NORTH BRANFORD CITIZENS AGAINST BULK PROPANE STORAGE *v.* TOWN OF NORTH BRANFORD ET AL.
(AC 46854)

Alvord, Clark and Westbrook, Js.

Syllabus

The plaintiff, an association comprised of town residents who opposed the construction of a bulk propane storage facility in the town, appealed from the judgment of the trial court dismissing its declaratory judgment action against the defendants. The plaintiff claimed that the court erred in dismissing the action on the ground that it failed to exhaust its administrative remedies. *Held*:

This court affirmed the trial court's judgment dismissing the action on the alternative ground that the plaintiff lacked standing to maintain the action against the defendants, the plaintiff having failed to allege sufficient facts

to establish that any of its individual members were aggrieved, as is required to establish associational standing.

The plaintiff's allegation that certain actions by one of the defendants, a town official, violated the public trust, without any allegation of how that violation affected the plaintiff's individual members in a manner distinguishable from those in the community as a whole, was insufficient to establish that the plaintiff's members were aggrieved.

Argued October 10, 2024—officially released January 28, 2025

Procedural History

Action seeking a judgment declaring that certain zoning regulations were invalid, brought to the Superior Court in the judicial district of New Haven, where the court, *Kamp*, *J.*, granted the defendants' motions to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Peter C. White, for the appellant (plaintiff).

Bryan L. LeClerc, for the appellees (named defendant et al.).

Jeffrey T. Beatty, for the appellee (defendant 2772 BPR, LLC).

Timothy J. Lee, for the appellee (defendant Donald Fucci).

Opinion

CLARK, J. The plaintiff, North Branford Citizens Against Bulk Propane Storage, appeals from the judgment of the trial court dismissing its declaratory judgment action against the defendants, the Town of North Branford (town), North Branford Planning and Zoning Commission (commission), Donald Fucci, and 2772 BPR, LLC (company). On appeal, the plaintiff claims that the court erred in dismissing the action on the ground that the plaintiff failed to exhaust its administrative remedies. We affirm the judgment of the trial court on the alternative ground that the plaintiff lacked standing to maintain the action.

The complaint, viewed in the light most favorable to the plaintiff; see *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 394, 234 A.3d 111 (2020); alleges the following facts that are relevant to our resolution of this appeal. The plaintiff is an association comprised of town residents who oppose the construction of a bulk propane storage facility at 40 Ciro Road (property) in North Branford. During the relevant time period, Fucci was a member of the North Branford Town Council (town council) and the owner of the property. Prior to the events at issue, bulk propane storage was a prohibited use under the town's zoning regulations. In May, 2014, the company applied to the commission for an amendment to the zoning regulations that would allow construction of a facility on the property consisting of two 30,000 gallon propane storage tanks (facility). Trucks equipped with 10,000 gallon propane tanks would deliver propane to the facility, and smaller trucks would deliver propane from the facility to residential and commercial customers. To get to the facility, the trucks would have to travel along Foxon Road, a heavily trafficked commuter route.

The complaint alleges that Fucci and Anthony Candelora, who was then mayor of the town, attended a closed hearing of the commission to lobby in favor of the amendment to the zoning regulations in order to advance Fucci's personal pecuniary interests by facilitating the sale of the property to the company. Thereafter, the town council, with Fucci voting in favor, voted to replace two members of the commission who had voiced objections to the amendment. At the next meeting of the newly comprised commission, on August 7, 2014, the commission approved the amendment. The complaint further alleges that Fucci and Candelora used their influence to replace members of the town's Inland Wetlands and Watercourse Agency (IWWA) and attended a closed meeting of the IWWA on August 14, 2014, in an

attempt to ensure approval of the inland wetlands portion of the company's permit application.[1]

In *2772 BPR, LLC* v. *Planning & Zoning Commission*, 207 Conn. App. 377, 262 A.3d 906, cert. denied, 340 Conn. 908, 264 A.3d 1001 (2021), this court addressed the company's appeal from the commission's denial of its site plan application. Though not set forth in the complaint, to provide additional context for the plaintiff's claim, we note the following additional facts and procedural history set forth in our decision in *2772 BPR, LLC*: "The amended regulations became effective on September 5, 2014. On that date, the [company] submitted a site development plan application to the commission in which it sought approval to construct on the property two 30,000 gallon propane storage tanks, a garage, a connector building, an office building, and canopies. On October 2, 2014, the commission held a public hearing on the [company's] application. After hearing testimony from the [company], the commission set aside the application pending review of the inland wetlands portion of the application. On January 17, 2017, with regard to the wetlands matter, the Department of Energy & Environmental Protection issued a final decision in favor of the [company], which allowed it to proceed with its application before the commission. The commission continued the public hearing on the site development plan application on March 2, March 9, and March 16, 2017." (Footnote omitted.) Id., 380–81.

[1] The complaint does not allege that the IWWA actually voted to approve the application. In fact, as we note later in this opinion, the inland wetlands portion of the application was approved by the Department of Energy & Environmental Protection, not the IWWA. See General Statutes § 22a-42a (c) (1) (providing that, if local inland wetlands agency fails to act on application within time prescribed by section, "the applicant may file such application with the Commissioner of Energy and Environmental Protection who shall review and act on such application in accordance with this section").

"On March 16, 2017, the commission voted three to two to deny the [company's] application." Id., 383. The company appealed the denial of its application to the Superior Court, which denied the appeal. Id., 384–85. On September 14, 2021, this court reversed that judgment, concluding that the commission improperly denied the company's application. Id., 396.

The plaintiff commenced the present action on March 3, 2017, while the company's site plan application was pending before the commission. The complaint contained a single count seeking a judgment declaring the amended zoning regulations "invalid for conflict of interest by members of the town council, for defective and inadequate notice by the [commission], or as against public policy." At the time it filed the complaint, the plaintiff also filed an ex parte motion for a temporary injunction seeking to enjoin the construction of the facility "until the validity of the zoning regulations has been established."[2] On the same day, the court, *A. Robinson, J.*, denied the motion for a temporary injunction.

On April 5, 2017, Fucci filed a motion to dismiss claiming, inter alia, that the plaintiff lacked standing and failed to exhaust its administrative remedies.[3] In relevant part, Fucci argued that the plaintiff failed to satisfy the test for associational standing because the

[2] The factual allegations in the motion for a temporary injunction largely mirrored those set forth in the complaint, and did not contain any additional allegations relevant to the plaintiff's standing to maintain the action.

[3] After Fucci filed his motion to dismiss, the plaintiff filed a request to amend its complaint, but the court did not act on that request prior to considering the motion to dismiss. Because Fucci's motion to dismiss claimed that the court lacked subject matter jurisdiction on the basis that the plaintiff lacked standing and failed to exhaust administrative remedies, "the court properly considered the motion to dismiss on the basis of the operative complaint and not the plaintiff's proposed amended complaint." *North Star Contracting Corp.* v. *Albright*, 156 Conn. App. 311, 315 n.5, 112 A.3d 216 (2015). Moreover, we note that the plaintiff's request to amend sought only to add a claim for injunctive relief, and did not contain any additional factual allegations relevant to the issue of standing.

complaint failed to allege sufficient facts to establish that the individual members of the association would have had standing to maintain the action in their own right. The plaintiff filed an opposition to the motion to dismiss, in which it argued that the complaint sufficiently alleged that it had standing to maintain the action on behalf of its members. The town and the commission filed a joint motion to dismiss on March 7, 2022, and the company filed a motion to dismiss on November 16, 2022.[4] Both motions expressly adopted the arguments set forth in Fucci's motion with respect to the plaintiff's standing.

The court, *Kamp*, *J.*, heard argument on the motions to dismiss on April 24, 2023. During the argument, the parties focused primarily on the defendants' claim that the plaintiff failed to exhaust its administrative remedies. Toward the end of the hearing, the court briefly addressed the defendants' claim that the plaintiff lacked standing. Specifically, the court asked the plaintiff how it had standing to maintain the action on behalf of its members given that the complaint does not identify any of the individual members or provide any information about "who these people are [or] where they live." The plaintiff argued that "the complaint alleges sufficiently that the organization has standing" because the members are residents of the town, the association was formed for the purpose of opposing the facility, and the action did not require the participation of the individual members. On August 9, 2023, the court granted the motions to dismiss on the ground that the plaintiff failed to exhaust its administrative remedies. The court did not address the claim that the action should be dismissed on the ground that the plaintiff lacked standing.

[4] Although not reflected in the record, at oral argument before this court, the plaintiff represented that this case was put on hold pending adjudication of the company's appeal from the commission's denial of the site plan application.

On appeal, the plaintiff claims that the court erred in granting the motions to dismiss on the ground that the plaintiff failed to exhaust its administrative remedies. On October 30, 2024, following oral argument, we ordered the parties to file supplemental memoranda "addressing whether the trial court's judgment of dismissal may be affirmed on the alternative ground that the plaintiff . . . lacked standing to commence the underlying action."[5] On the basis of our review of the record and the supplemental memoranda filed by the parties, we conclude that the plaintiff lacked standing to maintain the action.

"The issue of standing implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. Practice Book § [10-30 (a) (1)]. [I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009). "When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a

[5] "Our Supreme Court has stated that [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. . . . One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation." (Internal quotation marks omitted.) *Townsend* v. *Commissioner of Correction*, 226 Conn. App. 313, 326 n.13, 317 A.3d 1147 (2024). Because a plaintiff's lack of standing deprives the trial court of subject matter jurisdiction over the action, it is proper for us to consider whether the judgment of the trial court may be affirmed on this alternative ground. See *Black* v. *West Hartford*, 205 Conn. App. 749, 757–58, 261 A.3d 163 (2021).

manner most favorable to the pleader." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 615, 109 A.3d 903 (2015). "Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, supra, 214.

"It is a basic principle of our law . . . that the [plaintiff] must have standing in order for a court to have jurisdiction to render a declaratory judgment." (Internal quotation marks omitted.) *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, 218 Conn. 335, 346, 589 A.2d 356 (1991). "The declaratory judgment procedure . . . may be employed only to resolve a justiciable controversy where the interests are adverse, where there is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement. . . . A party pursuing declaratory relief must therefore demonstrate, as in ordinary actions, a justiciable right in the controversy sought to be resolved, that is, contract, property or personal rights . . . as such will be affected by the [court's] decision . . . ." (Citation omitted; internal quotation marks omitted.) Id., 347–48.

"Standing is the legal right to set judicial machinery in motion. . . . Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, supra, 198 Conn. App. 397–98. "These two objectives are ordinarily held to have been

met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Citations omitted; internal quotation marks omitted.) *Monroe* v. *Horwitch*, 215 Conn. 469, 473, 576 A.2d 1280 (1990). "Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, supra, 398.

The sole plaintiff in the present case is an association of residents of the town. The plaintiff does not claim that it has standing on the basis that the plaintiff's own interests were injured by the defendants' actions; rather, the plaintiff claims that it has standing to vindicate alleged injuries to its members' interests.

In *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, 199 Conn. 609, 616, 508 A.2d 743 (1986), our Supreme Court adopted the test for associational standing articulated by the United States Supreme Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Under that test, "[a]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (Internal quotation marks omitted.) *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 616.

The defendants in the present case claim only that the plaintiff failed to satisfy the first prong of the *Worrell*

test. "To meet that prong, an association must demonstrate aggrievement on the part of its members. . . . An association satisfies that burden by establishing that at least one of its members is aggrieved by the action in question. . . . Accordingly, resolution of the question of the plaintiff's associational standing hinges on whether the plaintiff has established that one of its members is aggrieved." (Citations omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, supra, 198 Conn. App. 401–402.

"There are two general types of aggrievement, namely, classical and statutory; either type will establish standing . . . ." (Internal quotation marks omitted.) Id., 402. The plaintiff in the present case relies only on classical aggrievement. "Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specifically and injuriously affected that specific personal or legal interest." (Internal quotation marks omitted.) Id. "[A] party who [is] simply a member of the general public who has not demonstrated how she was harmed in a unique fashion by the conduct she [has] challenged in a declaratory judgment action [has] failed to establish a colorable claim of direct injury, and accordingly lack[s] standing to maintain the action." (Emphasis omitted; internal quotation marks omitted.) *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 218 Conn. 348. Accordingly, to satisfy the first prong of the *Worrell* test, an associational plaintiff is required to allege sufficient facts to demonstrate that at least one of its members has an interest in the subject matter of the controversy "that is distinguishable from that of the general public," and that it has suffered a "colorable claim of

direct injury" to that interest. (Emphasis omitted; internal quotation marks omitted.) Id.

In the present case, the complaint contains no specific allegations describing any interest held by the plaintiff's members that is distinguishable from that of the general public and that would be harmed by the defendants' actions. The complaint merely alleges that the plaintiff's members are "[town] residents who oppose construction of a bulk propane storage facility at [the property]," and that the plaintiff "has members who would otherwise have standing to sue in their own right." It is well established that such conclusory allegations are insufficient to establish that the plaintiff's members were aggrieved; rather, the complaint must contain "supporting allegations as to the particular nature of the aggrievement . . . ." (Internal quotation marks omitted.) *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 543, 833 A.2d 883 (2003); see also *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, supra, 198 Conn. App. 405 ("[a]lthough the plaintiff broadly asserts an interest in 'declaring the invalidity of [the defendant's] actions' . . . such a conclusory statement does not satisfy the first prong of the classical aggrievement test"); *Concerned Citizens for the Preservation of Watertown, Inc.* v. *Planning & Zoning Commission*, 118 Conn. App. 337, 342, 984 A.2d 72 (2009) ("conclusory statements do not satisfy the appellant's burden of proving aggrievement"), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010). Thus, the bare allegation that the plaintiff's members "oppose construction of a bulk propane storage facility" and "would otherwise have standing to sue in their own right" are not sufficient to establish aggrievement. See *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, supra, 404–405.

The plaintiff, however, makes two separate arguments in support of its claim that the complaint sufficiently alleged that its members were aggrieved. First,

the plaintiff relies on allegations, made in support of its claim for temporary injunctive relief, that its members would be irreparably harmed because the amended zoning regulations would result in "[a]dditional traffic onto Foxon Road, clogging an already congested commuter road," "[d]iminished property values due to the proximity of a potential [boiling liquid expanding vapor explosion (BLEVE)]," and "[a]nxiety from a small but extant risk of a catastrophic BLEVE . . . ." The plaintiff argues that we should infer from these allegations "that some [of the plaintiff's] members live . . . within the area that would be affected by a BLEVE, and that would be affected by the diminished property values and traffic congestion."[6] Second, the plaintiff argues that its members were aggrieved because Fucci's alleged "serious violation of the public trust" is sufficient to establish aggrievement for "any North Branford citizen, regardless of location . . . ." (Citations omitted.) We conclude that the plaintiff has failed to allege sufficient facts to establish that any of its members have a specific, personal or legal interest in the subject matter as required to establish classical aggrievement.

The requirement that a plaintiff allege specific facts demonstrating how it was aggrieved "is not merely a matter of form," but, rather, "provides an opportunity

[6] In its supplemental memoranda filed with this court, the plaintiff also asserts that some of the plaintiff's members "do in fact live . . . within the area affected by the zoning amendments." Because the complaint does not include any such allegations, we cannot consider them in determining whether the plaintiff sufficiently alleged that its members had standing. See, e.g., *Nelson* v. *Commissioner of Correction*, 326 Conn. 772, 781, 167 A.3d 952 (2017) ("[i]t is clear that a memorandum of law is not a proper vehicle for supplementing the factual allegations in a complaint"). In any event, for the reasons explained subsequently in this opinion, because the complaint does not contain any allegations describing where any of the plaintiff's members live or the area likely to be affected by the construction of the facility, the general assertion that the plaintiff's members live "within the area affected by the zoning amendments" is insufficient to establish that any individual member was aggrieved.

for the opposing party to answer in denial, thereby placing the jurisdictional fact[s] into dispute for the court's resolution." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 791, 160 A.3d 333 (2017). "[T]he burden [is] upon the pleaders to make such averments that the material facts [alleged in the complaint] should appear with reasonable certainty . . . . Whenever that language fails to define clearly the issues in dispute, the court will put upon it such reasonable construction as will give effect to the pleadings in conformity with the general theory which it was intended to follow, and do substantial justice between the parties. . . . But *essential allegations may not be supplied by conjecture or remote implication*." (Emphasis added; internal quotation marks omitted.) *Stone* v. *Pattis*, 144 Conn. App. 79, 99, 72 A.3d 1138 (2013); see also *Pike* v. *Bugbee*, 115 Conn. App. 820, 828 n.5, 974 A.2d 743 ("[a]lthough the court is required to read the pleadings broadly and in the light most favorable to sustaining the legal sufficiency of the claim, it cannot read additional allegations into the pleading"), cert. granted, 293 Conn. 923, 980 A.2d 912 (2009) (appeal withdrawn December 1, 2011).

Our Supreme Court has emphasized that the purpose of the first prong of the associational standing test adopted in *Worrell* is to ensure that there is a justiciable controversy to be resolved by requiring the associational plaintiff "to establish . . . that its members would otherwise have standing to sue in their own right . . . ." (Internal quotation marks omitted.) *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 218 Conn. 345. "Associational standing, then, is derivative of—and not independent from—individual standing." *Prairie Rivers Network* v. *Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008 (7th Cir. 2021); see also *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517

U.S. 544, 555, 116 S. Ct. 1529, 134 L. Ed. 2d 758 (1996) (first prong of associational standing test "guarantees the satisfaction of [standing] elements by requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association"). Thus, in assessing whether the plaintiff satisfied the first prong of the associational standing test, we are required "to scrutinize the nature of the interests of the association's members" to determine whether "the members had a legal interest in the controversy distinguishable from the interest of the general public." *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 345–46.

We first address the plaintiff's argument that allegations that the plaintiff's members would be irreparably harmed are sufficient to establish aggrievement. The plaintiff essentially argues that we should infer, from a general description of the type of harm it claims would be caused by the construction of the facility, that at least one unidentified member of the plaintiff possesses an interest that would suffer such harm. The plaintiff, however, does not cite a single case to support that contention, and our own research has not uncovered any case in which a court has found associational standing based on such sparse allegations. To the contrary, in cases in which our courts have found that an association had standing to represent its members' interests, there was sufficient information about the association's individual members to support a claim that at least one of the members had an interest distinguishable from the public at large. See, e.g., *Connecticut Assn. of Not-For-Profit Providers for the Aging* v. *Dept. of Social Services*, 244 Conn. 378, 386–88, 709 A.2d 1116 (1998) (association of not-for-profit nursing homes had standing to challenge Medicaid reimbursement methodology

that was applied only to not-for-profit nursing homes that allegedly resulted in lower reimbursement rates because practice affected plaintiff's members and record showed that at least some members had not agreed to accept that methodology); *Connecticut State Medical Society* v. *Board of Examiners in Podiatry*, 203 Conn. 295, 305, 524 A.2d 636 (1987) (association of medical doctors had standing to challenge declaratory ruling determining that treatment of ankle was within scope of practice of podiatrists, who are not medical doctors, where specific individual member was found to have standing).

In the present case, the complaint does not identify any of the plaintiff's members or describe any member's interest beyond the vague allegation that they reside in the town and oppose construction of the facility. There is no allegation, for instance, that any member of the plaintiff owns or resides on property that is adjacent to or in close vicinity to the facility. Nor is there any allegation describing how likely it is that a BLEVE would occur, what would happen if a BLEVE did occur, how it would affect the surrounding area, or the extent of the area that would be affected. The allegations that the plaintiff's members would suffer "[d]iminished property values due to the proximity of a [BLEVE]" and "[a]nxiety" due to the risk of a BLEVE, therefore, are too vague and uncertain to infer that any of the plaintiff's members would be harmed in a manner that is distinguishable from the general public. Similarly, in the absence of any allegation that the plaintiff's members either reside near or regularly travel through the area in question, the allegation that the defendants would be harmed by "[a]dditional traffic onto Foxon Road" does not support an inference that the plaintiff's members would be affected by such traffic any more than other members of the public who travel through the area. See, e.g., *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, supra, 266 Conn. 543–44 (plaintiff

claiming to be aggrieved based on increased traffic lacked standing because there was no showing how plaintiff would be affected more than other members of general public who traveled through area). On the basis of the foregoing, we therefore conclude that the plaintiff failed to allege sufficient facts to establish that any of its individual members were aggrieved, as is required to establish associational standing.

Our conclusion is supported by a number of federal cases that have applied the associational standing test established in *Hunt*, which our Supreme Court adopted in *Worrell*. In *Summers* v. *Earth Island Institute*, 555 U.S. 488, 498–99, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009), the United States Supreme Court, citing *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 221, 235, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), a case that was decided on cross motions for summary judgment, noted that an associational plaintiff is required to identify at least one specific member who suffered the requisite harm necessary to establish standing. Since *Summers*, several federal courts of appeals have held that the same requirement applies at the pleading stage. See *National Infusion Center Assn.* v. *Becerra*, 116 F.4th 488, 497 (5th Cir. 2024) ("[t]o invoke associational standing . . . [the plaintiff] must identify at least one member that has suffered or will suffer harm" (footnote omitted)); *Assn. of American Physicians & Surgeons* v. *United States Food & Drug Administration*, 13 F.4th 531, 543 (6th Cir. 2021) (to meet first prong of *Hunt* test, "an organization must do more than identify a likelihood that the defendant's conduct will harm an unknown member in light of the organization's extensive size or membership base," but "must instead identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct"); *Draper* v. *Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (holding that associational plaintiff was required to identify in its complaint

at least one member with standing); *Southern Walk at Broadlands Homeowner's Assn., Inc.* v. *OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (affirming dismissal where association "failed to identify a single specific member injured by the [challenged conduct]" (emphasis omitted)); *New Jersey Physicians, Inc.* v. *President of the United States*, 653 F.3d 234, 241 (3d Cir. 2011) (plaintiff failed to meet burden to allege associational standing where "the complaint fail[ed] to establish that [the only member identified in the complaint] has experienced any injury in fact").

Although some federal courts of appeals have not required an associational plaintiff to include allegations revealing the specific *identity* of an individual member at the pleading stage, even those courts have held that a complaint must include sufficient specific factual allegations to support a claim that some individual member or members of the association have an interest in the dispute distinguishable from the general public; allegations of "generalized harm to a group of individual members will not do . . . for associational standing." *Prairie Rivers Network* v. *Dynegy Midwest Generation, LLC*, supra, 2 F.4th 1010; id. (even if associational plaintiff was not required to identify specific members with standing at pleading stage, "it must . . . provide some way of showing that *at least one* individual member has standing to sue on their own" (emphasis in original)); see also *Faculty, Alumni, & Students Opposed to Racial Preferences* v. *New York University*, 11 F.4th 68, 75–76 (2d Cir. 2021) (concluding that, even if associational plaintiff was not required to identify members with standing, complaint was insufficient because it failed to allege specific facts to show that individual members had standing), cert. denied, U.S. , 142 S. Ct. 2813, 213 L. Ed. 2d 1038 (2022).[7] For the reasons

[7] The Second Circuit has not expressly addressed whether *Summers* requires an associational plaintiff to identify specific members with standing in its complaint. Prior to *Summers*, the Second Circuit in *Building & Con-*

explained previously, the complaint in the present case alleges only "generalized harm"; *Prairie Rivers Network* v. *Dynegy Midwest Generation, LLC*, supra, 1010; that is insufficient to establish that any individual member would have standing to sue in their own right.

We next address the plaintiff's argument that Fucci's alleged violation of the public trust was sufficient to establish aggrievement. Relying on *Low* v. *Madison*, 135 Conn. 1, 60 A.2d 774 (1948), and *Murach* v. *Planning & Zoning Commission*, 196 Conn. 192, 491 A.2d 1058 (1985), the plaintiff contends that its members were aggrieved because "a serious violation of the public trust . . . has been grounds to invalidate zoning amendments since [*Low*]."

The plaintiff's reliance on *Low* and *Murach* conflates the issue of whether its complaint states a cognizable

struction Trades Council of Buffalo, New York & Vicinity v. *Downtown Development, Inc.*, 448 F.3d 138, 146 (2d Cir. 2006), held that an associational plaintiff was not required to identify specific members at the pleading stage. The Second Circuit recently suggested that it would continue to adhere to that holding, but did not expressly reach the issue. See *Do No Harm* v. *Pfizer, Inc.*, United States Court of Appeals, Docket No. 23-15, 2025 WL 63404, *4, 10 (2d Cir. 2025). In *Building & Construction Trades Council of Buffalo, New York & Vicinity*, however, the complaint alleged specific facts about the nature of the plaintiff's members' interest in the dispute sufficient to ensure that some members had standing, even if those members were not identified by name. See *Building & Construction Trades Council of Buffalo, New York & Vicinity* v. *Downtown Development, Inc.*, supra, 146 (plaintiff union claiming environmental contamination at site of construction project alleged that its members had been employed at site, exposed to contaminated soil and waste, and drank water from allegedly polluted water supply).

Similarly, although the Ninth Circuit in *California Restaurant Assn.* v. *Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) concluded that an associational plaintiff had standing despite failing to identify any members in its complaint, the allegations in that case contained sufficient information to ensure that some members of the association had an interest in the dispute distinguishable from the public at large. See id. (in challenge to local ordinance restricting use of natural gas in new construction, complaint alleged that association's members included restaurateurs and chefs who "would open or relocate a restaurant in a new building in Berkeley but for the [c]ity's ban on natural gas").

cause of action with the question of whether the plaintiff has standing to pursue that claim. Although *Low* and its progeny stand for the proposition that a public official's participation in a matter in which he has a pecuniary or personal interest may be grounds for invalidating a zoning decision, those cases did not dispense with the requirement that a plaintiff pursuing such a claim establish aggrievement by alleging a specific, personal or legal interest and individualized harm. Rather, our courts have addressed the threshold question of standing separately from the merits of claims seeking to invalidate a zoning regulation under *Low*. See *Murach* v. *Planning & Zoning Commission*, supra, 196 Conn. 194 n.8 (noting, prior to addressing merits of claim under *Low*, that "[t]he trial court specifically found that [the plaintiffs] have standing to pursue this appeal [from the commission's decision] under [General Statutes] § 8-28 as abutting owners" (internal quotation marks omitted)); accord *Schwartz* v. *Hamden*, 168 Conn. 8, 10, 13, 18, 357 A.2d 488 (1975) (where several plaintiffs appealed challenging decision of planning and zoning commission based on, inter alia, alleged conflict of interest by member of commission, Supreme Court affirmed trial court's dismissal of appeal by one group of plaintiffs for lack of aggrievement); *Fletcher* v. *Planning & Zoning Commission*, 158 Conn. 497, 502–503, 264 A.2d 566 (1969) (prior to addressing merits of plaintiff's challenge to zoning decision based on *Low*, Supreme Court concluded that trial court properly found plaintiff to be aggrieved because his status as record owner of one affected parcel and contract purchase of another gave him "a specific, personal and legal interest in the subject matter of the commission's decision"). These cases are consistent with the "well established principle that common concern for obedience to law is not a direct injury that supports standing." (Internal quotation marks omitted.) *Andross* v. *West*

Hartford, 285 Conn. 309, 327, 939 A.2d 1146 (2008). Accordingly, we conclude that the allegation that Fucci's actions violated the public trust, without any allegation of how that violation affected the plaintiff's individual members in a manner distinguishable from those in the community as a whole, was insufficient to establish that the plaintiff's members were aggrieved.

On the basis of the foregoing, we conclude that the plaintiff lacked standing to maintain this action against the defendants and, therefore, that the trial court lacked subject matter jurisdiction over the action. We therefore affirm the trial court's judgment dismissing the action on this alternative ground.

The judgment is affirmed.

In this opinion the other judges concurred.

GINO GENTILE *v.* COMMISSIONER OF CORRECTION (AC 46615)

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

Syllabus

The petitioner, who had been convicted of various crimes, including felony murder, appealed, on the granting of certification, from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to statute (§ 52-470). The petitioner claimed, inter alia, that the court erred in concluding that he failed to establish good cause for his late filed petition. *Held*:

The petitioner could not prevail on his claim that the habeas court committed plain error in determining that his habeas petition was untimely, as he did not establish that the court made a patent or readily discernable error and he did not demonstrate a manifest injustice.

Pursuant to the Supreme Court's decision in *Rose* v. *Commissioner of Correction* (348 Conn. 333), which was issued while this appeal was pending, and which held that ineffective assistance of counsel may constitute an external, objective factor sufficient to establish good cause to excuse the late filing of a habeas petition pursuant to § 52-470, the habeas court did not apply the correct legal standard when deciding whether the petitioner

had demonstrated good cause and, therefore, the petitioner was entitled to a new hearing at which the court must apply the proper legal standard with respect to § 52-470 (d) and (e).

Argued September 10, 2024—officially released January 28, 2025

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Judie L. Marshall, assigned counsel, for the appellant (petitioner).

Raynald A. Carre, deputy assistant state's attorney, with whom, on the brief, were *Christian M. Watson*, state's attorney, and *Helen J. McClellan*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Gino Gentile, appeals from the judgment of the habeas court dismissing as untimely his petition for a writ of habeas corpus under General Statutes § 52-470 (d) and (e).[1] On appeal, the

[1] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

petitioner claims that the court (1) committed plain error in determining that his habeas petition was untimely and (2) erred in concluding that he failed to establish good cause for this late filed petition. With respect to the former, we conclude that the petitioner has not established plain error. As to the latter, in light of our Supreme Court's recent decision in *Rose* v. *Commissioner of Correction*, 348 Conn. 333, 304 A.3d 431 (2023), which recognized that ineffective assistance of counsel may constitute good cause for the delay in filing, and this court's subsequent decisions in *Ibrahim* v. *Commissioner of Correction*, 229 Conn. App. 658, A.3d (2024), *Coney* v. *Commissioner of Correction*, 225 Conn. App. 450, 315 A.3d 1161 (2024), *Michael G.* v. *Commissioner of Correction*, 225 Conn. App. 341, 314 A.3d 659 (2024), *Rapp* v. *Commissioner of Correction*, 224 Conn. App. 336, 311 A.3d 249, cert. denied, 349 Conn. 909, 314 A.3d 601 (2024), and *Hankerson* v. *Commissioner of Correction*, 223 Conn. App. 562, 308 A.3d 1113 (2024), we conclude that the judgment of the habeas court must be reversed, and the case remanded for a new good cause hearing.

The following facts and procedural history are relevant to our resolution of the petitioner's appeal. Following a jury trial, the petitioner was convicted of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes

"(e) In a case in which the rebuttable presumption of delay under subsection (c) or (d) of this section applies, the court, upon the request of the respondent [the Commissioner of Correction], shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section. . . ."

§ 53a-134 (a) (1), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-134 (a) (1) and 53a-48 (a). See *State* v. *Gentile*, 75 Conn. App. 839, 840–41, 818 A.2d 88, cert. denied, 263 Conn. 926, 823 A.2d 1218 (2003).[2] The petitioner received a total effective sentence of 100 years of imprisonment. Id., 842–43. This court affirmed the judgment of conviction; see id., 841;[3] and our Supreme Court denied the subsequent petition for certification. See *State* v. *Gentile*, 263 Conn. 926, 823 A.2d 1218 (2003).

After the events underlying his Connecticut conviction, the petitioner fled to New Jersey, where he committed various serious criminal offenses. Prior to his Connecticut trial and conviction, the petitioner was convicted in New Jersey of murder, attempt to commit murder, and manslaughter.[4] On May 5, 2000, the New

[2] On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The petitioner and two other individuals planned to rob a restaurant in New Britain on the evening of March 17, 1997. *State* v. *Gentile*, supra, 75 Conn. App. 841. After ensuring that there were no customers in the restaurant or police in the area, the petitioner put on a mask, chambered a round in his .380 semiautomatic gun, and entered the restaurant with the other two men. Id., 841–42. The petitioner entered the kitchen area, where two employees were located. Id., 842. During the course of the robbery, the petitioner fired a single shot from his weapon that struck the victim in the back of his head, causing his death the following day. Id.

[3] In his direct appeal to this court, the petitioner claimed that "(1) the trial court improperly permitted the state to introduce into evidence the cooperation agreement that the state had entered into with a witness, [(2) the court improperly] permitted the state to question the witness about the agreement and to comment on it during closing argument, [3] the court improperly refused to charge the jury with his requested instruction about the credibility of accomplice testimony, [4] the court improperly refused to inquire into his complaints about his attorney and [5] there was insufficient evidence for the jury to have convicted him of conspiracy to commit robbery in the first degree." *State* v. *Gentile*, supra, 75 Conn. App. 841.

[4] The Appellate Division of the New Jersey Superior Court set forth the following summary of the petitioner's criminal offenses in New Jersey: "After a trial by jury, [the petitioner] was convicted of multiple offenses, including murder of one victim, attempted murder of another, and aggravated manslaughter with respect to the death of a third victim. The incident occurred on

Jersey court sentenced the petitioner to serve an indeterminate life sentence, and he remains ineligible for parole until 2037. The petitioner's subsequent Connecticut sentence of 100 years of incarceration was ordered to be served consecutive to the New Jersey sentence.

In February, 2003, while in custody in New Jersey, the petitioner filed a petition for a writ of habeas corpus in the Connecticut Superior Court, alleging the ineffective assistance of his criminal trial counsel, Attorney Douglas Pelletier.[5] The Office of the Chief Public Defender appointed Attorney Thomas Mullaney III to represent the petitioner in his first Connecticut habeas action. During the course of this representation, Mullaney wrote a letter to the petitioner dated February 29, 2008. He opined to the petitioner that "[t]here is no such thing as a 'strong' [ineffective assistance of counsel] habeas case in Connecticut. . . . You should [not] go into a Connecticut habeas case thinking you have any kind of 'strong' chance to win, no matter what the

March 30, 1997, when [the petitioner] fired multiple rounds from a handgun, initially at a group of individuals on the street in Paterson. [The petitioner] did not testify at his trial. However, he had given a statement to the police which was admitted at trial. In the statement, [the petitioner] contended he was shooting in self-defense. In support of that contention, he said he had not brought the gun to the scene but, when he felt threatened, he retrieved it from a tire well, where it had been previously placed by his [codefendant].

"In the course of their investigation, the police learned that [the petitioner] had been involved in an incident in Connecticut thirteen days prior to this incident in Paterson. In the Connecticut incident, [the petitioner] shot and killed an individual in the course of robbing a restaurant. Ballistic testing revealed that the gun used in Connecticut was the same gun that was used in Paterson." *State* v. *Gentile*, No. A-5597-08T3, 2011 WL 677281, *1 (N.J. Super. App. Div. February 25, 2011), cert. denied, 207 N.J. 188, 23 A.3d 413 (2011).

[5] In his amended petition, dated February 6, 2007, the petitioner alleged that Pelletier improperly failed (1) to prepare adequately for trial by failing to secure the appearance of an exculpatory witness, (2) to cross-examine a witness, (3) to object to and preserve for appeal issues regarding the cooperation agreement of the petitioner's codefendant, and (4) to preserve his opportunity for sentence review.

issues." (Emphasis omitted.) Mullaney further advised the petitioner: "You are not currently even serving the Connecticut sentence, yet. If it were me, I would try to get an agreement that you can have sentence review on the current sentence and just file a federal habeas on the issue appealed [to the Connecticut Appellate Court] . . . . You can always file an [ineffective assistance of counsel] habeas as to the Connecticut sentence later, since you are not even in 'custody' yet on that sentence."

The petitioner's 2003 Connecticut habeas action was resolved by a stipulation. Pursuant to this stipulation, the petitioner's right to apply for sentence review was restored, and the parties agreed that he had exhausted his state remedies to permit him to pursue a habeas action in federal court on certain issues raised in his direct appeal.[6] On April 7, 2008, the petitioner filed a

[6] The March 13, 2008 stipulation provided the following: "The petitioner may file a new application for review of sentence ('application') pursuant to [General Statutes §] 51-195 with respect to his Connecticut conviction . . . . The Office of the Chief Public Defender shall in a timely fashion appoint such counsel as shall be required and appropriate to assist the petitioner in pursing the Application . . . . The respondent and the state of Connecticut by counsel stipulate that the state will not raise any prior existing procedural or jurisdictional objections to a consideration of the petitioner's application on its merits . . . . The state reserves all permissible responses to the application which it may choose to make as to the substance of the issues raised by the petitioner . . . . The petitioner stipulates that whether the application is ultimately acted on favorably or unfavorably to the petitioner by the sentence review division of the Connecticut Superior Court, it is the consideration of the application on its merits which is the relief stipulated to in favor of the petitioner . . . . The petitioner and the respondent specifically stipulate that acceptance of and an order of this habeas court pursuant to this stipulation shall act to restore any and all in-personam and subject matter jurisdiction to the sentence review division as shall be necessary for a full consideration of the petitioner's application on the merits . . . . The petitioner and the respondent further stipulate that this resolution of this habeas is stipulated by the respondent to constitute an 'exhaustion' of all issues and remedies sought by the petitioner as to the direct appeal . . . to the extent that any such 'exhaustion' is or may be required as a condition precedent to the filing of or seeking any further relief on said issues in other forums including any federal writ of habeas corpus."

The United States Court of Appeals for the Second Circuit has stated that "the federal habeas statute normally requires a state prisoner to exhaust

motion for judgment on the parties' stipulation, which the court, *dos Santos*, *J.*, granted two days later. Accordingly, a judgment was rendered in accordance with the terms of the stipulation.

While he remained incarcerated in New Jersey, the petitioner filed his application for sentence review in Connecticut. Attorney Robert J. McKay was appointed to represent the petitioner in that proceeding. The petitioner argued that his sentence was inappropriate and disproportionate pursuant to Practice Book § 43-28[7] and claimed that it should run concurrently with his New Jersey sentence. During the time of his representation, McKay wrote a letter to the petitioner dated September 29, 2012. In this letter, McKay stated: "I wanted to let you know that I have not forgotten the possibility of a

state remedies before filing a habeas petition in federal court." *McKithen* v. *Brown*, 481 F.3d 89, 100 (2d Cir. 2007), cert. denied, 552 U.S. 1179, 128 S. Ct. 1218, 170 L. Ed. 2d 59 (2008). The United States Supreme Court has explained: "Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief. . . . This rule of comity reduces friction between the state and federal court systems by avoiding the unseem[liness] of a federal district court's overturning a state court conviction without the state courts having had an opportunity to correct the constitutional violation in the first instance. . . . Because the exhaustion doctrine is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts, we conclude that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the [s]tate's established appellate review process." (Citations omitted; internal quotation marks omitted.) *O'Sullivan* v. *Boerckel*, 526 U.S. 838, 844–45, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); see generally *Parker* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-11-4004290-S (December 5, 2014) (in practical terms, law of habeas requires proper exhaustion), aff'd sub nom. *Parker* v. *Commissioner of Correction*, 169 Conn. App. 300, 149 A.3d 174, cert. denied, 324 Conn. 903, 151 A.3d 1289 (2016).

[7] Practice Book § 43-28 provides: "The review division shall review the sentence imposed and determine whether the sentence should be modified because it is inappropriate or disproportionate in the light of the nature of the offense, the character of the offender, the protection of the public interest, and the deterrent, rehabilitative, isolative, and denunciatory purposes for which the sentence was intended."

new habeas case. I am continuously researching your issues. . . . Of course, the Connecticut sentence still remains to be served when you leave New Jersey. I would like to find out whether a Connecticut habeas case can be filed with the [c]ourt while the inmate [is] in another [s]tate, but has not [started] the sentence imposed by Connecticut. In addition, a new law involving habeas cases in Connecticut will be effective October 1, 2012. I will have to review that and get back to you as to . . . whether it affects you or not."[8]

In its November 20, 2012 memorandum of decision, the sentence review division of the Connecticut Superior Court found that "there is nothing inappropriate or disproportionate about the sentence imposed by the trial court in this case. The petitioner is a multistate murderer who senselessly took the life of a young, hard-working father and husband. In reviewing the record as a whole, the division finds that the sentencing court's actions were in accordance with the parameters of Connecticut Practice Book § 43-23 . . . ." Accordingly, the petitioner's Connecticut sentence was affirmed.

The self-represented petitioner commenced a habeas action in federal court in the United States District Court for the District of New Jersey on October 14, 2008, challenging his Connecticut conviction. Approximately one month later, the District Court of New Jersey ordered the habeas petition transferred to the United States District Court for the District of Connecticut; however, this transfer did not occur until January 26, 2011. In his

[8] Our Supreme Court has stated: "As a part of a legislative effort to expedite the resolution of habeas cases, the General Assembly, in 2012, passed legislation to curb the filing of untimely habeas petitions. In particular, the legislature amended . . . § 52-470 and created a rebuttable presumption of delay without good cause, providing that Superior Court judges must dismiss habeas petitions that are not filed within certain specified time periods. See Public Acts 2012, No. 12-115, § 1." *Felder* v. *Commissioner of Correction*, 348 Conn. 396, 399, 306 A.3d 1061 (2024); see also *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 434, 274 A.3d 85 (2022).

amended habeas petition, filed pursuant to 28 U.S.C. § 2254,[9] the petitioner asserted the same five grounds he had raised in his direct appeal of his Connecticut conviction.[10] On March 25, 2014, the District Court of Connecticut denied the amended petition for a writ of habeas corpus.[11] See *Gentile* v. *Ricci*, United States District Court, Docket No. 3:11CV138 (JBA), 2014 WL 1248221 (D. Conn. March 25, 2014), appeal dismissed, United States Court of Appeals for the Second Circuit, Docket No. 14-1162 (2d Cir. May 14, 2014). Additionally, it did not issue a certificate of appealability, concluding that "the petitioner has not shown that he was denied a constitutionally or federally protected right. Thus, any appeal from this order would not be taken in good faith . . . ." Id., *14. The United States Court of Appeals for the Second Circuit declined to afford the petitioner further review with respect to the denial of his federal habeas petition. *Gentile* v. *Ricci*, United States Court of Appeals for the Second Circuit, Docket No. 14-1162 (2d Cir. May 14, 2014).

On May 11, 2016, the self-represented petitioner commenced the present habeas action. Thereafter, the petitioner, represented by counsel, subsequently filed a second amended petition. He alleged ineffective assistance of Pelletier, his criminal trial counsel, in counts one and two, claiming that Pelletier performed deficiently

[9] Title 28 of the United States Code, § 2254 (a), provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States."

[10] See footnote 3 of this opinion.

[11] We note that our Supreme Court has determined that the phrase " 'prior petition' [as used in § 52-470 (d)] unambiguously refers only to prior state [of Connecticut] habeas petitions." *Felder* v. *Commissioner of Correction*, 348 Conn. 396, 405, 306 A.3d 1061 (2024). The petitioner's federal habeas petition, therefore, does not constitute a prior petition for purposes of § 52-470.

which resulted in prejudice and that Pelletier suffered from a medical condition that resulted in a complete breakdown of the adversarial process. In count three, the petitioner asserted that his rights to due process and a fair trial were violated as a result of the prosecutor's failure to disclose evidence that was material and exculpatory. Finally, in count four, the petitioner alleged ineffective assistance of Pamela Nagy, his appellate counsel. The respondent, the Commissioner of Correction, filed his return and special defenses on July 26, 2019.[12] The petitioner filed his reply on August 22, 2019.

At the request of the respondent,[13] the court, *Oliver*, *J.*, ordered the petitioner to show cause as to why this petition should not be dismissed as untimely because it was filed beyond the time limit for successive petitions in § 52-470 (d).[14] See General Statutes § 52-470 (e). In his March 7, 2022 written response to the court's order to show cause, the petitioner asserted that he has been detained in a New Jersey correctional facility

[12] Specifically, the respondent set forth the following special defenses: "1. The petitioner's claims one through three have been previously litigated in the petitioner's direct appeal and first habeas petition. Such claims are therefore barred by the doctrine of res judicata.

"2. The petitioner's claims one through three have or could have been previously litigated in the petitioner's direct appeal and first habeas petition. Such claims are improper successive claims that are barred.

"3. The petitioner's claims three and four are barred by the doctrine of laches as the petitioner has unreasonably delayed presentment of such claims, which delay is unduly prejudicial to the respondent."

[13] In the motion requesting the petitioner to show cause why this petition should be allowed to proceed, the respondent's counsel stated that the petitioner had filed a prior state habeas action which resulted in a stipulated judgment on April 9, 2008, the current state habeas action was filed on May 11, 2016, more than two years after the expiration of time to seek appellate review of the prior petition and was filed after October 1, 2014, and therefore a rebuttable presumption existed that the current petition had been delayed without good cause pursuant to § 52-470 (c) and (d).

[14] Judge Oliver's order stated: "The respondent's motion for order to show cause is granted. The petitioner shall file a responsive pleading within thirty days, if objecting to the dismissal and including a position and an offer of proof demonstrating good cause for the delay in filing the petition."

since May 14, 2001, and has very limited access to Connecticut legal materials.[15] Furthermore, he claimed that good cause exists as a result of the erroneous and misleading legal advice he received from Mullaney and McKay regarding the petitioner's ability to file another habeas action in Connecticut while he was held in New Jersey and whether § 52-470, which was effective in 2012, would apply to him.[16]

The court, *Newson*, *J.*, held an evidentiary hearing on February 17, 2023. Mullaney, McKay, and the petitioner testified at this proceeding. Mullaney stated that, in his February 29, 2008 letter, he was informing the petitioner that a Connecticut habeas action could be commenced at a later date because, even if he prevailed in such an action and had his Connecticut sentence vacated, the petitioner first had to complete his New Jersey sentence of approximately thirty years before he would be released from incarceration. In other words, there is no rush or immediate need to file a habeas action in Connecticut because the petitioner had to complete his New Jersey sentence prior to the start of his Connecticut sentence.[17]

[15] The petitioner's counsel also represented that delays had ensued as a result of logistical issues in having the petitioner appear remotely while physically held in New Jersey and due to the COVID-19 pandemic.

[16] Specifically, the petitioner's counsel stated the following in the written response to show cause: "The legal counsel provided by . . . Mullaney and . . . McKay . . . ultimately led the petitioner to unfortunately believe that he should only refile his habeas petition in Connecticut once he was serving his Connecticut sentence. . . . The petitioner would further testify that the question . . . McKay had raised in his letter regarding whether the petitioner could file a habeas petition in Connecticut while serving his New Jersey sentence was confirmed when he observed . . . McKay argue to the court at the sentence review hearing that the petitioner's Connecticut sentence should be reduced because of the petitioner's inability to bring a habeas action in Connecticut due to the Connecticut sentencing running consecutive to the New Jersey sentence. Such testimony would be evidenced by the fact that, in the court's decision affirming the petitioner's sentence, the court noted: He argues this sentence was made consecutive to his New Jersey sentence and therefore he could not bring a habeas action in Connecticut." (Internal quotation marks omitted.)

[17] Additionally, Mullaney noted in his letter that he had returned the transcripts from the criminal trial to the petitioner and testified that any materials

McKay indicated that, at the time he represented the petitioner, he was "fairly new" with respect to his habeas practice.[18] In response to questions concerning a letter he had sent to the petitioner on September 29, 2012, McKay further stated that he "believed" he had followed up with the petitioner regarding the applicability of § 52-470 but could not provide any specifics regarding such a conversation. McKay later noted that he could not recall whether he had, in fact, spoken with the petitioner regarding § 52-470 and its impact on the petitioner's ability to file another habeas petition. He did recall subsequently advising the petitioner that he could not file another habeas petition until he was incarcerated in Connecticut.

The petitioner testified that both Mullaney and McKay had advised him that he could not file a habeas action in Connecticut until he began to serve the sentence imposed by the criminal court in Connecticut.[19] The petitioner also stated that McKay never followed up with additional information regarding § 52-470 and whether it applied to him. The petitioner indicated that, at the time he commenced this habeas action, he was unaware of the time limits set forth in § 52-470 and did not learn about them until he received notice of the good cause hearing. He unequivocally indicated that he was unaware of the two year limitation of § 52-470, and, had he known of it, he would have filed the present habeas action within this time frame. Finally, the peti-

from his case file that he did not send to the petitioner would have been sent to the habeas unit of the Public Defender's Office.

[18] McKay stated that he had destroyed his case file regarding his representation of the petitioner "a while ago . . . ."

[19] In *Hickey* v. *Commissioner of Correction*, 82 Conn. App. 25, 842 A.2d 606 (2004), appeal dismissed, 274 Conn. 553, 876 A.2d 1195 (2005), this court stated: "Under the federal rule, which this court looks to for guidance, *the mere fact that a petitioner is serving a consecutive sentence outside Connecticut, rather than within the state, does not deprive the court of jurisdiction for purposes of habeas corpus to determine whether the commissioner is holding the petitioner illegally*." (Emphasis added.) Id., 34.

tioner testified that his decision to file the present habeas action was based upon learning of Pelletier's death and his desire to demonstrate that he was "earnest about wanting" to pursue this matter.

On April 18, 2023, the habeas court issued a memorandum of decision summarizing the petitioner's argument "for not filing the present habeas [petition] until more than eight years after his prior habeas [petition] was disposed of, and more than one and one-half years past the operative deadline of October 1, 2014, was that he was unsure if he could file a habeas in Connecticut state courts while still being held in New Jersey." It found that the petitioner's belief was not credible due to the fact he had, in fact, litigated his first state habeas petition and his application for sentence review in Connecticut while in custody in New Jersey. The court further determined that, assuming that the petitioner had no access to legal materials to research Connecticut habeas law while incarcerated in New Jersey, "there was no credible evidence that he was otherwise cut off from the outside world during [this] time . . . and that he could not have posed the questions to family [or] friends to research the matters for him or to seek the advice of counsel on his behalf." Additionally, the court specifically found that no external force outside of the control of the petitioner and counsel interfered with or prohibited him from initiating the present action prior to October 1, 2014. Additionally, the court stated that the petitioner and McKay bore the responsibility for commencing this action after the statutory deadline of October 1, 2014, and that the reasons proffered by the petitioner for the delay were not credible and not supported by the record. The court specifically stated: "In any event, even if true, . . . McKay's incorrect advice would be insufficient by itself to create good cause." (Internal quotation marks omitted.) Ultimately, the court concluded that the petitioner had failed to demonstrate

good cause for the untimely filing and dismissed the petition for a writ of habeas corpus. The court subsequently granted the petitioner's petition for certification to appeal the dismissal.

In his principal and reply appellate briefs, the petitioner claims that the habeas court (1) improperly determined that he failed to establish good cause for the untimely filing of this habeas petition, and (2) made factual findings that were clearly erroneous.[20] Following the submission of the respondent's appellate brief, and his reply brief, the petitioner filed a motion for permission to file a supplemental brief. This court granted the petitioner permission to file a supplemental brief on or before April 25, 2024, and the respondent to file a supplemental brief twenty days later.

In his supplemental brief to this court, the petitioner claims that he has never had a full habeas trial on the merits and that his first Connecticut habeas action that ended with a stipulation did not constitute a judgment deemed to be final within the context of § 52-470. He further asserts, pursuant to the language of § 52-470, that the present matter constitutes his first habeas petition with a filing deadline of October 1, 2017, and therefore the habeas court's determination that the commencement of this matter was untimely constituted plain error. In support of this argument, the petitioner asserts that § 52-470 does not include a reference to resolution by way of a stipulation. The respondent counters in

[20] Specifically, the petitioner asserts that the court improperly found that (1) he and McKay were aware that a Connecticut habeas petition could be filed while the petitioner was incarcerated in New Jersey and not serving his Connecticut sentence, (2) he knew or should have known that a Connecticut habeas petition could have been filed because he had done so in 2003, (3) he knew that counsel would likely be appointed had he filed an action in Connecticut, (4) he could have availed himself of friends or family to assist him in obtaining access to Connecticut legal materials and legal advice, and (5) the delay in this case was twenty-two years, commencing with the date of his Connecticut sentencing.

his supplemental brief that this court should reject the petitioner's claim of plain error for three reasons: First, the 2008 stipulated judgment was a judgment to end litigation; second, the present habeas action constitutes a successive petition within the plain meaning of § 52-470; and third, the petitioner acknowledges that the state complied with the terms of the 2008 stipulated judgment.

I

We first address the claim raised in the petitioner's supplemental brief that the court committed plain error[21] in determining that his 2016 habeas petition was untimely. Specifically, he argues that his 2003 habeas petition that was resolved by the parties' 2008 stipulation did not constitute a prior petition within the meaning of § 52-470, and therefore the 2016 habeas petition was filed prior to the October 1, 2017 statutory deadline and, thus, timely.[22] We disagree.

"Under the plain error doctrine, an appellant must demonstrate that the claimed error is *both* so clear *and* so harmful that a failure to reverse the judgment would result in manifest injustice. . . . It is axiomatic that . . . [t]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it

[21] Practice Book § 60-5 provides in relevant part that "[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ."

[22] General Statutes § 52-470 (c) provides in relevant part: "Except as provided in subsection (d) of this section, there shall be a rebuttable presumption that the filing of a petition challenging a judgment of conviction has been delayed without good cause if such petition is filed after the later of the following: (1) Five years after the date on which the judgment of conviction is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) *October 1, 2017*; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive . . . ." (Emphasis added.)

is a doctrine that [an appellate] court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal. . . . An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record." (Emphasis in original; internal quotation marks omitted.) *Banks* v. *Commission of Correction*, 225 Conn. App. 234, 249–50, 314 A.3d 1052, cert. denied, 349 Conn. 922, 321 A.3d 1130 (2024); see also *State* v. *Daren Y.*, 350 Conn. 393, 405–406, 324 A.3d 734 (2024) (plain error is extraordinary remedy used by appellate court to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work serious and manifest injustice on aggrieved party); *State* v. *Jones*, 210 Conn. App. 249, 272, 269 A.3d 870 (plain error doctrine described as very demanding standard that should be invoked sparingly), cert. denied, 343 Conn. 901, 272 A.2d 199 (2022). We conclude that the petitioner has failed to establish either prong of the test for plain error; that is, the petitioner has not demonstrated (1) an obvious and readily discernable error, and (2) that such error was so harmful or prejudicial that it resulted in manifest injustice. See *State* v. *Kyle A.*, 348 Conn. 437, 446, 307 A.3d 249 (2024).

The petitioner contends that his 2003 petition, which was resolved by a 2008 stipulated judgment, did not constitute a "prior petition" because the reinstatement

of his right to sentence review and the agreed on exhaustion for purposes of federal habeas review were not appealable issues and, therefore, not a "final judgment" within the context of § 52-470 (d). He also asserts that his present habeas petition is not frivolous and that he "has never had a full habeas trial on the merits." The respondent counters, inter alia, that the 2008 stipulation constituted a judgment to end the litigation of his first habeas petition and, therefore, the present habeas petition is his second and thus falls within the plain language of § 52-470 (d) as a successive petition.

The petitioner has not persuaded us that the court committed an obvious and readily discernable error by treating the 2008 stipulation as a final judgment within the context of § 52-470. We emphasize that our Supreme Court has stated that "[i]t is not enough for the [appellant] simply to demonstrate that his position is correct. Rather, the party seeking plain error review must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal." (Internal quotation marks omitted.) *State* v. *Kyle A.*, supra, 348 Conn. 445.

As noted in the respondent's brief, "[t]he essence of the [stipulated] judgment is that the parties to the litigation have voluntarily entered into an agreement setting their dispute or disputes at rest and that, upon this agreement, the court has entered judgment conforming to the terms of the agreement. . . . It necessarily follows that if the judgment conforms to the stipulation it cannot be altered or set aside without the consent of all the parties, unless it is shown that the stipulation was obtained by fraud, accident or mistake. . . . *For a judgment by consent is just as conclusive as one rendered upon controverted facts*." (Citations omitted; emphasis added; internal quotation marks omitted.) *Gillis* v. *Gillis*, 214 Conn. 336, 339–40, 572 A.2d 323 (1990); *Bryan* v. *Reynolds*, 143 Conn. 456,

460–61, 123 A.2d 192 (1956) (same); see also *Wallerstein* v. *Stew Leonard's Dairy*, 258 Conn. 299, 310, 780 A.2d 916 (2001) (*Zarella*, *J.*, dissenting) (although obtained through mutual consent of parties, stipulated judgment is binding to same degree as judgment obtained through litigation); *Housing Authority* v. *Lamothe*, 225 Conn. 757, 767, 627 A.2d 367 (1993) (same); see generally *Lime Rock Park*, *LLC* v. *Planning & Zoning Commission*, 335 Conn. 606, 625, 264 A.3d 471 (2020) (stipulated judgment bears earmarks both of judgments rendered after litigation and contracts derived though mutual agreement).

The petitioner has not demonstrated that the court made an obvious or readily discernable error in treating the judgment rendered after the parties' stipulation as no different than a judgment on the merits. Furthermore, as to his bald assertion that he could not file an appeal from the 2008 stipulation, the petitioner has not provided us with any authority to support such a contention. For these reasons, we conclude that the petitioner has not met his heavy burden of establishing a patent or readily discernable error. Additionally, the petitioner has not demonstrated a manifest injustice, which is the second requirement necessary to prevail on a claim of plain error. Regardless of whether the court improperly determined that the 2016 habeas action was untimely, the petitioner still had the opportunity to demonstrate good cause and have the court consider the merits of his petition. Accordingly, we conclude that reversal pursuant to the plain error doctrine is not warranted in the present case.

II

Next, the petitioner claims that the court erred in concluding that he failed to establish good cause for his late filed petition. He argues, inter alia, that ineffective assistance of counsel may constitute good cause for

the untimely filing of a successive petition for a writ of habeas corpus.[23] We agree and conclude that the judgment of the habeas court dismissing the petition must be reversed and the case remanded for a new good cause hearing.

In *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022),[24] our Supreme Court explained that the "factors directly related to the good cause determination [under § 52-470 (e)] include, but are not limited to: (1) whether external forces outside the control

[23] In *Hankerson* v. *Commissioner of Correction*, supra, 223 Conn. App. 569–71, we explained: "To be clear, although the court in *Rose* held that constitutionally deficient performance by habeas counsel may constitute good cause for a late-filed petition, it did not hold that counsel's failure to advise a petitioner of the deadline for filing a new petition necessarily constitutes ineffective assistance of counsel. . . . Such a determination is a fact specific inquiry that depends on a number of factors, including the relationship between the petitioner and his counsel during the pertinent time. For example, a petitioner who terminates his relationship with counsel before withdrawing his pending petition and filing a new petition stands in a very different position than does a petitioner who withdraws his petition on the advice of his counsel and is told the wrong deadline for filing a new petition by that counsel. . . .

"Furthermore, although the habeas court may conclude that ineffective assistance of counsel constitutes good cause in this case, it is not required to do so. Such a determination is still left to the discretion of the habeas court taking into consideration the [*Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 438, 274 A.3d 85 (2022)] factors. . . . No single factor is dispositive, and, in ascertaining whether good cause exists, the habeas court must consider all relevant factors in light of the totality of the facts and circumstances presented. . . . For example, in the context of a purported failure to advise the petitioner of the applicable filing deadline, the habeas court could conclude that counsel's failure was constitutionally deficient and still conclude that good cause does not exist because the petitioner was otherwise aware of the deadline or unreasonably delayed in filing a new petition when he had opportunities to independently discover the applicable deadline. In the end, the court's conclusion as to whether the petitioner has established good cause is still reviewed under the abuse of discretion standard." (Citations omitted; footnote omitted; internal quotation marks omitted.)

[24] We note that our Supreme Court released its decision in *Kelsey* approximately eleven months prior to the habeas court's decision in the present case.

of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented." (Internal quotation marks omitted.) Id., 438. The court further explained that whether and *to what extent the petitioner or his counsel bore any personal responsibility for the lack of knowledge of the law* was a factor to be considered in the determining whether good cause has been established under § 52-470. Id., 445.

During the pendency of this appeal, our Supreme Court issued its decision in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333. In that case, the court agreed with the petitioner's argument that "the actions of counsel that are ineffective [under the sixth amendment to the United States constitution] cannot be imputed to the petitioner and, therefore, that ineffective assistance of counsel constitutes an external, objective factor sufficient to establish good cause." (Internal quotation marks omitted.) Id., 346. We recently summarized that reasoning in the opinion as follows: "In *Rose*, the court discussed [the *Kelsey*] factors relevant to the good cause determination under § 52-470 (e). . . . In determining whether deficient performance of counsel may constitute good cause under § 52-470 (e), our Supreme Court turned to the distinction between internal and external factors that cause or contribute to the failure to comply with a procedural rule. . . . Specifically, the court noted that, in the context of the procedural default doctrine, [*i*]*neffective assistance of counsel is an objective factor external to the defense because*

the [*s*]*ixth* [*a*]*mendment itself requires that responsibility for the default be imputed to the* [*s*]*tate*. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate. . . . Although a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps . . . *a petitioner is not bound by the ineffective assistance of his counsel*. . . . It then concluded: Consistent with this authority, we conclude that ineffective assistance of counsel is an objective factor external to the petitioner that may constitute good cause to excuse the late filing of a habeas petition under the totality of the circumstances pursuant to § 52-470 (c) and (e)." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Ibrahim* v. *Commissioner of Correction*, supra, 229 Conn. App. 662–64.

The habeas court in the present case did not have the benefit of our Supreme Court's subsequent clarification of *Kelsey* "regarding the fundamental distinction between internal and external factors that cause or contribute to a petitioner's failure to comply with a procedural rule." (Internal quotation marks omitted.) *Hankerson* v. *Commissioner of Correction*, supra, 223 Conn. App. 569; see also *Rapp* v. *Commissioner of Correction*, supra, 224 Conn. App. 344. We conclude, therefore, that the habeas court, through no fault of its own, did not apply the correct legal standard subsequently set forth by our Supreme Court in *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 333, when deciding whether the petitioner in the present case had demonstrated good cause for the late filing of his petition. See *Hankerson* v. *Commissioner of Correction*, supra, 569. Simply put, as explained by the court in *Rose*, the actions of counsel that are ineffective under

the sixth amendment cannot be imputed to the petitioner, and, therefore, the ineffective assistance of counsel constitutes an external, objective factor sufficient to establish good cause for the untimely filing. See *Ibrahim* v. *Commissioner of Correction*, supra, 229 Conn. App. 664; *Rapp* v. *Commissioner of Correction*, supra, 343.

Here, the petitioner has claimed that the delayed filing of the present habeas petition was the result of ineffective assistance he received from both Mullaney and McKay. Accordingly, the petitioner is entitled to a new hearing at which the habeas court must apply the proper legal standard with respect to § 52-470 (d) and (e). See *Rose* v. *Commissioner of Correction*, supra, 348 Conn. 350; see also *Ibrahim* v. *Commissioner of Correction*, supra, 229 Conn. App. 664; *Coney* v. *Commissioner of Correction*, supra, 225 Conn. App. 454; *Michael G.* v. *Commissioner of Correction*, supra, 225 Conn. App. 343; *Rapp* v. *Commissioner of Correction*, supra, 224 Conn. App. 344.

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

In this opinion the other judges concurred.

LAWRENCE FRANKO *v.* COMMISSIONER OF CORRECTION
(AC 46356)

Alvord, Cradle and DiPentima, Js.

Syllabus

The petitioner, who had been convicted of kidnapping in the second degree, appealed following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing his petition for a writ of habeas corpus. The petitioner claimed, inter alia, that the court erred in concluding that he failed to establish good cause for his late filed petition pursuant to statute (§ 52-470). *Held*:

The habeas court did not abuse its discretion in dismissing the petitioner's habeas petition as untimely pursuant to § 52-470, as the petitioner's argument essentially attacked the credibility determinations of the habeas court, and this court does not second-guess such credibility determinations on appeal.

The habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal to this court, the petitioner having failed to show that the issues presented in his appeal were debatable among jurists of reason, that a court could resolve them in a different manner or that the questions raised deserved encouragement to proceed further.

Argued November 19, 2024—officially released January 28, 2025

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson, J.*, rendered judgment dismissing the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Jonathan M. Sousa, assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, J. The petitioner, Lawrence Franko, appeals following the denial by the habeas court of his petition for certification to appeal from the dismissal of his third petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470. On appeal, he claims that the court improperly determined that he failed to demonstrate good cause within the meaning of § 52-470 (e) to overcome the statutory presumption of unreasonable delay in the filing of his third habeas petition. He also claims that the court abused its discretion in denying his petition for certification to appeal. We dismiss the appeal.

The following facts and procedural history are relevant. The petitioner was convicted in 2010 of one count of kidnapping in the second degree in violation of General Statutes § 53a-94 (a) and was sentenced to sixteen years of incarceration followed by four years of special parole. His conviction was affirmed on direct appeal. See *State* v. *Franko*, 142 Conn. App. 451, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013). In 2011, the petitioner filed a petition for a writ of habeas corpus, alleging ineffective assistance of counsel. The petition was denied, and that judgment was affirmed on appeal. See *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 507, 139 A.3d 798 (2016). The petitioner filed a second petition for a writ of habeas corpus in 2016, again challenging the kidnapping conviction. On September 1, 2021, the petitioner, represented by counsel, filed a withdrawal of the petition.

On May 26, 2022, the self-represented petitioner filed a third petition for a writ of habeas corpus, again challenging the kidnapping conviction. The respondent, the Commissioner of Correction, filed a motion for order to show cause as to why the petition should not be dismissed as untimely pursuant to § 52-470. An evidentiary hearing was held on the motion on November 21 and December 16, 2022. In a January 19, 2023 memorandum of decision, the court, *Newson*, *J.*, rendered a judgment of dismissal. The court stated that the third habeas petition was untimely and that the action should have been commenced no later than May 27, 2018.[1] The

[1] The court noted that § 52-470 (d) (1) requires a subsequent petition challenging the same conviction to be filed within two years after the date on which the judgment in the prior petition is deemed final. The court reasoned that no judgment was rendered on the second petition because it was withdrawn and therefore the time period in § 52-470 (d) (1) ended two years after the judgment of this court affirming the denial of the first habeas petition became final. On appeal, the petitioner does not dispute that the third petition was untimely under § 52-470 (d) (1); rather, his challenge concerns the court's determination that the petitioner did not establish good cause for the delay.

court further determined that the petitioner failed to demonstrate good cause for the delay. Specifically, the court found credible the testimony of the petitioner's former counsel, Attorney John Drapp, that he discussed with the petitioner that the withdrawal of the second habeas petition would subject any further habeas petitions to a challenge under § 52-470 as untimely. The court did not credit the petitioner's testimony that Drapp never mentioned to him the potential implications of withdrawing the second habeas petition.

The court also found that the withdrawal of the second petition "was done strategically" because the petitioner wanted instead to pursue a sentence modification. The court stated that, "[i]n the end, it is clear that the petitioner made a conscious choice to choose the avenue, at least at that time, [that] he thought provided him [with] the quickest opportunity to be heard on his case. While the petitioner claims *now* that he would 'never have withdrawn' his [second habeas petition] if he had known about the implications of § 52-470, that is likely 'buyer's remorse' after finding out the sentence modification motion was not successful." (Emphasis in original.) The court dismissed the petition. The petitioner filed a petition for certification, which the court denied. This appeal followed.

The following law and legal standards are relevant to the petitioner's claim that the court abused its discretion in denying his petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review . . . 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 must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an

abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"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. . . . If this burden is not satisfied, then the claim that the judgment of the habeas court should be reversed does not qualify for consideration by this court." (Internal quotation marks omitted.) *Bennett* v. *Commissioner of Correction*, 222 Conn. App. 689, 691, 306 A.3d 1195 (2023), cert. denied, 348 Conn. 948, 308 A.3d 37 (2024). "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." (Internal quotation marks omitted.) *Burgos-Torres* v. *Commissioner of Correction*, 142 Conn. App. 627, 630–31, 64 A.3d 1259, cert. denied, 309 Conn. 909, 68 A.3d 663 (2013).

Accordingly, we examine the petitioner's underlying claim to determine whether the habeas court abused its discretion in denying his petition for certification to appeal. The petitioner claims that the court improperly determined that he had not demonstrated good cause within the meaning of § 52-470 (e) to overcome the statutory presumption of unreasonable delay in the filing of his third habeas petition.

Section 52-470 (d) provides in relevant part that, "[i]n the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing

of the subsequent petition has been delayed without good cause if such petition is filed . . . (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review . . . .'' Subsection (e) of § 52-470 provides in relevant part that, ''[i]n a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. . . . For the purposes of this subsection, good cause includes, but is not limited to, the discovery of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection (c) or (d) of this section.''

''[F]actors directly related to the good cause determination [under § 52-470 (e)] include, but are not limited to: (1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition. No single factor necessarily will be dispositive, and the court should evaluate all relevant factors in light of the totality of the facts and circumstances presented. . . . In discussing § 52-470, we have described [t]he habeas court's exercise of its discretion to manage [cases as] the best tool to . . . balance the principles of judicial economy and due process. . . . Generally, when a finding requires the balancing of several factors, many of which require factual determinations . . . this court

has held that such conclusions are reversed only for an abuse of discretion. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the [habeas] court's ruling[s] . . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Citations omitted; internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 438–40, 274 A.3d 85 (2022).

The petitioner argues that he was unaware of § 52-470, that Drapp failed to explain the ramifications of withdrawing his second habeas petition and that he never would have withdrawn his second habeas petition if he had known that his third habeas petition would be time barred. This argument is unavailing. The court expressly credited Drapp's testimony that he had discussed with the petitioner the ramifications pursuant to § 52-470 of withdrawing his second habeas petition[2] and discredited the petitioner's testimony that Drapp never mentioned to him those potential ramifications. On the basis of these credibility assessments, the court found that the petitioner chose to withdraw his second habeas petition for strategic reasons and that the petitioner's argument that he would not have withdrawn his petition if he had known about the implications of § 52-470 was merely " 'buyer's remorse.' " The petitioner's argument, which essentially attacks the credibility determinations of the habeas court, is unmeritorious because we do not second-guess on appeal the credibility determinations of the habeas court. See, e.g., *Ayuso* v. *Commissioner of Correction*, 216 Conn. App. 234, 235, 284 A.3d 1013 (2022) ("[i]t is simply not the role

[2] Specifically, Drapp testified that he had advised the petitioner that if he withdrew his second habeas petition, any habeas petition subsequently filed would be time barred by the statute of limitations in § 52-470.

of this court on appeal to second-guess credibility determinations made by the habeas court" (internal quotation marks omitted)).

The petitioner further contends that an external factor that constitutes good cause for the delay is that he was incarcerated at the time of the withdrawal of his second habeas petition and thus was unable to conduct legal research to either counter or verify the legal information that Drapp had provided. In support of this argument, he maintains that the law library at his facility was closed due to COVID-19 and, even if it had not been closed, he was unable to access it because he was under quarantine and unable to leave his unit.

The court did not make any explicit findings regarding whether the petitioner's library access was restricted due to COVID-19 prior to his withdrawal of his second habeas petition on September 1, 2021. The library access issue is immaterial in light of the court's express findings. The court found that Drapp informed the petitioner of the consequences of withdrawing his second habeas petition and that the petitioner chose to withdraw his petition for strategic reasons. Additionally, the petitioner's testimony at the show cause hearing that he "had no reason to go to the library to research anything" and that he relied on Drapp to tell him what he needed to know further supports the court's determination that the petitioner had not demonstrated good cause.

Finally, the court reasoned that, even if Drapp "had failed to notify the petitioner about the potential ramifications of § 52-470 prior to the withdrawal [of the second habeas petition], that would not constitute forces outside of the representation establishing 'good cause' to excuse the petitioner's delay." The petitioner argues that this reasoning conflicts with the precedent of our Supreme Court in *Rose* v. *Commissioner of Correction*,

348 Conn. 333, 304 A.3d 431 (2023).[3] In *Rose*, which was decided after the habeas court's dismissal of the petitioner's third habeas petition in the present case, our Supreme Court held that, "[a]lthough a petitioner is bound by his counsel's inadvertence, ignorance, or tactical missteps, regardless of whether counsel is flouting procedural rules or hedging against strategic risks, a petitioner is not bound by the ineffective assistance of his counsel." (Internal quotation marks omitted.) Id., 348. In other words, after *Rose*, ineffective assistance of counsel was to be considered an external factor that may constitute good cause to excuse late filing under § 52-470 (d) and (e). In the present case, the court, following appellate authority that was subsequently overruled by *Rose*, did not apply the correct legal standard to its alternative analysis based on the hypothetical that Drapp did not inform the petitioner about the deadlines in § 52-470. See *Ibrahim* v. *Commissioner of Correction*, 229 Conn. App. 658, 664, A.3d (2024). This, however, does not require us to grant the petitioner's request for a new hearing. The judgment of the court dismissing the petitioner's third habeas petition as untimely pursuant to § 52-470 is supported by the court's primary conclusion that Drapp did advise the petitioner of the consequences of withdrawing the second petition. This conclusion does not conflict with *Rose*.

For the foregoing reasons, we conclude that there is no merit to the petitioner's argument that the court abused its discretion in dismissing his third habeas petition as untimely. Accordingly, we are not convinced that the issues presented in this appeal are debatable

[3] Although the petitioner did not raise this argument in his main brief, the respondent did cite *Rose* in its responsive brief, so the petitioner properly could address it in his reply brief. See Practice Book § 67-5A (reply brief "should respond directly and succinctly to the arguments in the appellee's brief").

among jurists of reason, that a court could resolve them in a different manner or that the questions raised deserve encouragement to proceed further. See *Simms* v. *Warden*, supra, 230 Conn. 616. Consequently, we conclude that the petitioner failed to establish that the court abused its discretion in denying certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

MOZZELLE BROWN *v.* COMMISSIONER OF CORRECTION (AC 46658)

Suarez, Clark and Lavine, Js.

Syllabus

The petitioner, who had been convicted of murder and conspiracy to commit murder, appealed following the habeas court's denial of his petition for certification to appeal from the court's judgment denying his habeas corpus petition. The petitioner claimed, inter alia, that the court erred in concluding that he had procedurally defaulted on his claim under *Brady* v. *Maryland* (383 U.S. 83) that his right to due process was violated because the state failed to disclose evidence favorable to his defense regarding an agreement or understanding it had with a cooperating witness, F, to provide her consideration concerning criminal charges against her in exchange for her testimony at his criminal trial. *Held*:

The habeas court abused its discretion in denying the petition for certification to appeal, as the petitioner's *Brady* claim was debatable among jurists of reason, a court could resolve the claim in a different manner and the questions involved were adequate to deserve encouragement to proceed further.

The habeas court incorrectly concluded that the petitioner's *Brady* claim was procedurally defaulted because he failed to demonstrate the existence of an undisclosed agreement between the state and F.

The state's suppression of statements to F that it had a practice of providing consideration to cooperating witnesses suggested that it had an informal understanding with her to do so in exchange for her testimony, and those statements, which were material to the petitioner's defense, gave rise to a reasonable probability that the result of the criminal trial would have been different had they been disclosed.

Accordingly, the habeas court's judgment was reversed, and the case was remanded with direction to grant the petition for a writ of habeas corpus, to vacate the petitioner's convictions, and to order a new trial on the charges of murder and conspiracy to commit murder.

Argued September 4, 2024—officially released January 28, 2025

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *M. Murphy*, *J.*; thereafter, the petition was withdrawn in part; judgment denying the petition; subsequently, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Reversed*; *judgment directed*.

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

Timothy F. Costello, supervisory assistant state's attorney, with whom, on the brief, were *Paul J. Narducci*, state's attorney, and *Donna M. Fusco*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Mozzelle Brown, appeals from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. The petitioner claims that the court erred in (1) denying his petition for certification to appeal and (2) concluding that his due process claim related to the state's failure to disclose an agreement or understanding between the prosecutor and a cooperating witness was procedurally defaulted.[1] We agree with the petitioner that the habeas court abused its discretion in denying the petition for

[1] The petitioner also claims that the court improperly rejected on its merits his claim that he was deprived of the effective assistance of trial counsel. In light of the relief that we afford the petitioner in connection with his second claim, including a new trial on his criminal charges, it is unnecessary for us to consider the merits of his third claim.

certification to appeal. We also agree with the petitioner that the habeas court erred in refusing to consider the merits of his due process claim. After reaching the merits of that claim, we conclude that the alleged constitutional violation exists and that he is entitled to a new trial. Accordingly, we remand the case to the habeas court with direction to render judgment granting the petition for a writ of habeas corpus, to vacate the petitioner's conviction of conspiracy to commit murder in violation of General Statutes §§ 53a-54a and 53a-48 (a) and murder in violation of General Statutes §§ 53a-54a (a) and 53a-8, and to order a new trial on those offenses.

The record reflects the following procedural history. In October, 2014, the petitioner was convicted, following a jury trial, of conspiracy to commit murder and murder.[2] In its memorandum of decision denying the petition for a writ of habeas corpus, the habeas court found the following facts: "On the evening of May 14, 2004, [the body of the victim, Dr. Eugene Mallove] was discovered in the driveway of his rental property at 119 Salem Turnpike in Norwich, Connecticut (119 Salem). During its investigation, Norwich police determined that [the victim] had recently evicted the tenants of 119 Salem, Roy and Patricia Anderson, the month prior, and he had traveled from his primary residence in New Hampshire to clean out the property. Chad Schaffer, Patricia Anderson's son, and his girlfriend, Candace Foster, had also lived at the property. The police spoke with Schaffer and Foster. Schaffer informed the police that he had never met [the victim] and that his family never had any personal problems with him during the eviction process. Foster told the police that Schaffer had been home with her and their child at their current

[2] The jury found the petitioner not guilty of felony murder in violation of General Statutes § 53a-54c and robbery in the first degree in violation of General Statutes § 53a-136 (a).

apartment at ArtSpace Apartments, located at 35 Chestnut Street, Norwich, Connecticut, that entire day and evening. [The victim's] vehicle, a green minivan, was discovered at the Foxwoods Casino employees parking lot in Ledyard, Connecticut, on May 15, 2004. A folding knife with the initials 'D.E.' was recovered near [the victim's] body.

"On May 16, 2004, the New Britain police informed Norwich police that they had two men, Gary McAvoy and Joseph Reilly, in custody with suspicious injuries and bloodlike stains on their clothing. Andrew Nickerson, a local shuttle bus driver, identified Reilly from a photo lineup as a potential driver of a green van near Mohegan Sun casino on the night of the murder. Reilly and McAvoy were arrested for [the victim's] homicide in the summer of 2005. On September 15, 2005, a trial court determined [that] there was probable cause to charge Reilly and McAvoy for [the victim's] death. During subsequent investigation, the Norwich police eliminated Reilly and McAvoy as the source of any DNA profiles related to [the victim's] death, and the state entered a nolle on all charges against them.

"In 2009, Jill Sebastian contacted the police with information that the former tenants at 119 Salem may have been involved in [the victim's] death. Sebastian, who had lived with Schaffer, Foster, and Sebastian's boyfriend, Keishon Dullivan, in ArtSpace, informed the police that she had seen Schaffer's bloody clothing in the apartment, and that Foster had admitted to lying about Schaffer being home on the night of the murder and had disposed of Schaffer's bloody pajama pants. Dullivan also spoke with the police, indicating that he saw Schaffer's basketball jersey on the apartment floor covered in blood and that Schaffer had told him that he had assaulted [the victim] with the petitioner at 119 Salem and took [the victim's] possessions to stage the attack as a robbery.

"Foster met with the police to provide her first written statement and was placed in witness protection with her two children. Foster provided the police with several different versions about what occurred on the night of the incident. In her final statement to the police on March 23, 2010, Foster admitted that she had kicked [the victim] and hit him with a pipe. Foster claimed that Schaffer hit her during the incident, causing her nose to bleed. Foster further indicated that she drove [the victim's] van and parked it at Foxwoods and that Schaffer took several of the [victim's] possessions.

"On April 1, 2010, Foster and Schaffer were arrested for their involvement in [the victim's] homicide. The state extended Schaffer a plea offer during his criminal trial and, on April 20, 2012, Schaffer pleaded guilty to manslaughter in the first degree and robbery in the third degree charges. The petitioner was arrested for his role in [the victim's] death on November 20, 2013 . . . [and was later convicted of murder and conspiracy to commit murder]. Foster pleaded guilty to hindering prosecution in the second degree and tampering with physical evidence in May, 2015. State's Attorney Paul [J.] Narducci represented the state in all three cases."

The petitioner was represented at trial by Attorney Richard Marquette. In January, 2015, the trial court, *Jongbloed, J.*, imposed a total effective sentence of fifty-eight years of incarceration. The petitioner, represented by Attorney Max Simmons, filed a direct appeal. Later, Simmons withdrew his appearance, and the petitioner withdrew his appeal.

On September 25, 2017, the petitioner, in a self-represented capacity, filed a petition for a writ of habeas corpus. On November 27, 2021, the petitioner, represented by counsel, filed a third amended petition, the resolution of which is the subject of this appeal. In count one, the petitioner raised two distinct freestanding due

process claims. First, he alleged that the prosecution violated his due process right to a fair trial by "fail[ing] to correct false testimony [from Foster at the criminal trial] and/or to disclose material, exculpatory evidence to the petitioner and/or Marquette." Specifically, the petitioner alleged that, in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecution failed to disclose that there was an actual or implied agreement between the prosecution and Foster for her testimony in exchange for consideration related to her pending criminal charges and convictions. Second, in conjunction with his *Brady* claim, the petitioner alleged that, in violation of *Napue* v. *Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), and its progeny, the prosecution failed to correct Foster's trial testimony that no promises were made to her in exchange for her testimony and that she did not expect to receive a benefit in exchange for her testimony. In count two, the petitioner alleged that Marquette did not provide him with effective assistance of counsel in twelve ways, including by "fail[ing] to properly identify, plead, or litigate the [*Brady*] claim raised in count one . . . of this petition . . . ." In count three, the petitioner alleged that the attorney who represented him in connection with his direct appeal, Simmons, did not provide him with effective assistance in that he failed to claim on appeal that the trial court had erred in denying his motion for a new trial.

The respondent, the Commissioner of Correction, filed a return in which he either denied the substantive allegations of the petition or left the petitioner to his proof. With respect to count one, however, the respondent also raised the affirmative defense of procedural default in that "[the petitioner] did not raise these claims in any motions in the trial court and appeal the denial therefrom or on direct appeal." The respondent alleged that the petitioner could not overcome the procedural

default because he was unable to establish either cause or prejudice sufficient to excuse his default. In his reply, the petitioner alleged that his allegations of ineffective assistance on the part of Marquette and Simmons, if proven, were sufficient to overcome the procedural default. The petitioner also alleged that a failure to consider the merits of the due process claims in count one would result in a manifest miscarriage of justice.

A trial on the merits of the habeas petition occurred on March 7 and November 18, 2022. In addition to presenting many documentary exhibits, including but not limited to the court file for and transcript of the petitioner's criminal trial, the petitioner also presented testimonial evidence from the following witnesses: Robert Powers, a forensic toxicologist; Jeffrey Kaplan, an expert in forensic psychology; Marquette; and Frank Riccio, a defense attorney who testified as an expert witness for the petitioner. The respondent presented testimony from Narducci and submitted into evidence a note that Narducci had authored and put into Foster's criminal file. Both parties filed posttrial briefs.

In its memorandum of decision, the habeas court, *M. Murphy*, *J.*, concluded that "the due process claim in count one" was procedurally defaulted, and it did not reach the merits of the claim. With respect to the twelve allegations of ineffective assistance set forth in count two, the court concluded that the petitioner had not sustained his burden of proving either deficient performance or prejudice.[3] The court did not reach the merits of the claim set forth in count three of the petition after it determined that the petitioner had abandoned that

[3] Earlier in its decision, the court noted that, in his posttrial brief, the petitioner withdrew one of his allegations of ineffective assistance, namely, a claim that Marquette had violated his right to adequate representation by failing to argue before the jury during closing argument that DNA evidence did not support Foster's testimony.

claim by failing to address it in his posttrial brief. Following the court's denial of the petition for a writ of habeas corpus, the petitioner filed a petition for certification to appeal, which the court also denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

First, we address the petitioner's claim that the habeas court improperly denied his petition for certification to appeal. We agree with the petitioner.

General Statutes § 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

It is well settled that, "[f]aced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [a] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should

be reversed on its merits." (Internal quotation marks omitted.) *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 332, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022).

"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 [claim] to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive [claim] for the purpose of ascertaining whether [that claim satisfies] one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) Id.

In light of our analysis in part II of this opinion, we are persuaded the petitioner's challenge to the habeas court's analysis of and resolution of his *Brady* claim is debatable among jurists of reason, a court could resolve the issues in a different manner, and the questions are adequate to deserve encouragement to proceed further. Accordingly, we conclude that the court abused its discretion in denying the petition for certification to appeal.

II

Next, we address the petitioner's claim that the court erred in concluding that the *Brady* claim set forth in count one of his petition was procedurally defaulted. The petitioner argues that the court incorrectly analyzed the claim and that it relied on an improper finding of fact as to whether the prosecutor had an agreement with Foster.[4] We agree with the petitioner.

[4] One of the claims in the petitioner's brief is that "[t]he habeas court erred in finding that there was no *Brady* violation." However, as we explain in greater detail herein, and as recognized by the petitioner in his appellate brief, the court did not reach the merits of the petitioner's *Brady* claim after concluding that, in light of its findings in connection with the petition-

As stated previously in this opinion, the petitioner alleged in count one that the prosecution "inadvertently failed to correct false testimony and/or to disclose material, exculpatory evidence to the petitioner and/or Marquette." At the habeas trial and presently, the petitioner asserts that an undisclosed "agreement or understanding" existed between Narducci and Foster whereby Foster would receive consideration from the state in connection with the pending criminal charges against her in exchange for her testimony implicating the petitioner in the events culminating in the victim's death. At the habeas trial, the petitioner attempted to demonstrate the existence of this undisclosed agreement or understanding by means of a memorandum that Narducci had generated and put into Foster's criminal file following his conviction, as well as Narducci's testimony at the habeas trial concerning statements that he made to Foster prior to her testimony. The petitioner also relied on undisputed evidence that, following his trial, Foster received favorable treatment from the state in connection with charges that had been pending against her related to the events at issue and that Narducci brought her cooperation to the attention of the court at the time of her sentencing on those charges. The petitioner claimed that, in violation of *Brady*, the prosecution did not disclose the existence of this agreement or

er's claim of ineffective assistance of trial counsel, the petitioner had failed to prove cause and prejudice to overcome the respondent's claim of procedural default. Having carefully reviewed the substance of the petitioner's arguments, they reflect the petitioner's belief that, in disposing of the ineffective assistance of counsel claim in count two, the court improperly found that an undisclosed agreement between the state and Foster did not exist.

Another of the petitioner's claims on appeal is that "[t]he habeas court erred in finding that the petitioner procedurally defaulted count one." In connection with this claim, the petitioner argues that the court misapplied the doctrine of procedural default by improperly conflating the due process claims in count one and the ineffective assistance of counsel claim set forth in his petition. In this part of the opinion, we address the substance of both interrelated claims.

understanding to the petitioner, it was favorable to the defense because it was valuable impeachment evidence, and it was material because there is a reasonable likelihood that evidence of the undisclosed agreement or understanding might have affected the verdict.

The court's analysis of procedural default, in count one, is legally intertwined with its resolution of the petitioner's claim, in count two, that Marquette had rendered ineffective assistance in that he failed to identify, plead, or litigate a claim with respect to the state's failure to disclose an agreement with Foster. In disposing of count one, the court set forth principles related to the affirmative defense of procedural default on which the state relied.[5] The court stated that a petitioner may satisfy the cause and prejudice requirement necessary to defeat the defense by means of a successful

[5] As stated previously in this opinion, in addition to raising a claim under *Brady*, the petitioner also claimed in count one that his right to due process was violated when the prosecution failed to correct Foster's trial testimony that no promises were made to her in exchange for her testimony and that she did not expect to receive a benefit in exchange for her testimony. The court, however, described count one as a "due process *claim*" under *Brady*, specifically, "that [the petitioner's] right to due process was violated because the state failed to disclose an agreement between the state and the state's witness, Foster." (Emphasis added.) The court did not distinctly address the separate due process claim based on the state's alleged failure to correct Foster's testimony.

We conclude in connection with the petitioner's *Brady* claim that the case should be remanded with direction to render judgment granting the petition for a writ of habeas corpus, to vacate the petitioner's criminal convictions, and to order a new trial on those offenses. Accordingly, it is unnecessary for us to resolve a claim of error related to the petitioner's separate but interrelated due process claim brought under *Napue*. Nevertheless, we observe that, in light of our conclusion that a *Brady* violation occurred related to an undisclosed understanding between the prosecutor and Foster, it follows as a matter of law that the state likewise violated the petitioner's right to due process based on the prosecutor's failure to correct or clarify Foster's misleading testimony at the petitioner's criminal trial that the prosecutor had not offered her any consideration in exchange for her testimony and that what transpired at the trial would not affect what happened to her in connection with her pending criminal charges.

ineffective assistance of counsel claim. Without reaching the merits of the due process claims in count one, the court then concluded that, "[b]ecause the petitioner alleges ineffective assistance of trial counsel as the cause and prejudice, a claim already alleged in count two, the court concludes that procedural default bars the due process claim in count one. The due process claim in count one need not be separately addressed because it is subsumed within the claim in count two." In support thereof, the court cited the following proposition set forth in *Braham* v. *Commissioner of Correction*, 72 Conn. App. 1, 13, 804 A.2d 951, cert. denied, 262 Conn. 906, 810 A.2d 271 (2002): "A habeas court need not . . . separately address due process claims subsumed by claims of ineffective assistance of counsel. The habeas court's finding that the petitioner was not prejudiced by any of the alleged improprieties of . . . counsel necessarily disposed of the petitioner's due process claims as well." (Internal quotation marks omitted.)

As stated previously in this opinion, in his reply to the respondent's affirmative defense of procedural default with respect to the due process claims in count one, the petitioner relied on the allegation of ineffective assistance on the part of Marquette and Simmons as the cause that prejudiced him necessary to overcome the claimed procedural default. In count two, the court considered and rejected the petitioner's claim that Marquette had rendered ineffective assistance by virtue of his failure to raise a claim at trial related to the alleged undisclosed agreement between the state and Foster. In so concluding, the court relied on its dispositive factual finding that "the petitioner failed to demonstrate the existence of an undisclosed agreement through which Foster would receive consideration from the state in exchange for her testimony at the petitioner's

trial." Consequently, the court concluded that the petitioner had failed to establish either deficient performance or prejudice with respect to the claim that Marquette failed to identify, plead, or litigate a claim with respect to the state's alleged failure to disclose a plea agreement with Foster.

For several reasons, the petitioner presently argues that the court's analysis of the *Brady* claim was flawed. The petitioner argues that the court improperly focused on his reply to the return, in which he relied on the claim of ineffective representation. The petitioner argues that the court ignored an additional ground of cause and prejudice that he raised in his posttrial brief, specifically, "that Marquette could not properly raise the *Brady* violation at trial because the state not only did not disclose, but vehemently denied, any agreement or understanding with [Foster]." The petitioner effectively argues that the court could not properly have concluded that his *Brady* claim was procedurally defaulted because the claim was based on the state's alleged failure to fulfill its obligation to disclose the representations that Narducci had made to Foster. Such nondisclosure, the petitioner asserts, necessarily impeded his defense counsel's efforts to raise the claim at the time of trial. The petitioner also argues that, even if Narducci's representations had been disclosed, the state, not Marquette, had the duty to correct Foster's trial testimony concerning the same. Although the petitioner also relied on ineffective assistance of trial counsel as the cause and prejudice to excuse the procedural default, he argues presently that the alleged failures of the prosecutor, on the one hand, and Marquette, on the other hand, are "mutually exclusive" and the court improperly "mischaracterized the nature of the claims and improperly concluded that count two subsumed count one."

The respondent argues both that it was improper for the petitioner to attempt to raise a new ground to

establish cause and prejudice in his posttrial brief and that the record is inadequate to review this ground in light of the fact that the habeas court did not specifically address it. In light of this court's analysis in *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 193 A.3d 625 (2018), the habeas court should have considered the merits of the *Brady* claim in its evaluation of the claimed procedural default. Moreover, for the reasons that follow, we conclude that the record is adequate for this court to consider the merits of that claim.

In connection with the present claim, the petitioner also challenges the court's factual finding, made in connection with its analysis of the petitioner's claim of ineffective assistance, that the petitioner failed to prove the existence of an undisclosed agreement between the state and Foster by which Narducci offered Foster consideration in exchange for her testimony at the petitioner's criminal trial. Because the court clearly relied on that finding in concluding that the petitioner's due process claims were procedurally defaulted, such finding is properly before us for review in connection with the present claim.

Before discussing the merits of the claim, we set forth some general principles that govern *Brady* claims. "The law governing the state's obligation to disclose exculpatory evidence to defendants in criminal cases is well established. The defendant has a right to the disclosure of exculpatory evidence under the due process clauses of both the United States constitution and the Connecticut constitution. . . . In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence after a request by the defense; (2) that the evidence was favorable to the defense; and (3) that the evidence was material. . . .

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, [our Supreme Court has] noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine. . . .

"The prerequisite of any claim under . . . *Brady* . . . [pertaining to the failure to disclose an agreement with a cooperating witness] . . . is the existence of an undisclosed agreement or understanding between the cooperating witness and the state. . . . Normally, this is a fact based claim to be determined by the trial court, subject only to review for clear error. . . . [T]he burden is on the defendant to prove the existence of undisclosed exculpatory evidence." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 227 Conn. App. 487, 497–99, 321 A.3d 470, cert. granted, 350 Conn. 924, 326 A.3d 247 (2024); see also *State* v. *Ouellette*, 295 Conn. 173, 185–87, 989 A.2d 1048 (2010).

"Whether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review. . . . [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 491, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007). A reviewing court affords plenary review to a habeas court's determination that a due process claim has been procedurally

defaulted. See, e.g., *Saunders* v. *Commissioner of Correction*, 343 Conn. 1, 10, 272 A.3d 169 (2022).

In contrast, "[w]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . 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." (Citation omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 227 Conn. App. 499–500.

We first consider the petitioner's argument that the court improperly applied the procedural default doctrine to his *Brady* claim. Under the procedural default doctrine, "a claimant may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding and . . . if the state, in response, alleges that a claimant should be procedurally defaulted from now making the claim, the claimant bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). Our Supreme

Court has explained that, "although federal postconviction jurisprudence does not bind us, this court has adopted the procedural default standard articulated in *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). . . . Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . The cause and prejudice standard is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . . The procedural default doctrine is a prudential limitation on the right to raise constitutional claims in collateral proceedings that vindicates the interests of finality of judgments and uniformity." (Citations omitted; internal quotation marks omitted.) *Saunders* v. *Commissioner of Correction*, supra, 343 Conn. 9.

"Although ineffective assistance of counsel . . . is the most commonly asserted basis for cause to excuse procedural default . . . it is not the exclusive basis. . . . [T]he cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests. . . . [T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the requirement is met." (Citation omitted; internal quotation marks omitted.) *Kukucka* v. *Commissioner of Correction*, 225 Conn. App. 159, 165, 314 A.3d 631, cert. denied, 350 Conn. 904, 323 A.3d 342 (2024).

This court has discussed the proper application of the procedural default doctrine to *Brady* claims, noting that "[o]ur Supreme Court has recognized that the showing of prejudice under the procedural default doctrine is the same showing of prejudice that is required for . . . *Brady* errors . . . and the United States

Supreme Court has observed that [c]ause and prejudice . . . parallel two of the three components of . . . *Brady* . . . . Corresponding to the second *Brady* component (evidence suppressed by the [s]tate), a petitioner shows cause when the reason for his failure to develop facts in state-court proceedings was the [s]tate's suppression of the relevant evidence; coincident with the third *Brady* component (prejudice), prejudice within the compass of the cause and prejudice requirement exists when the suppressed evidence is material for *Brady* purposes. . . . Thus, if [a petitioner] succeeds in demonstrating cause and prejudice, he will at the same time succeed in establishing the elements of his . . . *Brady* . . . due process claim. . . . *Banks* v. *Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004).

"We fail to see how the converse is not also true, namely, that the petitioner establishes cause and prejudice by establishing the suppression of material exculpatory evidence under *Brady* and its analogues. . . . We are not at liberty to overrule this court's or our Supreme Court's precedents applying the procedural default doctrine to due process claims under *Brady* and its analogues . . . however, we believe the prudential considerations underlying the doctrine would warrant looking past procedural default to address the merits . . . of such claims." (Citations omitted; internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 513–14.

In concluding that the *Brady* claim at issue in *Gaskin* had not been procedurally defaulted, this court in *Gaskin* was guided by the fact that the *Brady* claim before it was based on extrarecord information of which the petitioner's appellate counsel was unaware. See id., 516. The court in *Gaskin* thus carefully distinguished the claim before it from the *Brady* claim that this court

deemed to be procedurally defaulted in *Salters* v. *Commissioner of Correction*, 141 Conn. App. 81, 60 A.3d 1004, cert. denied, 308 Conn. 932, 64 A.3d 330 (2013), stating: "In *Salters* . . . this court held that the petitioner procedurally defaulted his *Brady* claim because, at the time of his criminal trial, he and his trial counsel were aware of a cooperating witness' history of arrests that they claimed for the first time at the habeas trial the state had failed to disclose. Specifically, the petitioner's trial counsel discussed at length his theories as to the existence of the witness' records, but he did not ask for an evidentiary hearing at that time. . . . Counsel did not seek further disclosure from the state at trial, and the petitioner did not claim a *Brady* violation in his direct appeal. . . .

"This case is distinguishable from *Salters* because the petitioner's appellate counsel could not have developed a due process claim without extrarecord information of which she was unaware. We note that the petitioner's appointed appellate counsel, a highly experienced appellate attorney, had only the record in front of her in determining to move to withdraw as counsel. *Anders* requires only that appellate counsel look to the entire record in deciding whether there are appealable issues. *Anders* v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). We conclude that it runs contrary to the spirit of *Anders* to then impose on appellate counsel the additional duty of investigating if there are also any possible claims outside of the record to determine if additional claims are viable." (Citations omitted; internal quotation marks omitted.) *State* v. *Gaskin*, supra, 183 Conn. App. 518–19.

Thus, this court's analysis in *Gaskin* supports the petitioner's argument that the habeas court should have considered whether the state's failure to disclose the understanding that Narducci had reached with Foster was sufficient to overcome the respondent's claim of

procedural default, not merely whether Marquette's alleged ineffective assistance amounted to cause and prejudice. As was the case in *Gaskin*, the *Brady* claim at issue in the present case could not have been developed by the petitioner's appellate counsel because it was based on extrarecord information of which both the petitioner's trial and appellate counsel were unaware. Thus, in response to the respondent's argument that the *Brady* claim was procedurally defaulted, the court should have thoroughly analyzed whether the *Brady* claim had merit.

As stated previously in this opinion, the court's analysis appears to have rested on its factual determination that "the petitioner failed to demonstrate the existence of *an undisclosed agreement* through which Foster would receive consideration from the state in exchange for her testimony at the petitioner's trial." (Emphasis added.) A proper evaluation of whether the petitioner's *Brady* claim had merit, however, must be guided by an understanding that the state's obligations under *Brady* are not limited to the requirement that it disclose the existence of what may be characterized as *a formal agreement* to provide some measure of consideration to a cooperating witness. Rather, "[t]he prerequisite of any claim under . . . *Brady* [pertaining to the state's failure to disclose an agreement with a cooperating witness] . . . is the existence of an undisclosed *agreement or understanding between the cooperating witness and the state*." (Emphasis added; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 227 Conn. App. 499. An agreement or understanding between a cooperating witness and the state is a potentially fertile ground for impeaching the credibility of a cooperating witness. See *State* v. *Ouellette*, supra, 295 Conn. 190 ("The importance of candor is particularly acute when a cooperating witness testifies on behalf of the state, which also wields power over that

witness' sentencing. As one court has noted, '[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . .' "). As this court has observed, "[o]ur case law is clear . . . that the petitioner need not establish the existence of a formal plea agreement in order to prove a *Brady* violation. [E]vidence that merely suggests an informal understanding between the state and a state's witness may constitute impeachment evidence for the purposes of *Brady*. . . . Such evidence is by no means limited to the existence of plea agreements. . . . An agreement by a prosecutor with a cooperating witness to bring the witness' cooperation to the attention of the judge who later sentences the witness on [her] own pending criminal charges is a deal that must be disclosed to the defendant against whom [she] testifies, even if the deal does not involve a specific recommendation by the prosecutor for the imposition of a particular sentence." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 758–59, 187 A.3d 1163 (2018); see also *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 725, 138 A.3d 430 (2016) (same). Indeed, "[a]ny . . . understanding or agreement between any state's witness and the state police or state's attorney clearly falls within the ambit of *Brady* principles." *Walker* v. *Commissioner of Correction*, supra, 103 Conn. App. 493; see also *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 152, 10 A.3d 578 (same), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

It is clear from the petitioner's arguments, both before the habeas court and this court, that his *Brady* claim is not based on the existence of a formal agreement between Narducci and Foster for an agreed upon disposition, but on what he characterizes as a "suggested understanding" that, he argues, "is precisely the kind of agreement or understanding that the state is

required to disclose." This argument is consistent with the principle that "[t]he purpose of requiring the state to disclose impeachment evidence to a criminal defendant is to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . ." (Internal quotation marks omitted.) *State* v. *Floyd*, 253 Conn. 700, 744, 756 A.2d 799 (2000).

The habeas court was presented with undisputed evidence concerning the representations that Narducci made to Foster. Narducci testified that, at the time of the petitioner's criminal trial, Foster had pending criminal charges in connection with the victim's homicide, and she was represented by a special public defender, Richard Kelly.[6] Narducci stated that he spoke with Kelly in connection with interviewing Foster prior to her testifying at trial and that Foster's testimony was important in obtaining a conviction. The following colloquy between the respondent's counsel and Narducci transpired:

"Q. Okay. You had testified previously that the state made no offers to [Foster] prior to [the petitioner's] trial?

"A. That's correct.

"Q. Okay. Did the state make that clear to [Kelly] that there were going to be no offers regarding [Foster's] testimony?

"A. Yes . . . that was made clear.

"Q. Okay. So, just so I'm clear, it was made clear to both . . . Foster and [Kelly], who represented [Foster]—

"A. Yes.

"Q. —that there would be absolutely no promises or deals regarding her testimony?

[6] We note that neither Foster nor Kelly testified at the habeas trial.

"A. That's correct. We did say at the time, and . . . what I said virtually in all the cases that I've handled, that we do not make any specific promises concerning any offers that are being made. What we do tell them [is], in the past, people who come in to testify truthfully and accurately, that information is considered by the prosecuting authorities in determining a recommendation. And if they do testify truthfully and completely and accurately, that information will be made available to the sentencing judge, but we do not make any promises, any specific promises, as it relates to any offense.

"Q. Okay. And do you recall [Foster] testifying at [the petitioner's] trial that she hoped for some consideration?

"A. That's correct. We also tell witnesses that . . . it's expected that you can testify that you're hoping for some consideration in exchange for your complete, accurate and truthful testimony.

"Q. Okay. And the mere fact that a witness hopes for consideration, does that guarantee that the state will give consideration after the testimony?

"A. No, it doesn't.

"Q. Okay. So, there could be times when a witness testifies for the state, hopes to get consideration, but, ultimately, does not get consideration?

"A. That is correct."

The respondent's counsel then showed Narducci a copy of a note that Narducci had authored, dated November 12, 2014, and included in Foster's criminal file. Narducci testified that he, in fact, created notes to memorialize what was occurring in Foster's case and that he inserted the note into her criminal file. The following colloquy between the respondent's counsel and Narducci then occurred:

"Q. . . . Did the state make any offers to [Foster] prior to [the petitioner's] trial?

"A. Did not.

"Q. Why not?

"A. Because [Foster], we believed, was an important witness in this particular case. We did not want to make an offer to her because we were concerned that a jury hearing that there was an offer made to her might . . . view her credibility differently if there was a quid pro quo, if you will, offer made, and so we intentionally did [not] make an offer to her, nor did we indicate to her counsel or to [Foster] that we were prepared to make an offer.

"Additionally, I wanted to see all of the information come out, not only from [the petitioner's] trial, but also what information came out . . . at [Schaffer's] trial. So, it wasn't until after all of that information could come out and I had an opportunity to review it and digest it that we made an offer concerning [Foster].

"Q. Okay. So, one of the things you mentioned was that not providing an offer to [Foster] prior to [the petitioner's] trial was important for the state.

"A. Yes."

With respect to the memorandum that Narducci put into Foster's file, he testified that he drafted it following the petitioner's trial and that it memorialized conversations that he had with Kelly following the petitioner's trial. The memorandum dated November 12, 2014, and admitted into evidence at the habeas trial provided in relevant part as follows: "Since the verdict in [the petitioner's criminal trial], I have spoken to [Kelly] on several occasions concerning the ultimate disposition of [Foster's] case. [Kelly] wants to dispose of her case as soon as practicable, and is hoping to either dispose of

the case, or address her bond, when he returns from Florida in early December. [The petitioner] is [scheduled] for sentencing on January 6, 2015.

"Initially, I did not think it prudent to address [Foster's] case until after [the petitioner] was sentenced. [Kelly] has pointed out that [Foster] has been tremendously cooperative throughout [Schaffer's] and [the petitioner's] cases (putting aside, for the moment, that her lack of truthfulness at the outset, and her lack of complete honesty when the police approached her in 2009, is a main contributing factor in the length of these cases). I am now willing to reconsider whether we should attempt to resolve her case next month.

"There have been no discussions concerning a disposition, or even the charges to which [Foster] would plead. [Foster] was made aware of [the] fact [that] there were no promises or offers made, only that, in the past, when a person testifies completely and truthfully, that is taken into consideration in the formation of an offer, and is called to the court's attention. Moreover, she testified [at the petitioner's trial] that she is hoping for some consideration and/or leniency.

"After reviewing the case, [Foster's] professed participation, and her testimony at two [h]earings in [p]robable [c]ause and at two trials, I am inclined to extend an offer of [fifteen] years suspended after [five] years served followed by [five] years of probation on the charges of [h]indering [p]rosecution in the [s]econd [d]egree . . . and [t]ampering with [p]hysical [e]vidence . . . . I am willing to listen to [Kelly's] arguments on the length of the suspended portion of the sentence."

Narducci testified that, at the time of the petitioner's trial, the state had pending charges against Foster for "accessory murder, felony murder and robbery in the

first degree." Consistent with the memorandum, Narducci testified that no formal agreements existed between the state and Foster. Moreover, Narducci testified that the state did not have an informal agreement with Foster to either reduce her bond or pending charges or with respect to any particular sentence in exchange for her testimony at the petitioner's trial. According to Narducci, following the petitioner's conviction, Kelly approached Narducci about a possible plea deal. Ultimately, the state offered Foster a plea deal pursuant to which the original charges were substituted with charges for hindering prosecution and tampering with evidence. Narducci testified that the reduced charges were, in his view of her testimony and all other information related to the case, "more in tune with [Foster's] involvement in this particular murder."

At the habeas trial, Narducci testified about the undisputed fact that a substitute information in Foster's file, reflecting the lesser charges that he had negotiated with Kelly, was dated May 20, 2014, prior to the petitioner's criminal trial. Narducci testified that the date on the substitute information was a scrivener's error. He explained: "I know that I had not discussed any changes in the charges prior to [the petitioner's] trial. I know that I did not speak to [Kelly] about any negotiations about the pleas or charges until after [the petitioner's] trial. I know that [the petitioner's] trial was after May 14, 2014. And I know that my practice is, when there are changes and I file a substitute information, I file it either on the day or shortly before there is a plea, that is taken . . . in this case, I believe, [Foster] ended up pleading on May 27, 2015, and I would not have prepared a change of charges in May of 2014. I would have prepared that in May of 2015, and that leads me to the conclusion that that is a scrivener's error."

In its memorandum of decision, the court stated that it had accepted as true the undisputed version of events

described by Narducci and reflected in the memorandum that he put into Foster's criminal file. In its analysis of the petitioner's claim of ineffective assistance of trial counsel, the court stated: "[Narducci] testified at the habeas trial that there were no promises or offers made to Foster in exchange for her testimony because Foster was an important witness in the state's case, and the state was concerned a jury would view her credibility differently had such an offer been made. [Narducci] further indicated that he wanted to review all of the information from Schaffer's trial and the petitioner's trial before making Foster an offer. [Narducci], who also served as the prosecutor in Foster's subsequent criminal case, wrote a note for his file, dated November 12, 2014, in which he indicated that there had been no prior discussions concerning a disposition or substituted charges with Foster, and that Foster had been made aware of the fact that the state had made no promises or offers to her as a result of her testimony.

"[Narducci] further testified that Foster's counsel, [Kelly], approached him regarding a possible plea deal after the petitioner's trial concluded. The state subsequently offered Foster a plea deal that substituted her pending charges to charges of hindering prosecution and tampering with evidence. [Narducci's] office generated a substitute information for Foster in anticipation for her plea and sentencing. The substitute information was dated May 20, 2014, which would have been several months prior to the petitioner's criminal trial, but [Narducci] testified that the recording of that date was a scrivener's error. [Narducci] indicated that his general practice is to file a substitute information shortly before or on the date a plea is taken and because Foster pleaded guilty on May 27, 2015, he would have prepared an amendment of charges in May, 2015, not May, 2014. [Narducci] also testified that the bond reduction to a promise to appear in Foster's file was dated December

11, 2014, after the purported date of the substitute information, but her charges listed the original charges [that he had brought against her] rather than the substituted charges. As a result, [Narducci] concluded that the May 20, 2014 date was recorded in error. The court finds [Narducci's] testimony credible.

"Foster did not testify at the petitioner's habeas trial. At the petitioner's criminal trial, [Marquette] cross-examined Foster regarding any benefit she might receive from the state for her own charges in exchange for her testimony against the petitioner. Foster denied the existence of a deal but testified that she was hopeful that her testimony would help with her charges. [Marquette] also addressed Foster's potential biases during his closing argument to the jury. Following the petitioner's trial, Foster's attorney, [Kelly], filed a motion for bond reduction, and Foster's bond was reduced from $2.5 million to a promise to appear. At the petitioner's sentencing, [Marquette] raised the issue of Foster's bond reduction with a motion for acquittal based on the state's failure to disclose a deal with Foster. [Narducci] addressed the issue at sentencing and restated that no deal existed between the state and Foster. The court, *Jongbloed*, *J.*, denied [Marquette's] motion for acquittal.

"Based on the foregoing, the court finds that the petitioner failed to demonstrate the existence of an undisclosed agreement through which Foster would receive consideration from the state in exchange for her testimony at the petitioner's trial. The petitioner has not proven that [Marquette's] performance in addressing such agreement was deficient or that he was prejudiced thereby."

The petitioner does not invite this court to second-guess the court's favorable assessment of Narducci's credibility, but instead argues that the court's ultimate

finding, that there was nothing that Narducci was obligated to disclose to him, was erroneous in light of what Narducci admitted having said to Foster. The gist of the petitioner's challenge to the court's finding is that the evidence reflects that, by informing Foster about his past practice involving cooperating witnesses in prior cases, Narducci had in fact suggested to her that the consideration that past witnesses had received in exchange for their testimony was likewise available to her in exchange for her testimony. As the petitioner argues, "Narducci's comments are heavily implying that, if Foster does what these past cooperating witnesses had, she will reap the same benefits."

As the precedent discussed previously in this opinion reflects, what constitutes an agreement or understanding between the state and a cooperating witness for *Brady* purposes is broadly defined and must be determined on a case-by-case basis. Evidence of such an agreement is not limited to what might be deemed formal plea agreements pertaining to specific charges, promises to recommend a specific sentence, or even express promises by the state to bring a witness' cooperation to the attention of a sentencing judge. In light of its potentially high value to the defense as fodder for impeachment, evidence that reasonably suggests that an informal understanding between the state and a cooperating witness exists, or reasonably may be viewed as an inducement by the state, falls within the ambit of what must be disclosed. See *State* v. *Ouellette*, supra, 295 Conn. 190; *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 758–59.

We recognize that there was no evidence that Narducci had presented Foster with an explicit plea offer that was tailored to the specific charges she faced at the time of the petitioner's criminal trial. Nonetheless, the evidence on which the court relied reflects that Narducci made Foster aware of the state's past practice

of providing consideration to cooperating witnesses, specifically, that, "when a person testifies completely and truthfully, that is taken into consideration in the formation of an offer, and is called to the court's attention."[7] In light of the undisputed context in which Narducci made these statements to Foster, who was facing very serious charges prior to her testimony at the petitioner's criminal trial, the statements strongly suggest that the past practice that Narducci described would apply to Foster if she testified favorably at the petitioner's trial. Thus, the statements reasonably give rise to an understanding that, in exchange for her cooperation, Narducci would provide Foster with a favorable plea deal in connection with her pending charges and bring her cooperation to the attention of the court at the time of her sentencing.

It is of no consequence to our evaluation of Narducci's statements that he did not describe with greater particularity the consideration that he had suggested to Foster in exchange for her testimony or, for that matter, that he testified as to his belief that he had not extended an "offer" to Foster.[8] That Narducci suggested

[7] The respondent observes that, although Narducci testified with respect to what he had stated to Foster about the state's past practice of providing consideration to cooperating witnesses, the court, in its findings of fact, did not explicitly refer to this portion of Narducci's testimony. Thus, the respondent argues that "the court did not find that such a promise ever was conveyed to Foster in any form."

In light of the fact that the court described Narducci as a credible witness and specifically referred to Narducci's testimony that he had drafted and put the November 12, 2014 memorandum in Foster's criminal file, we are not persuaded by the respondent's argument that the court did not likewise implicitly credit Narducci's uncontradicted testimony about what he had stated to Foster about the state's past practice with cooperating witnesses, as was reflected in Narducci's memorandum.

[8] The respondent argues that "the habeas court credited Narducci's testimony that the state offered no deal in exchange for Foster's testimony. This credibility determination is unassailable on appeal and defeats the petitioner's attempt to establish the prejudice components of . . . his allegation of cause and prejudice." Thus, the respondent appears to argue that, because Narducci opined that his statements to Foster did not amount to

consideration in general terms instead of presenting Foster with a more detailed offer related to her specific charges is unsurprising in light of Narducci's candid testimony that he wanted to prevent the defense from being able to use evidence of an offer to challenge her credibility. As the authorities we have cited previously in this opinion reflect, a prosecutor's obligation to disclose evidence that the state induced a cooperating witness to testify, however, is not triggered by a prosecutor's use of talismanic words or phrases, or what might be deemed formalized commitments from the state. Our obligation to protect the petitioner's right to due process counsels against such a mechanistic approach in our evaluation of *Brady* claims.

After applying the proper legal standard to the court's undisputed findings concerning what Narducci stated to Foster, we conclude that Narducci's statements suggested an informal understanding to provide consideration to Foster in exchange for her testimony at the petitioner's trial.[9] Accordingly, we conclude that the

an offer of consideration and the court credited that testimony, this court is bound by that opinion. Narducci testified as a fact witness, and this court is bound by the factual representations that were credited by the habeas court. To the extent that Narducci opined during his testimony that his statements did not rise to the level of an offer that should have been disclosed to the defense, such testimony is akin to a legal opinion that is not binding on this court.

[9] Our conclusion that an informal understanding existed is based solely on what Narducci stated to Foster. The undisputed evidence that, following the petitioner's criminal trial, Narducci entered into a plea agreement with Foster does not, in and of itself, reflect that any type of undisclosed suggestion or understanding between the state and Foster existed at the time of the petitioner's criminal trial. See *Shabazz* v. *Artuz*, 336 F.3d 154, 165 (2d Cir. 2003) ("the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony"); see also *Bell* v. *Bell*, 512 F.3d 223, 234 (6th Cir.) (en banc) ("although we do not take issue with the principle that the prosecution must disclose a tacit agreement between the prosecution and a witness, it is not the case that, if the government chooses to provide assistance to a witness following a trial, a court must necessarily infer a preexisting deal subject to disclosure under *Brady*"), cert. denied, 555 U.S. 822, 129 S. Ct. 114, 172 L. Ed. 2d 35 (2008); *Williams* v.

state improperly suppressed these statements. Thus, the petitioner has satisfied the first two prongs of *Brady* by demonstrating that the prosecution suppressed evidence that was favorable to the defense. The remaining prong of *Brady* requires an evaluation of whether the suppressed evidence was material. "Not every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation. Indeed, a prosecutor's failure to disclose favorable evidence will constitute a violation of *Brady* only if the evidence is found to be material. The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial . . . . In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. [The] . . . touchstone of materiality is a reasonable probability of a different result, and the adjective [reasonable] is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (Citation omitted; internal quotation marks

Coyle, 260 F.3d 684, 707 (6th Cir. 2001) ("[t]he mere fact that [the witnesses'] sentences were later altered is not evidence that a deal existed prior to their testimony at trial"), cert. denied, 536 U.S. 947, 122 S. Ct. 2635, 153 L. Ed. 2d 816 (2002).

omitted.) *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 529–30.

Our Supreme Court has applied this standard in cases where, as here, the state suppressed evidence that was favorable to the defense in that it could have been used to impeach a cooperating witness, noting that the ultimate inquiry for materiality under *Brady* in such cases is whether there is a "reasonable probability that the jury would have reached a different verdict had the state disclosed the suppressed evidence." *State* v. *Floyd*, supra, 253 Conn. 746. Our Supreme Court in *Floyd* explained: "The purpose of requiring the state to disclose impeachment evidence to a criminal defendant is to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . . In determining whether impeachment evidence is material, the question is not whether the verdict might have been different without any of [the witness'] testimony, but whether the verdict might have been different if [the witness'] testimony [was] further impeached by disclosure of the [alleged deal]. . . . The fact that the witness' testimony is corroborated by additional evidence supporting a guilty verdict also may be considered in determining whether the suppressed impeachment evidence was material." (Citations omitted; internal quotation marks omitted.) Id., 744.

Finally, we observe that "[a] trial court's determination as to materiality under *Brady* presents a mixed question of law and fact subject to plenary review, with the underlying historical facts subject to review for clear error." *Cator* v. *Commissioner of Correction*, 229 Conn. App. 393, 429, A.3d (2024).

Although we recognize that the habeas court did not consider the merits of *Brady*'s materiality prong, we are satisfied that under the unique circumstances of

the present case we may do so for four reasons.[10] First, the relevant historical facts concerning the suppressed evidence are not in dispute. Second, the record of the petitioner's criminal trial was presented in evidence at the habeas trial, thereby affording this court with a clear record on which to assess the significance of Foster's testimony with respect to the judgment of conviction and the likely effect, if any, that the disclosure of the suppressed evidence may have had on the jury's assessment of that testimony. Third, in the absence of any issues of fact concerning what was suppressed at trial and the evidentiary basis of the petitioner's conviction, we are left to consider whether the suppressed evidence, if used to impeach Foster, gives rise to a reasonable probability of a different result. This narrow issue presents a question of law over which our review is plenary. Fourth, the parties have availed themselves of the opportunity to address the issue of materiality in their appellate briefs. The respondent, while disputing that the state failed to disclose evidence favorable to the defense, also argues that the evidence at issue was not material under *Brady*. The petitioner, relying on the underlying historical facts that are not in dispute, argues that the evidence was material under *Brady*.

At the habeas trial, the petitioner introduced into evidence a transcript of Foster's testimony at his criminal trial. Foster testified that the petitioner was a frequent visitor when she and Schaffer resided at 119 Salem. During the afternoon of May 14, 2004, Schaffer left their apartment at ArtSpace after he had learned from his mother that someone at 119 Salem, their former residence, was "throwing things in a dumpster." Schaffer was angry because he was supposed to have retrieved items from 119 Salem, including items that

[10] See *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 760 (concluding that petitioner suffered *Brady* violation after concluding that habeas court applied incorrect legal standard).

belonged to Foster, prior to this time. Schaffer thereafter left the apartment for a period of time. When he returned to their apartment, his clothing had visible bloodstains.

Foster further testified that, after Schaffer returned, he spoke to Dullivan on the phone. Schaffer then told Foster that she had to go somewhere with him. The petitioner drove to their apartment and drove them the short distance to the parking lot of a fast food restaurant that is located behind 119 Salem. As the petitioner, Schaffer, and Foster walked down a path they had used on prior occasions to reach 119 Salem, Schaffer stated that "they had to make it look like a robbery." When they reached 119 Salem, Foster immediately observed the victim face-down on the ground. Foster heard the victim say, "help me." The petitioner and Schaffer "flipped him over." Schaffer removed the victim's shirt, shoes, and wallet. The petitioner and Schaffer then forcefully kicked the victim and struck his head with a pipe that they found in the nearby garage. Schaffer then placed a bag over the victim's face. The petitioner urged him to "hurry up."

Foster also testified that Schaffer directed her to strike the victim with the pipe so that she "couldn't tell" anyone about what she had observed at the scene. When she was reluctant to comply, Schaffer struck her in the face which caused her nose to bleed. Thereafter, Foster struck the victim with the pipe and kicked him.

Foster testified that a white van was parked in the driveway of 119 Salem. The petitioner and Schaffer retrieved the petitioner's automobile and, at Schaffer's instruction, Foster, following the petitioner's automobile, drove the van from 119 Salem to Mohegan Sun casino. Shortly thereafter, Foster, following the petitioner's automobile, drove the van from Mohegan Sun casino to a Foxwoods Casino commuter lot. At this

time, Foster parked the van and got into the backseat of the petitioner's automobile. The petitioner then drove Schaffer and Foster back to ArtSpace and then left to pick up his girlfriend. Foster testified that, while she was living at ArtSpace, there was a cardboard box in her apartment that contained the victim's wallet, a digital camera that Schaffer removed from the van that Foster drove from 119 Salem, a cell phone, and the blood-stained basketball jersey that Schaffer was wearing on May 14, 2004.

The respondent argues that the foregoing testimony was not material because it was "largely corroborated by both interested and disinterested witnesses who variously saw Foster and the petitioner at the scene, saw the petitioner in possession of items taken from [the victim], heard the petitioner make admissions regarding his participation in [the victim's] murder, and saw the petitioner destroying the items taken from [the victim]." Although the state presented evidence, including testimony from Dullivan and Sebastian, that corroborated portions of Foster's testimony, Foster was the only witness with firsthand knowledge of the specific events leading up to the victim's murder and the nature and extent of the petitioner's violent criminal conduct. No other witness was able to corroborate what Foster observed firsthand, as Schaffer did not testify at the petitioner's trial.[11] The state did not present any forensic evidence tying the petitioner to the crime scene, nor did the petitioner at any time provide a confession to the police with respect to his conduct during the events

[11] The state brought charges against Schaffer in connection with his role in the events underlying the petitioner's conviction. During his criminal trial in 2012, and after several witnesses had testified in the state's case-in-chief, Schaffer elected to plead guilty under the *Alford* doctrine; see *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); to manslaughter in the first degree and robbery in the third degree. After accepting the plea, the court, *Jongbloed*, *J.*, imposed a sentence of twenty years of incarceration, execution suspended after fifteen years, followed by five years of probation.

at issue.[12] After carefully reviewing the evidence presented at the petitioner's criminal trial, we agree with the petitioner that Foster's testimony was crucial to the state's case against the petitioner.[13]

In an evaluation of the materiality of the suppressed evidence, we must consider whether there is a reasonable probability that the jury would have reached a different verdict if Foster had been further impeached by use of the suppressed evidence at issue. The record of the petitioner's criminal trial reflects that, at the outset of her testimony, Foster stated that she was incarcerated and charged with murder, accessory to murder, burglary and robbery charges in connection with the victim's death. Foster testified that, prior to her incarceration, she had been placed in a witness protection program with her two children.

The following colloquy between Narducci and Foster transpired:

"Q. With respect to your testimony, have any promises been made to you in conjunction with your truthful testimony?

"A. No.

"Q. Have you been offered any sort of consideration or any sort of promise as a result of your testimony?

[12] We note that, although the state did not present evidence of a confession by the petitioner, at the petitioner's trial, Sebastian testified that, following the victim's murder, she saw the petitioner making punching and kicking motions while stating that "we fubarred . . . that motherfucker . . . ." Sebastian testified that, because the incident involving the victim was a frequent topic of discussion at that time, she believed that the petitioner was referring to the victim and that the word "FUBAR" was an acronym that stood for "[f]ucked up beyond all recognition."

[13] Our conclusion is consistent with Narducci's testimony at the habeas trial that he had endeavored not to make what he considered to be an "offer" to Foster because, in light of her importance to the state's case, he did not want to damage her credibility in the eyes of the jury.

"A. No.

"Q. Okay. Fair to say that you're hoping to receive some consideration for your truthful testimony?

"A. Yes.

"Q. Okay. Have any promises or consideration been given to you or predicated upon the conviction of a person or persons?

"A. No.

"Q. What do you hope about it?

"A. To be sentenced, I guess, so I can—

"Q. And take into consideration your truthful and complete testimony?

"A. Yes.

"Q. But have any promises, as you sit here today, ever been made to you in terms of leniency for your truthful testimony?

"A. No."

During Foster's cross-examination by the petitioner's trial counsel, the following colloquy occurred:

"Q. You've been arrested at this point?

"A. Yes.

"Q. And presently you're over at York [Correctional Institution]?

"A. Yes.

"Q. And the state has made no promises to you?

"A. That's true.

"Q. Is it fair to say that from your point of view that what happens here in this courtroom will affect what happens to you?

"A. No.

"Q. That's not true?

"A. In my opinion, no."

During closing arguments, Marquette challenged Foster's credibility on several grounds, but he also invited the jury to consider whether the state's witnesses "lied on the witness stand simply to save their own skins or to gain some sort of benefit specific to them." Marquette then stated, "[f]or example, I asked [Foster] about getting less time in jail. I can't remember all the questions that I put to her, but scrutinize her motives."

As the aforementioned evidence reflects, through direct and cross-examination, the jury heard evidence that Foster faced criminal charges and that Foster hoped for consideration of some type from the state in exchange for her testimony. The defense, therefore, was able to impeach Foster to some extent by demonstrating that she hoped for consideration.[14] Because the state suppressed the evidence of Narducci's statements to Foster in anticipation of her testimony, however, the jury did not learn that Foster's hope for consideration logically could have been based on what she learned from Narducci about his office's past practice of providing specific forms of consideration to cooperating witnesses, namely, consideration "in the formation of an offer" and that a cooperating witness' testimony "is called to the court's attention."

We are persuaded by the petitioner's argument that his impeachment of Foster at trial, with respect to the

[14] The state does not have a duty to disclose that a cooperating witness merely hopes to receive consideration; its obligation to disclose arises from an affirmative inducement made by the state to a cooperating witness. See *Akrawi* v. *Booker*, 572 F.3d 252, 263 (6th Cir. 2009) ("the mere fact that a witness desires or expects favorable treatment in return for his testimony is insufficient; there must be some assurance or promise from the prosecution that gives rise to a mutual understanding or tacit agreement" (emphasis omitted)).

critical issue of whether her testimony was motivated by her desire to receive consideration from the state, would have been more powerful if the petitioner's trial counsel could have utilized the statements that had been made to her by Narducci. Marquette could have argued to the jury that Foster was not merely being optimistic that the state might provide her with consideration, but that she was testifying with a clear understanding of the state's past practice of providing consideration to cooperating witnesses. See, e.g., *United States* v. *Dvorin*, 817 F.3d 438, 450–51 (5th Cir.) (undisclosed plea agreement with cooperating witness was material for *Brady* purposes because it was more powerful for impeachment purposes than cooperating witness' testimony that he merely hoped he would receive leniency but had not received any promise from government that he would), cert. denied, 580 U.S. 859, 137 S. Ct. 140, 196 L. Ed. 2d 108 (2016). In light of the foregoing, we are persuaded that, if Foster's testimony was further impeached by disclosure of the representations that Narducci had made to her concerning his office's past practice of providing consideration to cooperating witnesses, there is a reasonable probability that the jury would have reached a different verdict.

Accordingly, we conclude that the habeas court improperly determined that the petitioner's due process claim under *Brady* was procedurally defaulted. We also conclude that the petitioner has demonstrated that a *Brady* violation occurred.

The judgment is reversed and the case is remanded with direction to render judgment granting the petition for a writ of habeas corpus, to vacate the petitioner's conviction of conspiracy to commit murder in violation of §§ 53a-54a and 53a-48 (a) and murder in violation of §§ 53a-54a (a) and 53a-8 and to order a new trial on those offenses.

In this opinion the other judges concurred.

BROOK RUN DEVELOPMENT CORP. *v.* KRISTINE NOON ET AL.
(AC 46873)

Elgo, Suarez and DiPentima, Js.

Syllabus

The defendant tenant appealed from the trial court's judgment for the plaintiff landlord in the plaintiff's summary process action. The defendant claimed, inter alia, that the court improperly concluded that her residential lease with the plaintiff had terminated because a specific provision of the lease agreement did not operate to automatically renew the lease. *Held*:

The trial court properly determined that the defendant's residential lease with the plaintiff had terminated, as the language of the lease was clear and unambiguous as a matter of law.

Argued September 17, 2024—officially released January 28, 2025

Procedural History

Summary process action, brought to the Superior Court in the judicial district of New Haven, Housing Session, where the plaintiff withdrew its complaint as to the defendant John Doe et al.; thereafter, the case was tried to the court, *Spader*, *J.*; judgment for the plaintiff, from which the named defendant appealed to this court. *Affirmed.*

Richard F. Connors, for the appellant (named defendant).

David E. Dobin, with whom was *Joshua Pedreira*, for the appellee (plaintiff).

Opinion

ELGO, J. In this summary process action, the defendant Kristine Noon appeals from the judgment of the trial court in favor of the plaintiff, Brook Run Development Corp.[1] On appeal, the defendant claims that the

[1] The original defendants in this case were Kristine Noon, her brother William Henninger, and John Doe and Jane Doe. The plaintiff withdrew the cause of action against John Doe and Jane Doe on July 5, 2023. Because Noon was the original leaseholder, and Henninger moved into the residence after the lease was signed, we refer to Noon as the defendant throughout this opinion.

court improperly concluded that her residential lease with the plaintiff had terminated because a specific provision of the lease did not operate to automatically renew the lease.[2] We affirm the judgment of the court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. The plaintiff is the owner of real property located at 183 Bull Hill Lane, Unit 12, in West Haven (premises). On November 17, 2012, the plaintiff and the defendant entered into a residential lease agreement for the premises, at the amount of $1200 per month (lease). The original lease term was for two years, running through December 14, 2014. The typed lease, prepared by the plaintiff, defined certain terms used therein, noting that "the words 'we,' 'us,' and 'our' means the [l]andlord" and "[t]he words 'you' and 'yours' means the [t]enant." It also contained a handwritten provision labeled 10 (A) which read as follows: "This lease will automatical[l]y renew on every an[n]iversary for the term of one year unless a written [agreement] is signed by us, or you vacate the apartment when the lease ends." The final relevant portion of the lease was a holdover provision, paragraph 18, which read as follows: "If you continue to occupy the [a]partment with our consent after this lease ends, this lease will be on a monthly basis. In that case, either you or we can send a notice to the other and cancel lease at any time. All the other terms of this lease will still apply."

The defendant took possession of the premises and has remained there throughout the events relevant to this appeal. On September 19, 2021, the plaintiff sent the defendant a notice of lease nonrenewal. That notice informed the defendant that the lease would no longer

[2] Although the defendant presents six issues in her briefing to this court, they may be distilled to the question of whether the trial court properly interpreted the lease in concluding that the automatic renewal provision had terminated.

renew and that the plaintiff was providing "the required written notice to vacate the premises as stated in your current [l]ease." The defendant did not vacate. The plaintiff then commenced a summary process action (first action) against the defendant, alleging, inter alia, lapse of time, with return of service on April 9, 2022. The defendant filed an answer and a special defense pursuant to General Statutes § 47a-23c.[3] The first action concluded on May 26, 2022, when the court rendered a judgment of possession in favor of the defendant, who the court found had proved her special defense that she is entitled to the protections provided by § 47a-23c.

On December 27, 2022, the plaintiff sent the defendant a letter notifying her that it would be increasing her rent to $1300 per month, effective February 1, 2023. Since the inception of the lease in 2012, the defendant has continued to pay the same rental amount of $1200 per month without increase. This letter also apprised the defendant that a previous notice to quit from November, 2022, was "rescinded and no longer has any legal effect."[4] It went on to notify the defendant that "[t]his notice is to advise you that you are in violation of your lease and/or rental agreement and your obligations

[3] General Statutes § 47a-23c prohibits eviction of certain tenants with physical or mental disability except for good cause, which is defined in subdivision (b) (1). Although the court found, in the first action, that the term of the lease had terminated, the court also determined that, because the defendant is protected by statute, she could not be evicted for lapse of time.

[4] The November 17, 2022 notice to quit read, in substance, as follows: "I hereby give notice that you are to quit possession or occupancy of the premises described above and now occupied by you on or before November 27, 2022 for the following reasons:

"(1) Nonpayment of rent.

"(2) Although you previously had a right or privilege to occupy the premises, said right or privilege has terminated.

"Any payments tendered after service of this Notice shall be accepted as 'USE and OCCUPANCY' and NOT as rent. You may be evicted only if the landlord brings a judicial action against you and in said action you may present a defense." (Emphasis in original.)

under Connecticut law . . . .'' The pretermination notice, provided pursuant to General Statutes § 47a-15, accused the defendant of nuisance causing conduct and claimed that the defendant owed the plaintiff $500 for ''marshal and legal fees incurred to enforce your lease.'' The letter contained the further proviso that, ''[i]f these conditions are not corrected within the time frame indicated, your lease will terminate on the sixteenth day after you receive this letter.'' On May 25, 2023, the plaintiff served another notice to quit upon the defendant, citing the violation of lease terms, nonpayment of rent, failure to remedy a nuisance, and refusal to agree to a fair and equitable rent increase. The defendant nevertheless retained possession of the premises at all relevant times and refused to vacate.

The plaintiff then commenced the present action on May 30, 2023. In its summary process complaint, the plaintiff alleged five counts: (1) nonpayment of rent; (2) refusal to agree to a fair and equitable rent increase; (3) nuisance; (4) violation of the terms of the lease; and (5) right or privilege to occupy terminated. From the outset, the plaintiff argued that, in the first action, the trial court held that the term of the lease had ''in fact terminated.''[5] The plaintiff further noted that, since the inception of the lease in 2012, the defendant has continued to pay the same rental amount of $1200 ''without increase.''

In her answer, the defendant claimed to have a ''current lease'' and, citing paragraph 10 (A) of the lease, asserted that it provides for automatic renewal. The

[5] The plaintiff attached to its complaint a copy of the original lease for the premises; the original notice of lease nonrenewal, dated September 19, 2021; the court's order in the first action, dated May 26, 2022; the plaintiff's December 27, 2022 pretermination notice to the defendant; the final notice to quit, dated May 25, 2023; the return of service documentation dated May 30, 2023; and a handwritten letter by the plaintiff to the defendant advising her that her brother must vacate the premises under the terms of the lease.

defendant subsequently filed an amended answer and special defenses, in which she claimed, inter alia, that the lease had renewed at the current rent of $1200 per month and that the plaintiff's claim that there was a termination of right or privilege to occupy the premises "must fail" due to principles of res judicata. The defendant argued that the court, in resolving the first action, had found that a valid lease existed between the parties. In its reply, the plaintiff generally denied those special defenses.

A one day trial followed. The plaintiff called Robert Lanziero,[6] who had drafted the lease and testified with respect to the automatic renewal provision set forth in paragraph 10 (A). Lanziero testified that he had handwritten the provision and that the defendant had never agreed to terminate the lease. Lanziero further testified that the lease allows the lessor to "preclude the lease from renewing an additional year." Finally, Lanziero testified that the defendant had been leasing the premises for eleven years and that she continues to pay the original $1200 rent, having refused to pay the rent increase. The court also heard testimony from the defendant's neighbor and the defendant.

In its memorandum of decision, the court noted, with respect to the first action, that the lease had terminated but that the defendant qualified as a protected tenant under § 47a-23c.[7] The court also found that the defendant continued to pay $1200 per month to the plaintiff (rather than the increased rent of $1300) and that she

[6] At all relevant times, Lanziero was the sole owner of the plaintiff corporation.

[7] As the defendant acknowledges in her briefing to this court, the May 26, 2022 decision of the court in the first action found that the "term of the rental agreement terminated." The court also found that the plaintiff had proven by a fair preponderance of the evidence that the service of the notice to quit, the termination date and service of the complaint "were all timely and made according to the relevant law." The court dismissed four counts of the complaint but found in favor of the plaintiff on the lapse of time claim.

had not vacated upon receiving notice to quit. The court agreed with the plaintiff that paragraph 10 (A) of the lease provides that, "unless the [plaintiff] takes an action for nonrenewal, the lease would renew under its terms." The court also found that the September 19, 2021 letter provided notice to the defendant that the lease would no longer automatically renew.

The court further found that the lease contained a "holdover" provision that covered the circumstance of a tenant who remains on the premises after the expiration of the lease, converting the tenancy to a month-to-month tenancy. The court concluded that, "if no action is taken to the contrary, the terms of the lease are assumed to be the terms from the prior month especially as to the monthly rental amount. If the parties do *not* agree on the rental amount, there is no agreement for that month's tenancy between the parties. The plaintiff offered a new month-to-month rental at $1300 per month by letter dated December 27, 2022, and the defendant did *not* accept the new lease term and only continued to pay $1200 per month as use and occupancy. Accordingly, the defendant has *not* accepted a new month-to-month lease and has become a tenant at sufferance." (Emphasis in original.)

The court noted that the defendant, as a protected tenant under § 47a-23c, could not be evicted in the absence of "good cause," even as a tenant at sufferance. The court accordingly concluded that the defendant's failure to pay a fair rent increase constitutes good cause, citing our Supreme Court's ruling in *O'Brien Properties, Inc.* v. *Rodriguez*, 215 Conn. 367, 576 A.2d 469 (1990).[8]

[8] In *O'Brien Properties, Inc.*, our Supreme Court concluded, in relevant part, that "a landlord could still exercise his right to 'good cause' eviction against a tenant at sufferance under § 47a-23c (b) (1) (B), simply by offering the tenant at sufferance a rental agreement at a fair and equitable rent. Thereafter, if the tenant at sufferance refused to accept the rental agreement, the landlord's recourse to 'good cause' eviction would be appropriate." *O'Brien Properties, Inc.* v. *Rodriguez*, supra, 215 Conn. 374.

The court therefore rendered judgment in favor of the plaintiff, and this appeal followed.

On appeal, the defendant claims that the court improperly determined that her residential lease with the plaintiff had terminated. She contends, as a matter of contract interpretation, that the lease automatically renewed due to the ambiguous language of paragraph 10 (A). More specifically, the defendant claims, as she did in the first action, that the language of paragraph 10 (A) of the lease is "unequivocally ambiguous" and should therefore be construed against the drafter (the plaintiff), thereby locking the plaintiff and the defendant in a never-ending lease at a fixed monthly rent of $1200 unless and until both parties agree to terminate the lease. The plaintiff counters that the court correctly determined that the lease had terminated because paragraph 10 (A) clearly and unambiguously provides the plaintiff the right to terminate the lease and that the plaintiff did just that in its September 19, 2021 notice of lease nonrenewal.[9] We agree with the plaintiff.

We begin by noting that, "[a]s a contract, a lease is subject to the same rules of construction as other contracts." *Middlesex Mutual Assurance Co.* v. *Vaszil*, 279 Conn. 28, 35, 900 A.2d 513 (2006). "In construing a written lease . . . three elementary principles must be kept constantly in mind: (1) The intention of the parties is controlling and must be gathered from the language of the lease in the light of the circumstances

[9] As an alternative ground for affirmance, the plaintiff argues that the doctrine of collateral estoppel bars the defendant's claim that the lease was not terminated. The defendant disagrees, arguing that the first action does not bar this issue from being relitigated because whether the lease had terminated was not "essential to the decision in th[at] case" because the court found for the defendant, holding that she could not be evicted for lapse of time due to her protected status under § 47a-23c. In light of our resolution of the merits of the claim advanced by the defendant, we do not reach that alternative ground.

surrounding the parties at the execution of the instrument; (2) the language must be given its ordinary meaning unless a technical or special meaning is clearly intended; (3) the lease must be construed as a whole and in such a manner as to give effect to every provision, if reasonably possible. . . . A determination of contractual intent ordinarily presents a question of fact for the ultimate fact finder, although where the language is clear and unambiguous, it becomes a question of law for the court." (Internal quotation marks omitted.) *Cohen* v. *Postal Holdings, LLC*, 199 Conn. App. 312, 323, 235 A.3d 674, cert. denied, 335 Conn. 969, 240 A.3d 285 (2020); see also *Raczkowski* v. *McFarlane*, 195 Conn. App. 402, 409, 225 A.3d 305 (2020) ("when a contract is unambiguous within its four corners . . . the interpretation of it is a question of law for this court").

The question, then, is whether paragraph 10 (A) is ambiguous. "[T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the [writing]. . . . Where the language of the [writing] is clear and unambiguous, the [writing] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [written instrument] must emanate from the language used in the [writing] rather than from one party's subjective perception of the terms." (Internal quotation marks omitted.) *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 319, 12 A.3d 995 (2011). Further, "in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a

provision superfluous. . . . Therefore, [w]hen interpreting a contract, we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) Id., 322. "[T]he mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous." (Internal quotation marks omitted.) *Poole* v. *Waterbury*, 266 Conn. 68, 88, 831 A.2d 211 (2003). Where a term is used interchangeably throughout an agreement, though, such that two plausible interpretations are possible, such a term will be construed as ambiguous. See *Isham* v. *Isham*, 292 Conn. 170, 184, 972 A.2d 228 (2009). "The individual clauses of a contract, however, cannot be construed by taking them out of context and giving them an interpretation apart from the contract of which they are a part." *Levine* v. *Advest, Inc.*, 244 Conn. 732, 753, 714 A.2d 649 (1998).

We note that the defendant effectively asks us to construe the language of paragraph 10 (A) so as to grant a right to perpetual renewal of the lease, in the absence of the agreement of both parties to terminate the lease. "[T]he right to perpetual renewal of a lease is not forbidden by the law . . . . Courts do not favor perpetual leases, however; thus a provision in a lease will not be construed as conferring a right to a perpetual renewal unless the language is so plain as to admit of no doubt of the purpose to provide for perpetual renewal." (Citations omitted; internal quotation marks omitted.) *Lonergan* v. *Connecticut Food Store, Inc.*, 168 Conn. 122, 124–25, 357 A.2d 910 (1975).[10] Our Supreme Court, in

[10] As our Supreme Court noted, there are certain key phrases and words that clearly signal an intent to create a perpetually renewing lease, such as "forever, for all time, and in perpetuity, words whose presence or absence in a lease is of considerable significance to a court in deciding whether a right of perpetual renewal was intended by the parties." (Internal quotation marks omitted.) *Lonergan* v. *Connecticut Food Store, Inc.*, supra, 168 Conn.

Lonergan, interpreting a renewal clause within the framework of a lease that had no rent escalation clause, noted that the absence of any rent escalation clause lent support to the notion that the renewal clause at issue in that case did not give rise to a self-perpetuating, never-ending right to occupy the premises. Id., 127–28.

Our careful review of the lease compels us to conclude that it is unambiguous as a matter of law. As previously noted, paragraph 10 (A) of the lease provides: "This lease will automatical[l]y renew on every an[n]iversary for the term of one year unless a written [agreement] is signed by *us*, or you vacate the apartment when the lease ends." (Emphasis added.) The terms "we" and "us" are defined in the lease as referring to the plaintiff. This usage is consistent throughout the lease. For example, paragraph 2 reads: "You will pay us total rent of $28,800.00. You will pay the total rent in monthly payments . . . . You will pay us a late charge of 5% for each payment that is . . . late. . . ." Paragraph 7 notes that "[w]e may enter the [a]partment at reasonable times . . . . We will give you reasonable notice of our intent to enter the [a]partment. . . ." Paragraph 9 states that, in the event that the building is condemned, "[i]f we decide to cancel the lease, we will give you notice within fifteen (15) days after the date of the condemnation." Paragraph 22 provides that the lease "shall be binding upon you and us and our respective successors, heirs, executors and administrators."

Nevertheless, the defendant argues that "us" as used in paragraph 10 (A) of the lease refers to both parties

126; see also *Winslow* v. *Baltimore & Ohio Railroad Co.*, 188 U.S. 646, 655, 23 S. Ct. 443, 47 L. Ed. 635 (1903) ("[t]here must be some peculiar and plain language before it will be assumed that the parties intended to create [a perpetuity]"); *Leone* v. *Sharron*, Superior Court, judicial district of New London, Docket No. CV-15-5014867-S (October 22, 2015) (61 Conn. L. Rptr. 177, 177–78) (applying *Lonergan* to similar lease provision).

to the lease and not just the plaintiff because an "agreement" requires the assent of more than one party. According to the defendant, "[t]he ambiguity inherent in paragraph 10 (A) is in the [plaintiff's] linking the word 'us' which it chose to use as a definition term beyond its normal meaning with the word 'agreement' which by definition requires more than one actor to form." The defendant notes that, although the verb "agree" appears many times throughout the lease, the term "agreement" appears "but once" in paragraph 10 (A). Essentially, the defendant argues that, although one party can agree to something, it takes more than one party to form an agreement. Although there is some logic to the defendant's argument when considered in isolation, the result of this interpretation is unreasonable when taken in the context of the entire document.[11]

In effect, the defendant asks us to read paragraph 10 (A) independently of the other provisions of the lease, which we cannot do. We are not persuaded that the mere use of the word "agreement" in paragraph 10 (A) renders ambiguous terms defined by the lease. We reiterate that the terms "we" and "us" are not only defined in the lease, referring to the plaintiff, but consistently so throughout its provisions.

Likewise, the term "agree" is also used consistently throughout the lease. After defining "we" and "us" as the plaintiff, the lease states that, "[w]e agree to lease to you, and you agree to lease from us [the premises]. . . . You and we agree to the following [lease provisions] . . . ." In paragraph 6, the lease details which

[11] During cross-examination, the defendant admitted that the term "us" was defined in the lease to mean the plaintiff, but she suggested that the fact that paragraph 10 (A) is handwritten means that it is an "added clause" that alters the "original lease." To be clear, as the defendant acknowledged throughout these proceedings, there was a single typed "original" lease document that was signed by both parties in 2012, which contained the handwritten paragraph 10 (A) that has been the subject of dispute.

utilities the plaintiff has agreed to pay, and paragraph 7 then provides that the plaintiff may enter the premises at reasonable times for the purpose of making necessary repairs to "the utilities or services that we have agreed to supply."

The lease, including within paragraph 10 (A), also clearly and consistently delineates the respective responsibilities that have been agreed to by the plaintiff and the defendant, by referencing the former using the terms "we" and "us" and the latter by using the term "you." Therefore, although the lease itself is an agreement that requires the assent of both parties, paragraph 10 (A) establishes that the lease will automatically renew unless the plaintiff decides in writing not to renew the lease—or the defendant vacates the premises. Put differently, paragraph 10 (A) gives alternative mechanisms for each party to sever the relationship established by the lease, notwithstanding the use of the noun "agreement." Given the consistent usage of "us" and "agree" throughout the lease, the trial court's determination of paragraph 10 (A) as clear and unambiguous is correct.

Further, construed in terms of the entirety of the lease, the lack of a rent escalation provision further supports the conclusion that the parties did not intend to enter into a perpetual relationship with one another, over the objection of the other party, at the same rental rate for all time. Paragraph 18 clearly establishes that either party can give notice of termination to the other, once the tenancy has shifted to a monthly agreement. For purposes of terminating the automatic renewal provision at the end of the lease term, paragraph 10 (A) provides for either party to exercise that option by requiring the plaintiff to sign a writing and the defendant to simply vacate the premises. We note as well that we are reluctant to construe a contract in "such a way that it would lead to an absurd result." (Internal quotation

marks omitted.) *Noroton Heights Shopping Center, Inc.* v. *Phil's Grill, LLC*, 207 Conn. App. 211, 220, 262 A.3d 970, cert. denied, 339 Conn. 920, 262 A.3d 137 (2021). We cannot construe the lease to bind the plaintiff to the defendant unless the defendant agrees to allow the plaintiff not to renew the lease or she decides to vacate the premises upon the conclusion of a lease term. This interpretation would hand over to the defendant, and, by operation of paragraph 22, to her heirs and assigns, complete control over the plaintiff's property—an untenable result.

For all the foregoing reasons, we conclude that the language of the lease is clear and unambiguous as a matter of law and that the court properly determined that the defendant's lease with the plaintiff had terminated. The defendant's claim, therefore, fails.[12]

The judgment is affirmed.

In this opinion the other judges concurred.

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[12] In conclusory fashion, the defendant appears to challenge the court's determination that she was a tenant at sufferance. The defendant does not challenge the court's determination that, as a tenant at sufferance, her refusal to pay a fair and equitable rent increase constitutes good cause for eviction under §47a-23c. Instead, she simply relies on her primary claim that the lease did not terminate. Because we already have rejected this primary claim, and this secondary, conclusory claim is not otherwise adequately briefed, we do not address it.