioner], or to . . . get in touch with him by way of cell phone, and I have not heard from him." The court then recounted that, on November 6, 2014, after the petitioner had moved to dismiss Fazzone as counsel, it had continued the matter and instructed the parties that court would reconvene on November 10 for further consideration of the petitioner's motion. The court then asked Fazzone whether it "[w]ould . . . be a fair statement" to say that Fazzone had "tried to get ahold of the petitioner over the weekend." Fazzone responded: "Yes, Your Honor, I did. Just again for the record, I spoke with [the petitioner] on Friday, and he had made it clear to me that he wanted

to consult with other counsel. Then I called him last evening because I had not heard back from him and . . . it went straight to voicemail, Your Honor. And I attempted to call him twice today." The court found that the petitioner had "intentionally absented himself in an effort to thwart the proceedings in this matter and has waived, therefore, his right to be present."

In count two of his amended habeas petition, the petitioner alleged that Fazzone's trial performance was deficient in various ways, none of which relate to Fazzone's alleged performance at the hearing on November 10, 2014, or his statements to the trial court during that hearing.[14] As discussed previously, in his posttrial brief, the petitioner claimed that Fazzone's trial performance constituted ineffective assistance under either *Cronic* or *Strickland* and identified various actions and/or inactions by Fazzone that, he claimed, supported the ineffective assistance of counsel claim. The petitioner did not reference the November 10 hearing in his posttrial brief or argue that Fazzone was ineffective for allegedly lying to the court about his role in or knowledge of the petitioner's decision to flee. The petitioner also did not argue that Fazzone had a conflict of interest. Not surprisingly, therefore, the habeas court's memorandum of decision did not address any issues concerning Fazzone's statements to the court on November 10.

In his motion for rectification and articulation, the petitioner argued that "Fazzone's testimony before the

[14] The petitioner alleged in count two of his amended habeas petition that Fazzone had rendered ineffective assistance because he "failed to file pretrial motions to preclude testimony about [the petitioner's] prior conviction and about his allegedly violent relationship with the [victim's] mother"; "failed to adequately investigate the allegations against [the petitioner]"; "failed to pursue the [victim's] medical, [Department of Children and Families], and/or school records"; "failed to properly introduce evidence"; "failed to object to [certain testimony and to certain statements by the court]"; "failed to consult and/or obtain an expert witness to rebut the state's expert"; "failed to file an application for sentence review"; and "failed to file an appeal."

habeas court revealed that he lied to Judge Swords" because he did not disclose the details of his meeting at the petitioner's apartment between November 6 and 10, 2014. The petitioner requested that the court either "revise its judgment denying the . . . petition for [a] writ of habeas corpus" or, in the alternative, "acknowledge the undisputed fact that . . . Fazzone lied to the trial court about his contacts with the [petitioner] prior to [his] failure to appear . . . ." The habeas court denied that request on the ground that Fazzone's statements to the trial court "were not relevant to the determination of the specific claims" at issue because the petitioner did not raise any such issues in his amended habeas petition or posttrial brief.

On appeal, the petitioner claims that the habeas court erred by failing to address whether Fazzone's alleged "concealment" of his role in or knowledge of the petitioner's decision to flee constituted ineffective assistance and/or a conflict of interest. He argues that Fazzone made "false statements to Judge Swords concealing his contacts with [the petitioner] and his role in [the petitioner's] failure to appear," that these alleged "lies to the trial court constituted quintessential ineffective assistance of counsel," and that, "if Fazzone had answered Judge Swords truthfully about his conduct over the weekend and his role . . . in [the petitioner's] disappearance, the court's ruling on the motion for [a] mistrial, and the outcome of the trial, would have been different." Separately, he argues that, "when [Fazzone] lied to the court on the morning of November 10, [2014] his self-interest in concealing his involvement with [the petitioner's] disappearance trumped his duty to his client and to the court. There was at this point an irreconcilable conflict of interest." The petitioner contends that "[t]hese facts are on the record, do not require further fact finding, were known to both parties at the habeas trial and were available to the habeas court to

consider—and should be considered here by this court." We disagree.

Our review of the record indicates that nothing in the amended habeas petition or the petitioner's posttrial brief reasonably can be construed as raising a claim that Fazzone rendered ineffective assistance and/or had a conflict of interest based on his alleged "concealment" of his role in or knowledge of the petitioner's decision to flee. Neither the amended petition nor the posttrial brief even mention Fazzone's statements to the court on November 10, 2014, much less claim that Fazzone lied in those statements. The only testimony elicited during the habeas trial concerning the November 10 hearing occurred when the respondent's counsel asked Fazzone: "Do you recall on that Monday morning telling the court that you had attempted several times over the weekend to contact [the petitioner] in furtherance of preparing for or strategizing for the trial and that you were unable to reach him?" Fazzone responded: "[T]hat's right, yes."[15] The petitioner's counsel did not confront Fazzone with the transcript of the November 10 hearing or ask him any questions about his statements to the court on that date. Thus, the record does not support the petitioner's argument on appeal that he raised these claims before the habeas court.

Moreover, we disagree with the petitioner's contention that the existing record clearly establishes that Fazzone lied to the trial court on November 10, 2014.

[15] In his principal appellate brief, the petitioner cites this testimony in support of his argument that, at the habeas trial, "Fazzone admitted that he had misled Judge Swords about his contacts with [the petitioner] over that crucial weekend." The petitioner does not explain how Fazzone's testimony acknowledging that he told the trial court that he was unable to reach the petitioner during the weekend constitutes an admission that he lied about his contacts with the petitioner. In fact, as explained herein, Fazzone expressly told the court that he had last seen the petitioner on Friday, November 7, 2014, which the amended petition identifies as the day of the meeting between Fazzone and the petitioner at the petitioner's apartment.

To the contrary, the record actually contradicts the petitioner's claim. The petitioner's contention that Fazzone concealed information about his contact with the petitioner appears to be based on the premise that Fazzone did not disclose the meeting at the petitioner's apartment.[16] As discussed previously, the hearing on the petitioner's motion to dismiss Fazzone as counsel took place on Thursday, November 6, after which the trial court continued the matter to Monday, November 10. During the habeas trial, Fazzone and the petitioner both testified that they had two discussions after the court continued the matter: one conversation took place at the courthouse after court adjourned on November 6, and another took place at the petitioner's apartment at some point between November 6 and 10. Although the transcript does not contain any testimony as to the day of the meeting at the petitioner's apartment, the amended petition alleges that the meeting in question took place "[t]he following day" after the court granted the continuance on Thursday, November 6. Thus, according to the allegations in the amended petition, the meeting in question took place on Friday, November 7.

The transcript of November 10, 2014, indicates that, contrary to the petitioner's contention, Fazzone informed the trial court that he had seen and spoken with the petitioner on Friday, November 7. Specifically, when the court first asked Fazzone whether he knew the petitioner's whereabouts, Fazzone responded that he "saw [the petitioner] on Friday" and had "called him a couple of times last night" but "was not able to get in touch with him." Later, when the court asked whether it was accurate to say that Fazzone had "tried to get

[16] To the extent the petitioner intended to claim that Fazzone should have disclosed to the court that he had advised the petitioner to flee or otherwise led him to believe that fleeing was in his best interest, we reiterate that Fazzone testified that he did not advise the petitioner to flee, and the habeas court credited that testimony. Thus, any such claim is unsupported by the record and is contrary to the court's express factual findings.

ahold of the [petitioner] over the weekend," Fazzone responded that he "spoke with [the petitioner] on Friday, and he had made it clear to me that he wanted to consult with other counsel," and that Fazzone "called [the petitioner] last evening because I had not heard back from him and . . . it went straight to voicemail . . . ." Thus, we disagree with the petitioner's contention that we can discern from the existing record that Fazzone lied to the court about his contacts with the petitioner.

In any event, as indicated previously, at the habeas trial, the petitioner did not confront Fazzone with the November 10, 2014 transcript or otherwise raise the claims that he was ineffective and/or had a conflict of interest based on any alleged false statements to the trial court. Because the petitioner did not present his claims to the habeas court, that court did not make the factual findings necessary to permit us to review those claims. See, e.g., *Ruiz* v. *Gatling*, 73 Conn. App. 574, 575, 808 A.2d 710 (2002) ("It is not the function of this court to find facts. . . . Our role is . . . to review claims based on a complete factual record developed by a trial court." (Internal quotation marks omitted.)). Accordingly, we decline to review the petitioner's unpreserved claims.

B

The petitioner's final claim is that the court erred by failing to conclude that Fazzone rendered ineffective assistance during the sentencing hearing. We decline to review this claim because the petitioner failed to raise it before the habeas court.

The following additional facts and procedural history are relevant to this claim. As indicated previously, the petitioner failed to appear for his sentencing hearing, which was held on January 6, 2015. Fazzone represented the petitioner in absentia. At the outset of the hearing,

the court found that the petitioner had "voluntarily, wilfully, and intentionally absented himself" and "[c]onsequently . . . waived his right to be addressed personally at the sentencing and to speak in mitigation of his punishment." The state noted that the victim had provided a letter to the court, which the court confirmed it had read. The state then presented its sentencing argument and recommended that the court sentence the petitioner to twenty-five years to serve followed by ten years of special parole.

Fazzone then addressed the trial court and argued in full: "I did have a chance to read the presentence investigation [report] in full and the letter from [the victim] written to Your Honor. I wanted to note that for the record, that I have read both in full. I have not—just for the record, I have not heard from [the petitioner] since the trial has taken place. I have no idea where, obviously, he is at this time, Your Honor. I feel sorrow that he did not attend his trial. [The petitioner] obviously, was found guilty from a jury of his peers, and so, therefore, I do feel very comfortable in saying that I feel extreme sorrow for what [the victim] and her family ha[ve] been through. And I . . . really do and I hope that [the victim] has a brilliant future and enjoys a successful future ahead of her, and I hope that their family can mend and live a very happy life. That's all, Your Honor." Thereafter, the court sentenced the petitioner to a term of twenty years of incarceration, followed by twenty-five years of special parole.

The habeas court's memorandum of decision did not address any claim pertaining to Fazzone's representation at sentencing. In his motion for rectification and articulation, the petitioner requested that the court either "revise its judgment denying [the] . . . petition for [a] writ of habeas corpus . . . in light of . . . Fazzone's failure to advocate for the [petitioner] at his in absentia sentencing," or "rectify the record in its

memorandum of decision as to . . . Fazzone's representation of the [petitioner] at sentencing and the absence of any advocacy on behalf of the [petitioner]." The court denied that request on the ground that no such claim was alleged in the amended petition or addressed in the posttrial brief.

On appeal, the petitioner contends that "Fazzone's performance at the petitioner's sentencing was so deficient as to satisfy the *Cronic* presumption of prejudice" because, "[r]ather than provide any advocacy at all for the [petitioner], Fazzone merely expressed 'extreme sorrow' for the [victim]," and "completely failed to offer any argument on behalf of the [petitioner], to offer any mitigating evidence, to make any statement at all to support leniency in sentencing." The petitioner further argues that the court erred by failing to address that claim because "[t]he conduct of counsel at sentencing should have been understood to be part of the claim of ineffective assistance as trial counsel."

We conclude that the petitioner's claim is not reviewable because he failed to present it to the habeas court. The amended petition contains no allegations concerning Fazzone's performance at sentencing and, in fact, does not even mention that Fazzone represented the petitioner during the sentencing proceeding. Moreover, in the petition's prayer for relief, the petitioner did not request that the court order a new sentencing hearing. Similarly, the petitioner's posttrial brief does not present any argument that could reasonably be construed as raising a claim that Fazzone's representation at sentencing constituted ineffective assistance. The petitioner's posttrial brief contains only one sentence concerning the sentencing proceeding, which merely states: "Fazzone remained counsel through the petitioner's sentencing." Finally, although the petitioner introduced the transcript of the sentencing proceeding as a full exhibit during the habeas trial, the petitioner did not

confront Fazzone with that transcript or question him concerning his performance during that proceeding. In sum, there is nothing in the record to support the petitioner's claim that the court was on notice that the petitioner intended to challenge Fazzone's representation of him at sentencing. Accordingly, we decline to review the petitioner's claim.

The judgment is affirmed.

In this opinion MOLL, J., concurred.

ELGO, J., concurring in part. I fully agree with and join parts I A, II and III of the majority opinion. I respectfully disagree with the majority's conclusion in part I B that the habeas court improperly sustained the objection of the respondent, the Commissioner of Correction, to certain testimony of the petitioner, Randy A. Wright, on hearsay grounds. Accordingly, I depart from the majority opinion in that limited regard.

In his principal appellate brief, the petitioner claims that the habeas court's decision to sustain the respondent's objection on hearsay grounds "was clearly wrong." On the record before this court, I would conclude that the petitioner has not demonstrated that the court committed error with respect to that evidentiary ruling.

The petitioner's claim is predicated on a colloquy that transpired at the habeas trial on May 3, 2023. That colloquy began with the petitioner's counsel asking the petitioner about a conversation with Attorney Vincent Fazzone, his criminal trial counsel. The following colloquy ensued:

"[The Respondent's Counsel]: Your Honor, I'm going to object. This is hearsay.

"[The Petitioner's Counsel]: I think these are—first of all, I think some of these things have already been said

by [Fazzone]. Second, these are conversations between the attorney and client . . . so that . . . [the petitioner] is explaining what he was discussing with his attorney. And this is . . . directly leading into the conversations about the advice regarding his flight.

"[The Respondent's Counsel]: It's still hearsay, Judge. He can ask him what his impression was after their conversations . . . .

"[The Petitioner's Counsel]: I think his impression without knowing what was said—

"The Court: You can ask him what his understanding was—

"[The Respondent's Counsel]: Yeah.

"The Court: —or what he felt about the progress of the trial, [Fazzone's] performance, advice he was given.

"[The Petitioner's Counsel]: Yes, Your Honor. I can phrase it that way."

The petitioner's counsel then proceeded to question the petitioner on his understanding of the advice provided by Fazzone, as aptly chronicled in the majority opinion.[1]

[1] Later in the petitioner's testimony, the petitioner's counsel expressly indicated that he was not claiming the issue of whether the petitioner could offer hearsay testimony as to his conversations with Fazzone:

"[The Petitioner's Counsel]: After the conversation ended, what was your impression of what was happening in the case?

"[The Petitioner]: That it wasn't going well.

"[The Petitioner's Counsel]: Okay. Did you discuss any plans for your future representation?

"[The Petitioner]: Yes.

"[The Petitioner's Counsel]: Okay. What was—what had you discussed at that point?

"[The Petitioner]: We discussed that—[Fazzone] told me that if I left—

"[The Respondent's Counsel]: Objection.

"[The Petitioner's Counsel]: I'll withdraw that. Won't claim that."

In its subsequent memorandum of decision, the habeas court concluded that the petitioner had not established ineffective assistance of counsel on the part of Fazzone. The petitioner then filed a motion for articulation, in which he sought, inter alia, "articulation of the basis of the court's rulings that prevented [him] from making a record of [Fazzone's] advice to him to flee the jurisdiction." The court granted that motion in part and issued an articulation on December 1, 2023, in which it stated: "[T]he question was objected to on hearsay grounds, and that objection was sustained. At no time did [the petitioner's] habeas trial counsel explain that the testimony sought was not for the truth of the matter, as he now claims."[2]

It is well established that "the burden is on the proponent of the evidence, upon timely objection, to establish that the evidence is admissible." *New England Savings Bank* v. *Bedford Realty Corp.*, 238 Conn. 745, 753, 680 A.2d 301 (1996); *State* v. *Book*, 155 Conn. App. 560, 575, 109 A.3d 1027, cert. denied, 318 Conn. 901, 122 A.3d 632 (2015), cert. denied, 578 U.S. 977, 136 S. Ct. 2029, 195 L. Ed. 2d 219 (2016). The record before us indicates that the petitioner initially offered the testimony in question without any qualification. The record further confirms that, following the objection by the respondent,

[2] In its articulation, the habeas court also noted that, after sustaining the respondent's objection, it permitted the petitioner to offer nonhearsay testimony about the advice provided by Fazzone. As it stated: "[T]he court permitted [the petitioner] to testify about what his understanding of the conversation with [Fazzone] was. Typically, evidence that is hearsay, but not offered for the truth of the matter, is offered to show the impact on the listener or to explain any actions taken by the listener. Here, the court permitted [the petitioner] to testify—and he did—about his understanding of what [Fazzone] said to him and what that led him to do. [The petitioner] testified that his 'impression, what I understood from that conversation was that, when I left, the trial would stop, and that would give me a chance to get a new attorney to go back to it, but it would stop. It would be—there wouldn't be anything going on after that.' Shortly thereafter he testified, without objection, that the impression he got from [Fazzone] 'was to leave, get the burner, change the hair, and everything would stop.' " The record before us substantiates those findings.

the petitioner did *not* argue that the testimony constituted nonhearsay.[3] He likewise did not argue that it was admissible hearsay for any other reason.

Instead, the transcript of the May 3, 2023 proceeding indicates that, when the habeas court stated that the petitioner's counsel could "ask [the petitioner] what his understanding was . . . or what he felt about . . . Fazzone's performance [and the] advice [the petitioner] was given," the petitioner's counsel neither disagreed with that statement nor argued that the petitioner's testimony was admissible nonhearsay. Rather, the petitioner's counsel expressed agreement with the court and then stated, "Yes, Your Honor. I can phrase it that way." As detailed in the majority opinion, the petitioner then proceeded to testify at length on his understanding of the advice provided by Fazzone.

In light of the foregoing, I would conclude that the petitioner failed to establish that the testimony to which the respondent objected was admissible. See *New England Savings Bank* v. *Bedford Realty Corp.*, supra, 238 Conn. 753. Because the petitioner did not argue

[3] When a party seeks to admit testimony from a witness regarding conversations with another person, a blanket assertion that the testimony qualifies as nonhearsay does not suffice. Instead, the party must provide a proffer as to how that testimony is relevant to a material issue in the case. As one noted treatise explains: "[I]f a conversation is sought to be admitted not for the truth of its content but to establish that such a conversation took place, it is not hearsay. . . . *Proof of a conversation should never be admitted under this rubric unless the offeror can establish that the mere fact that the conversation took place is relevant to the case.* . . . Statements and conversations should never be admitted as [nonhearsay] merely on the claim that they are offered only to show they took place without inquiring and being satisfied that that fact is relevant to a material issue in the case." (Citations omitted; emphasis added.) E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.6, p. 511. The petitioner did not provide such a proffer in this case. Nevertheless, the petitioner, having acquiesced to the court's invitation to testify as to his "impressions" and their impact on him, proceeded to produce evidence premised on nonhearsay that was relevant to establish a material issue—specifically, that he fled the jurisdiction because of Fazzone's advice.

before the habeas court, that his testimony constituted admissible nonhearsay, I respectfully disagree with the majority to the extent that it agrees with the petitioner that "the court's hearsay ruling was erroneous because his testimony as to Fazzone's advice was offered not to prove that what Fazzone told him was true" but, rather, constituted admissible nonhearsay. I am reluctant to ascribe error on the part of a trial judge for failing to overrule a hearsay objection on a basis that never was presented to the court at trial. See, e.g., *State* v. *Ortega*, 345 Conn. 220, 255, 284 A.3d 1 (2022) ("to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party" (internal quotation marks omitted)); *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 58, 225 A.3d 953 (2020) ("[o]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court" (internal quotation marks omitted)). In my view, this case does not present any exceptional circumstance warranting departure from that settled precedent.

Far from articulating any basis on which the habeas court could consider whether the testimony in question constituted either nonhearsay or admissible hearsay, the record reflects that the petitioner's counsel acquiesced to the court's decision to sustain the hearsay objection and proceeded to question the petitioner accordingly.[4] In so doing, I believe, the petitioner waived

[4] As the majority notes, immediately after the habeas court clarified that the petitioner's counsel was free to "ask [the petitioner] what his understanding was . . . or what he felt about . . . Fazzone's performance [and the] advice [the petitioner] was given," the petitioner's counsel proceeded to question the petitioner on "his impression" of Fazzone's communications, leading to a record replete with testimony recounting the advice that Fazzone provided to him.

any claim that the court's evidentiary ruling was erroneous. As our Supreme Court has explained, "[i]t is well settled that we review claims alleging an improper evidentiary ruling only if they are distinctly raised at trial. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Citation omitted; internal quotation marks omitted.) *State* v. *Gonzalez*, 315 Conn. 564, 591–92, 109 A.3d 453, cert. denied, 577 U.S. 843, 136 S. Ct. 84, 193 L. Ed. 2d 73 (2015); see also *State* v. *Wade*, 351 Conn. 745, 758, 333 A.3d 90 (2025) ("[a] defendant cannot pursue one course of action at trial and later, on appeal, argue that a path he rejected should now be open to him" (internal quotation marks omitted)); *In re Aisjaha N.*, 343 Conn. 709, 722, 275 A.3d 1181 (2022) (" '[w]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same' ").

In addition, I am mindful that, "[i]n Connecticut, our appellate courts do not presume error on the part of the trial court. . . . [T]he burden rests with the appellant to demonstrate reversible error." (Internal quotation marks omitted.) *State* v. *Papineau*, 182 Conn. App. 756, 771–72, 190 A.3d 913, cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018). On the record before us, I would conclude that the petitioner has not met that burden with respect to his claim of evidentiary error.

I would reach that conclusion irrespective of the question of whether the habeas court properly sustained the respondent's objection on hearsay grounds. I agree with the majority that, "contrary to the petitioner's contention, the court did not deprive [him] of the opportunity to prove his claims" and that, following its decision to sustain that objection, the court permitted the petitioner to offer ample testimony regarding his

understanding of the advice provided by Fazzone.[5] I, therefore, concur with the conclusion of my colleagues that the petitioner has not demonstrated that a due process violation existed and deprived him of a fair trial, as required under the third prong of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

NINO D. NEALY *v.* COMMISSIONER OF CORRECTION (AC 47267)

Suarez, Clark and Westbrook, Js.

Syllabus

The petitioner, who previously had been convicted, on a plea of guilty, of assault in the first degree, appealed following the denial of his petition for certification to appeal from the habeas court's judgment denying his habeas petition. He claimed, inter alia, that the court erred in concluding that his criminal trial counsel did not provide ineffective assistance because she failed to adequately investigate certain potential witnesses. *Held*:

[5] In its memorandum of decision, the habeas court made detailed factual findings predicated on that testimony. As the court stated: "After the second day of trial, [the petitioner and Fazzone] met in the conference room. [Fazzone] told him it wasn't going well and that he was out of his depth. This conversation lasted about half an hour. Based on that conversation, [the petitioner] was left with the impression that, if he fled, the trial would stop and [the petitioner] would have an opportunity to hire alternate counsel. [The petitioner and Fazzone] once again spoke on the courthouse steps when they left the building. [The petitioner] characterized them as one long conversation that continued over two separate locations. Based on the conversation on the steps, [the petitioner] believed that he should flee, get a burner phone and change his hair. [Fazzone] gave [the petitioner] $500-600 on the steps, along with his case file. [The petitioner] understood that [Fazzone] gave him the money to have gas money to leave the state. He saw [Fazzone] again over the weekend at his apartment because [Fazzone] had inadvertently given him parts of another client's file and [the petitioner] wanted to return that. After that meeting, [the petitioner] was again left with the impression that it would be better for his case if he left the state. However, he testified that he was aware that [the trial judge] told him to appear in court."

This court dismissed the appeal because it concluded that the habeas court did not abuse its discretion in denying the petition for certification to appeal, as the petitioner failed to demonstrate, in accordance with the test adopted in *Simms* v. *Warden* (230 Conn. 608), that the issue of whether his trial counsel's representation was reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law was an issue that was debatable among jurists of reason, that a court could resolve in a different manner or that was adequate to deserve encouragement to proceed further.

Argued April 23—officially released October 21, 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, *Newson*, *J.*; judgment denying the petition; thereafter, the court, *Newson*, *J.*, denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Christopher A. Alexy, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Kelly Masi*, senior assistant state's attorney, and *Angela Macchiarulo*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

WESTBROOK, J. The petitioner, Nino D. Nealy, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court (1) abused its discretion by denying the petitioner's petition for certification to appeal the habeas court's decision and (2) improperly denied his petition for a writ of habeas corpus alleging ineffective assistance of criminal trial counsel. We conclude that the court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The following facts, as set forth by the habeas court, and procedural history are relevant to the resolution of this appeal. On July 23, 2018, at approximately 7:04 a.m., the police were dispatched to the petitioner's residence to respond to a disturbance complaint. Upon arrival, they were met by the petitioner's girlfriend, Holly Foster. Foster told the police that the victim[1] showed "up at the residence banging on the door." Foster stated that, when she opened the door, the victim entered the residence "screaming and yelling," grabbed a set of car keys from the kitchen table, and left.

After Foster gave her statement to the police, the officers began traveling in the direction of the victim's residence. While en route, they learned that the victim had contacted emergency services to address a head wound she sustained from a BB gun. When the officers arrived, they observed a laceration on the top of the victim's head, "several minor puncture wounds on her chest and stomach area, and a scrape on her right arm."

The victim told the police that she was awoken around 6 a.m. by the petitioner, who had entered her residence uninvited. The petitioner directed the victim into another room, where the two began arguing. The petitioner punched her in the face, and she struck him back. The petitioner then brandished a black crowbar and began jabbing her in the stomach with it while saying, " 'I will continue to break in anytime I want.' " At the time, the petitioner was the subject of a full no contact protective order in favor of the victim.

[1] In accordance with our policy of protecting the privacy interests of the victims of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

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

The victim stated that, as she attempted to leave the room, the petitioner grabbed her cell phone out of her pants pocket and ran out of her residence. The victim, using her house phone, called the police. She then called her cell phone and reported that the petitioner answered the phone and said, " 'If you call the [police] on me one more time I'm going to slice your throat.' "

At this point, the victim borrowed a friend's car and proceeded to drive to the petitioner's residence. The petitioner opened the door when she knocked, and they immediately began to argue about the return of the victim's cell phone. The petitioner began to walk toward his bedroom, while still in possession of her phone. She followed him into the room where she noticed Foster apparently asleep in bed. According to the victim, Foster awoke, and the two began to argue with each other when, suddenly, the victim was struck in the head with a hard object. When she turned around, she saw the petitioner standing behind her with a black BB gun. The petitioner began to flee the apartment, and the victim followed him. Once outside, the petitioner began throwing rocks at her and shot her again with the BB gun, striking her in the chest multiple times.

After the victim gave her statement, the police returned to the petitioner's residence in an attempt to locate him. Upon arrival at his residence, they conducted a search that resulted in the discovery of a black BB gun behind the living room sofa. Shortly following this search, the petitioner was found hiding in a rear stairway of his residence and was arrested. During a subsequent search of the victim's residence, the police discovered a black crowbar located under a rug outside of her apartment door. They also found that the front windows were unlocked.

While incarcerated, but prior to his conviction, on February 27, 2019, the petitioner received a letter from

his trial counsel, TaShun Bowden-Lewis, explaining the terms of a proposed plea agreement. In it, Bowden-Lewis stated: "Your offer is to plead to [a]ssault in the [f]irst [d]egree (felony, [twenty] year max jail, [five] year mandatory minimum) and [a]dmit your [p]robation [v]iolation ([three] years jail exposure). . . . If you accept your offer you will receive [eight] years to serve with [ten] years special parole." Bowden-Lewis also stated in the February 27, 2019 letter that "[t]he alleged victim in these cases . . . spoke to my investigator as well as the prosecutor . . . . She sticks to her story about what happened in these cases as well as admits to being aggressive and standing up for herself with you. . . . We have spoken to Kendria [Stenson], the [m]other of . . . one of your minor children as well as [Foster], your current girlfriend."

On March 27, 2019, the petitioner appeared before the trial court, *Hon. Roland D. Fasano*, judge trial referee, for a plea hearing. At the start of the hearing, the petitioner addressed the court regarding a letter he submitted to the court expressing a desire to fire Bowden-Lewis as his attorney. The petitioner stated on the record: "I was just expressing my remorse and sincerity in the situation and hoping that you would lessen the charge. Because right now I'm being charged with assault first, and I don't believe it was an assault first, I believe it was an assault second." At this point, Bowden-Lewis and the petitioner asked the court for a moment of time to discuss whether the petitioner would accept the state's offer. Bowden-Lewis explained her discussion with the petitioner and stated: "[The petitioner] asked if the offer was going to change. . . . And I said no, it was not, so we passed and we talked, and he's prepared to go forward with the offer today. . . . And both of these pleas, Judge, will be an *Alford*[2] plea." (Footnote added.)

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

Prior to accepting the petitioner's plea, the court asked him: "Are you satisfied with [Bowden-Lewis'] advice and counsel? That doesn't mean thrilled with the sentence, but satisfied she did her job," to which the petitioner responded, "Yes." The court further asked: "[Are] you . . . satisfied based on the evidence the state claims to have, that if you went to trial on all the charges, you would probably be found guilty on some or all of the charges, and you want to accept the agreement rather than risk a heavier penalty after trials and hearings; is that accurate?" The petitioner again responded, "Yes." On the advice of counsel and in accordance with the plea agreement proposed by the state, the petitioner entered a guilty plea under the *Alford* doctrine to one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (3). The petitioner also admitted to a violation of probation pending under another docket number in exchange for a recommended total effective sentence of eight years to serve, followed by ten years of special parole. The court imposed the sentences in accordance with the plea agreement on May 31, 2019.

The petitioner commenced this habeas action on November 12, 2019. His amended petition, filed on August 24, 2022, alleges that Bowden-Lewis provided ineffective assistance by, inter alia, failing to conduct an adequate investigation and that, but for counsel's deficient performance, he would not have entered a guilty plea and would have proceeded to trial.[3] The

[3] Specifically, the petitioner alleged that Bowden-Lewis provided ineffective assistance by (a) "[f]ailing to adequately investigate or sufficiently interview" Foster, Stenson and/or the victim, (b) "[f]ailing to develop a defense utilizing the testimony of" Foster, Stenson and/or the victim, and/or (c) "[f]ailing to call as a defense witness" Foster, Stenson and/or the victim. He further alleged that, "[b]ut for trial counsel's deficient performance, there is a reasonable probability that the petitioner would not have [pleaded] guilty and would have insisted upon a trial." The petitioner's counsel later expressly abandoned the petitioner's claim in his petition of ineffective assistance on the basis of Bowden-Lewis' failure to investigate the victim,

respondent, the Commissioner of Correction, filed a return on August 30, 2022, which generally left the petitioner to his proof with respect to the substantive allegations in the petition. The case was then tried to the habeas court, *Newson*, *J.*, on August 24, 2023.

During the habeas trial, the petitioner's counsel called four witnesses and submitted several exhibits that were admitted into evidence, including the February 27, 2019 letter. The first witness was Bowden-Lewis. She testified about her discussions with the petitioner regarding his acceptance of the plea agreement. Regarding her development of a defense, she stated that her strategy was to prove "that he didn't do it." She believed that the state would call as a witness "obviously [the victim], and I'm assuming [Foster] would be one . . . too." She testified that she did not think it was likely that the state would call Stenson because "she just came to the scene after everything happened . . . ." Specifically, Bowden-Lewis testified that she spoke with Stenson and determined that Stenson would not be helpful. Bowden-Lewis further testified that she investigated whether the victim may have fabricated her story. Bowden-Lewis testified that her investigator spoke to the victim and reported that her story was the same as the one she previously gave to the police. Bowden-Lewis also testified that "[the petitioner] knew everything that we did. All the investigation. We also spoke to [the victim's sister] . . . . He knew all the people we spoke to, he knew the results of all the conversations, he had seen all the materials, so he was informed about everything." Lastly, she testified about the February 27, 2019 letter she gave to the petitioner and described it as "just one more way to make sure that he was informed about the pros and cons of either accepting or rejecting the offer."

stating at the habeas trial that, as to the victim, "[w]e're not having her testify and we're not pursuing claims related to her."

The petitioner's counsel next called Stenson as a witness. Stenson and the petitioner share a child together but were not in a relationship at the time of the incident. She testified that Foster called her "between 6 [and] 7 [a.m.]," telling her to "get [her] child because [the victim] had broke into the house with a knife." She further testified that it took her roughly five minutes to get to the petitioner's residence after Foster's call. Stenson testified that, although the petitioner was present when she arrived, the victim was no longer at the residence. Specifically, she testified: "I wouldn't have seen the break-in or nothing."

The petitioner was the third witness. The petitioner testified about his impressions of the February 27, 2019 letter sent by Bowden-Lewis. He stated: "I felt like [Bowden-Lewis] already talked to [Foster] and [Stenson], and they weren't willing to help, basically." The petitioner also testified, "I wasn't going to go to trial if she already talked to them and, from what I interpreted, they weren't going to be helpful." The petitioner testified that he believed Foster would testify that he was with her for the entire night. Lastly, he testified that he admitted to the trial court that he believed the allegations supported a charge of assault in the second degree, as opposed to assault in the first degree.

The last witness called was Foster. She testified that she knew who the victim was and that the victim had broken into the petitioner's residence. Foster stated: "She ransacked the house, came into the bedroom, held me at knifepoint. . . . And then [the petitioner] got her out of the house." She testified that the victim held her up against the wall while the petitioner told her to get out of the house. Additionally, she testified that, when Stenson arrived, the petitioner had already left his residence, as had the victim. She also testified that she received two phone calls after the incident regarding the case. One of the callers was from the office of the

petitioner's habeas counsel, but she could not recall the other. Finally, she testified that she was never contacted prior to the petitioner's sentencing.

During closing arguments, the petitioner's habeas counsel argued that "there's a credibility contest between the [victim] and the petitioner, and that credibility contest must consider what happened afterwards as well, in terms of what [the victim] alleged happened during the initial assault." His counsel further argued that Foster and Stenson can testify to "the credibility of the [the victim]" and that this is pertinent because "she's the state's evidence as to what happened in that first incident."

The habeas court issued its memorandum of decision on November 20, 2023, and found that the petitioner failed to prove ineffective assistance of counsel on the basis of Bowden-Lewis' alleged failure to adequately investigate Stenson and Foster. Regarding Stenson, the court found her testimony to be "wholly irrelevant" and incapable of supporting a defense. The court stated that, "[b]y the time Stenson got to the scene . . . the dispute between the victim and petitioner was over, and the victim and petitioner were both gone." The court further found that Foster's testimony lacked credibility. The habeas court noted that, although she testified about her interaction with the victim, Foster never testified regarding how the victim sustained her injuries, nor did she testify that there was any physical contact between the victim and the petitioner. The habeas court found "Bowden-Lewis credible that she spoke to . . . Foster and did not find any of the information [she] provided at that time would have been helpful to the petitioner's defense . . . ."

Regarding the petitioner, the court noted that, although he pleaded for leniency on his assault charge, absent from his plea was any intimation that he was not present

at the victim's residence. Additionally, after reviewing the petitioner's letter to the trial court, the habeas court concluded that the petitioner's letter constituted an admission to assaulting the victim. The habeas court contrasted the petitioner's version of events with Foster's testimony to illustrate her lack of credibility. The court noted that the petitioner met with his trial counsel multiple times and had at least one month to consider the consequences of accepting the *Alford* plea.

Additionally, the "court found . . . Bowden-Lewis credible that she spoke to both Stenson and Foster and did not find any of the information they provided at that time would have been helpful to the petitioner's defense . . . ."

The habeas court concluded by finding there was "no credible evidence the petitioner was ever prepared, in this matter, to proceed to trial." The court additionally found that there was no credible evidence to suggest that defense counsel failed to "conduct a diligent investigation or that she did not contact the available witnesses in the case." For these reasons, the habeas court found that the petitioner "failed to meet his burden [of] proving deficient performance or prejudice . . . ."

The petitioner filed a petition for certification to appeal the denial of his petition for a writ of habeas corpus. The habeas court denied the petition for certification to appeal. This appeal followed.

We begin by setting forth applicable principles of law and our standard of review. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he [or she] must demonstrate

that the denial of his [or her] petition for certification constituted an abuse of discretion. . . . To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . Second, if the petitioner can show an abuse of discretion, he [or she] must then prove that the decision of the habeas court should be reversed on the merits. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . [and] [r]eversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . .

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *McClain* v. *Commissioner of Correction*, 188 Conn. App. 70, 74–75, 204 A.3d 82, cert. denied, 331 Conn. 914, 204 A.3d 702 (2019). "In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 201 Conn. App. 339, 345, 242 A.3d 756 (2020), cert. denied, 336 Conn. 905, 242 A.3d 1009 (2021).

The standard of review of a habeas court's judgment on an ineffective assistance of counsel claim is well settled. "In a habeas appeal, this court cannot disturb

the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"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 [or she] fails to meet either prong." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–12, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

To prove deficient performance, the petitioner must prove that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to him] by the [s]ixth [a]mendment." *Strickland* v. *Washington*, supra, 466 U.S. 687. The petitioner is tasked with "demonstrat[ing] that his [or her] 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." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 12. Additionally, "[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." (Internal quotation marks omitted.) Id.

In the context of a guilty plea, the *Strickland* test requires the petitioner to prove that counsel's conduct falls outside of the range of reasonable professional assistance and to show that, "but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). "For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his [or her] recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." Id.

With respect to determinations of witness credibility, "[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. . . . Appellate courts do not second-guess the trier of fact with respect to credibility." (Citation omitted; internal quotation marks omitted.) *Necaise* v. *Commissioner of Correction*, 112 Conn. App. 817, 825–26, 964 A.2d 562, cert. denied, 292 Conn. 911, 973 A.2d 660 (2009). With these principles in mind, we turn to the merits of the petitioner's claims.

The petitioner claims that the habeas court abused its discretion by denying his petition for certification to appeal. There are two aspects to the petitioner's claim. First, he argues that Bowden-Lewis failed to adequately investigate Foster, Stenson, and the victim. Second, he argues that Bowden-Lewis failed to formulate a

defense using information that she would have obtained had she investigated the witnesses mentioned previously. For the following reasons, we are not persuaded that the petitioner demonstrated that the issue of whether Bowden-Lewis' performance amounted to ineffective assistance of counsel was "debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Simms* v. *Warden*, supra, 230 Conn. 616; see *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 11.

This court previously found that "[t]he issue of credibility is not debatable among jurists of reason and, thus, cannot be used to overturn the decision of a habeas court." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 194 Conn. App. 239, 243, 220 A.3d 901, cert. denied, 334 Conn. 910, 221 A.3d 43 (2019). Specifically, "[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. . . . Appellate courts do not second-guess the trier of fact with respect to credibility." (Internal quotation marks omitted.) Id., 242.

The petitioner's claim closely mirrors credibility issues raised in *Perez*. In *Perez*, the petitioner claimed that he was coerced into a guilty plea. Id., 241. Prior to his trial, the petitioner ultimately pleaded guilty. Id. Only four witnesses testified in the habeas trial: the petitioner, his grandmother, and his two trial attorneys. Id. The habeas court found that the only testimony supporting his claim came from the petitioner himself and his grandmother. Id. Prior to his guilty plea, the petitioner's grandmother and his cousin were arrested for witness tampering in the petitioner's case. Id. The petitioner and his grandmother subsequently met with

his attorneys where he claimed his attorneys threatened him, saying "that [the petitioner's grandmother] and the petitioner's cousin would go to prison if he did not plead guilty." Id. The habeas court heard from the two trial attorneys, who stated that the petitioner had already decided to plead guilty prior to their meeting. Id. Additionally, they stated that the petitioner informed them that he wanted his grandmother present so he could consult her about whether to accept the plea and that they simply accommodated that request. Id. The habeas court found only the attorneys' testimony credible and denied the petitioner's petition and his petition for certification to appeal, which led to this court's review of the decision. Id., 242. We held that, due to the deference afforded to the habeas court in its determinations of a witness' credibility, the petitioner had failed to meet his burden, and we dismissed the appeal. Id., 243.

In the present case, the habeas court, as the sole arbiter of witness credibility, found Bowden-Lewis' testimony credible. Bowden-Lewis investigated all key witnesses and considered whether their testimony would aid the petitioner's defense. In her February 27, 2019 letter to the petitioner, Bowden-Lewis informed the petitioner of the actions she had taken with respect to her investigation of key witnesses. In the letter, she explained the details of the proposed plea agreement and the actions she took to investigate each potential witness. From this letter, it is reasonable to conclude, as the habeas court did, that Bowden-Lewis investigated and considered the possibility of each individual's participation as a potential witness should the petitioner proceed with a trial. Ultimately, it was her reasoned opinion that the petitioner should accept the plea agreement. As previously stated, the burden falls on the petitioner to overcome the presumption that the challenged

action was not sound trial strategy. See *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 12.

By contrast, the habeas court found that neither Foster's nor the petitioner's testimony was credible. Foster's testimony at the habeas trial conflicted with the testimony of other witnesses. Foster testified that she never spoke with Bowden-Lewis; however, in her letter to the petitioner, Bowden-Lewis stated that she had spoken with Foster. The habeas court, as the trier of fact, was not required to credit Foster. Next, Foster's recollection of events conflicts with the victim's statement to the police. Foster stated that she let the victim into the residence after the victim showed up for some unknown reason and began banging on the door.[4] The victim, however, stated that the petitioner let her into the residence.[5] Once inside, Foster alleged that the victim held her at knifepoint, before she ransacked the residence and left with Foster's purse and keys.[6] The victim explicitly told the police that she was assaulted while at the petitioner's residence.[7] Yet, Foster's testimony did not address how the victim's injuries occurred.

Lastly, Foster testified that the petitioner was asleep the entire night. The petitioner's own statements, however, are in direct conflict with her testimony. At his

[4] "[Foster] stated that a female she knows . . . came to her residence, and was banging hard on her apartment door. When she opened her door [the victim] walked into her apartment screaming and yelling . . . ."

[5] "When [the victim] knocked on the door [the petitioner] opened the door, and [they] began to argue when she asked him for her phone."

[6] "When [Foster] opened her door [the victim] walked into her apartment screaming and yelling but [Foster] did not [understand] what she was saying because [Foster] was half [asleep]. During the incident [the victim] grabbed her car keys from the dining room table and left the area in an unknown vehicle."

[7] The police incident report notes, "Upon arrival [at the victim's residence] I located [the victim] and I observed that she had a laceration on the top of her head a few minor puncture wounds on her chest and stomach, and a minor scrape on the right arm."

plea hearing, the petitioner stated, "right now I'm being charged with assault first, and I don't believe it was an assault first, I believe it was an assault second." The court found that the petitioner's statements are effectively an admission to having committed an assault. Notably, nowhere in his statement does he say that he was not present at the victim's residence or that he was asleep with Foster, further casting doubt on the credibility of both Foster and the petitioner.

The petitioner next argues that Bowden-Lewis should have investigated Stenson to aid the creation of a defense. We agree with the habeas court's conclusion that Stenson's testimony was "wholly irrelevant" to the petitioner's underlying claim. Through her testimony, Stenson was able to corroborate only the fact that Foster called her "between 6 [and] 7 [a.m.]" on the day of the incident. Although Stenson arrived at the petitioner's residence shortly after the call, neither the petitioner nor the victim was present. Stenson's testimony could not help establish an alibi or any other defense for the petitioner and, therefore, lacked any exculpatory value to the petitioner had he elected to go to trial.

In short, the petitioner failed to show how Bowden-Lewis' representation was "not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law." (Internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, supra, 201 Conn. App. 12. Stenson's testimony was irrelevant, and Foster's inconsistent testimony was found not credible. Bowden-Lewis' choice to build a defense without those witnesses' testimony reflects a wholly reasonable belief that their testimony would have had little value at trial. Because the petitioner has failed to demonstrate that the issues raised in his habeas petition are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are

adequate to deserve encouragement to proceed further, the petitioner failed to prove that the habeas court abused its discretion in denying his petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.