STATE OF CONNECTICUT *v.* RICHARD S. ROSZKOWSKI (SC 19370)

Palmer, McDonald, Robinson, D'Auria and Mullins, Js.*

Syllabus

Convicted of the crimes of murder, capital felony, and criminal possession of a firearm in connection with the death of three victims, and sentenced to death, the defendant appealed to this court. In 2009, the trial court set aside the jury's special verdict during the defendant's first penalty phase hearing, at which the jury found that a death sentence was the appropriate punishment for the defendant's two capital felony convictions, and the case was continued for a second penalty phase hearing. In 2012, the trial court determined that the defendant had been restored to competency after being deemed incompetent in 2011, and the legislature enacted legislation (P.A. 12-5) repealing the death penalty for crimes committed on or after April 25, 2012, the effective date of P.A. 12-5, but retaining the death penalty for capital crimes, such as the defendant's capital felonies, that were committed prior to that date. In 2013, the trial court denied the defendant's motions for a reexamination of his competency and for a stay of the second penalty phase hearing to await this court's decision in a pending appeal in which the issue was whether, following the enactment of P.A. 12-5, the state constitution continued to permit the imposition of the death penalty in Connecticut. In 2014, a second penalty phase hearing was conducted at which the jury found, by special verdict, that a death sentence was the appropriate punishment for one of the defendant's capital felony convictions. The trial court thereafter rendered judgment sentencing the defendant to death and merged his three murder convictions with his corresponding capital felony convictions. In 2015, this court concluded in that pending appeal that, in light of the legislature's enactment of P.A. 12-5 in 2012, the imposition of the death penalty is unconstitutional for capital felonies committed prior to the effective date of that public act. On appeal, the defendant claimed that he should not have been subjected to a second penalty phase hearing because the imposition of the death penalty became unconstitutional upon the enactment of P.A. 12-5 and because the trial court improperly denied his request for a reexamination of his competency. The defendant sought to have this court declare the jury's special verdict during the second penalty phase hearing void and to have this court remand the case for imposition of a sentence of life imprisonment without the possibility of release. The defendant also

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

claimed that the trial court improperly merged his three murder convictions with his corresponding capital felony convictions. *Held*:

1. The defendant having been entitled to have his death sentence vacated and to be resentenced to life imprisonment without the possibility of release, the only legally available punishment for his capital felony convictions in light of this court's recent precedent declaring the death penalty unconstitutional, the defendant's other appellate claims related to his death sentence and to the procedures by which that sentence was imposed were moot, insofar as prevailing on them could afford the defendant no additional relief, or were unripe, insofar as there was not yet an adequate factual record to assess whether, upon resentencing, the defendant will be subject to less favorable conditions of confinement than he would have been subject to if he had not been initially sentenced to death; accordingly, the defendant's appeal was dismissed with respect to claims challenging the penalty phase of the proceedings.
2. The trial court improperly merged the defendant's three murder convictions into his corresponding capital felony convictions in light of this court's decision in *State* v. *Polanco* (308 Conn. 242), in which the court determined, in the exercise of its supervisory authority over the administration of justice, that when a defendant is convicted of both a greater offense and a lesser included offense in violation of the double jeopardy clause of the federal constitution, the trial court must vacate not only the sentence for the lesser included offense but also vacate rather than merge the conviction itself; accordingly, the case was remanded to the trial court with direction to vacate the defendant's murder convictions.

Argued December 12, 2017—officially released July 31, 2018

Procedural History

Substitute information charging the defendant with three counts of the crime of murder, two counts of the crime of capital felony, and one count of the crime of possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the guilt phase of the proceedings was tried to the jury before *Kavanewsky, J.*; verdict of guilty; thereafter, during the penalty phase of the proceedings, the jury found the existence of aggravating factors and one or more mitigating factors and that the aggravating factors outweighed the mitigating factor or factors; subsequently, the court *Kavanewsky, J.*, granted the defendant's motion to set aside the jury's verdict during the penalty phase of the proceedings, and the court, *Devlin, J.*, denied the

defendant's motion for a competency evaluation; thereafter, a second penalty phase was tried to the jury before *Blawie*, *J.*; finding of the existence of aggravating factors and one or more mitigating factors and that the aggravating factors outweighed the mitigating factor or factors; subsequently, the court, *Blawie*, *J.*, rendered judgment in accordance with the jury's verdict during the guilt phase and the jury's finding with respect to the aggravating and mitigating factors during the second penalty phase, sentencing the defendant to death, and the defendant appealed to this court. *Appeal dismissed in part*; *reversed in part*; *judgment directed.*

Adele V. Patterson, senior assistant public defender, for the appellant (defendant).

Harry D. Weller, senior assistant state's attorney, with whom were *Margaret E. Kelley*, supervisory assistant state's attorney, and, on the brief, *John C. Smriga*, state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. Following a jury trial, the defendant, Richard S. Roszkowski, was convicted of three counts of murder, in violation of General Statutes § 53a-54a (a), for the 2006 murders of Thomas Gaudet, Holly Flannery (Flannery), and Kylie Flannery (Kylie); one count of capital felony, in violation of General Statutes (Rev. to 2005) § 53a-54b (7), for the coincident murders of Gaudet and Flannery; a second count of capital felony, in violation of General Statutes (Rev. to 2005) § 53a-54b (8), for the murder of nine year old Kylie; and one count of criminal possession of a firearm, in violation of General Statutes (Supp. 2006) § 53a-217 (a) (1). In 2014, the defendant was sentenced to death for his second capital felony conviction. On appeal, the defendant contends that he should not have been subjected to a penalty phase hearing because (1) the impo-

sition of capital punishment became unconstitutional in Connecticut following the legislature's prospective repeal of the death penalty in 2012; see Public Acts 2012, No. 12-5 (P.A. 12-5); and (2) the trial court improperly denied his request for a competency evaluation. He further contends that the trial court improperly merged his three murder convictions with the corresponding capital felony convictions. We conclude that the defendant's penalty phase challenges must be dismissed as either moot or unripe. We agree, however, that the defendant's murder convictions should have been vacated rather than merged. Accordingly, we dismiss in part the defendant's appeal and reverse in part the judgment of the trial court.

The following additional procedural history is relevant to our resolution of the defendant's appeal. During the defendant's penalty phase proceedings in 2009, the jury found, by special verdict, that a sentence of death was the appropriate punishment for both of the capital felony convictions. The trial court, *Kavanewsky, J.*, granted the defendant's subsequent motion to set aside the jury's special verdict because the jury did not unanimously find that the defendant had failed to establish a statutory mitigating factor. However, the court denied the defendant's request in that motion to impose a sentence of life imprisonment without the possibility of release. Instead, the case was continued for a second penalty phase hearing.

In the interim, in 2011, the defendant was deemed incompetent to stand trial pursuant to General Statutes § 54-56d (a). The following year, the trial court, *Devlin, J.*, found that the defendant had been restored to competency. Also in 2012, the legislature enacted P.A. 12-5, which repealed the death penalty for crimes committed on or after April 25, 2012, the effective date of P.A. 12-5, but purported to retain the death penalty for capital crimes committed prior to that date.

In response to those developments, the defendant filed two motions in 2013, the denial of which is at issue in the present appeal. First, the defendant moved for a reexamination of his competency, citing various new developments that again called into question his competency to stand trial. The trial court, *Devlin*, *J.*, denied the motion for a competency evaluation, although the court did grant an accompanying request for the appointment of a guardian ad litem to assist the defendant in making decisions necessary to conduct his defense. Second, the defendant moved for a stay of the penalty phase hearing to await the resolution of *State* v. *Santiago* (SC 17413), in which we considered whether, following the enactment of P.A. 12-5, the state constitution continues to permit the imposition of the death penalty in Connecticut. See *State* v. *Santiago*, 318 Conn. 1, 9, 122 A.3d 1 (2015). The trial court, *Blawie*, *J.*, denied that motion, and Chief Justice Rogers denied the defendant's petition for certification to appeal pursuant to General Statutes § 52-265a.

Following the denial of those motions, a second penalty phase hearing was held in 2014. At that time, the jury found, by special verdict, that a sentence of death was the appropriate punishment for the defendant's second capital felony conviction, for the murder of Kylie, but the jury was not persuaded beyond a reasonable doubt that death was the appropriate punishment for the capital felony conviction for the murders of Gaudet and Flannery. The trial court, *Blawie*, *J.*, accepted the verdict and imposed a sentence of death in connection with the second capital felony count, a consecutive sentence of life imprisonment without the possibility of release in connection with the first capital felony count, and a consecutive sentence of five years incarceration in connection with the firearms charge. The court also merged the three murder convictions with the corresponding capital felony convictions. This

appeal followed. Additional facts will be set forth as necessary.

I

We first consider the defendant's claims that (1) his sentence of death for the second capital felony conviction was imposed pursuant to an unconstitutional statute, and (2) the trial court improperly failed to order an examination to determine whether he was competent for the second penalty phase hearing and for sentencing. As a remedy for both claims of error, the defendant asks that we declare the special verdict and judgment imposing a sentence of death "void and a nullity," and remand the case for imposition of a sentence of life imprisonment without the possibility of release. The state responds, and we agree, that the defendant is entitled to have his death sentence vacated and a sentence of life imprisonment without the possibility of release imposed, pursuant to *State* v. *Santiago*, supra, 318 Conn. 14–15, and *State* v. *Peeler*, 321 Conn. 375, 377, 140 A.3d 811 (2016), but that any additional requests for relief are either moot or unripe at this time.

In his primary brief to this court, the defendant offers two principal arguments as to why he should not have been subjected to a second penalty phase hearing in 2014 and why the trial court should simply have sentenced him at that time to life imprisonment without the possibility of release on both of the capital felony convictions. First, he contends that the death penalty became unconstitutional in Connecticut upon the enactment of P.A. 12-5 in 2012 and, further, that he would not have had to undergo a second penalty phase hearing in 2014 if not for the arbitrary fact that this court did not issue its decision in *Santiago* until 2015. For that reason, his death sentence was imposed while the fate of our state's capital sentencing scheme was still in legal limbo. The defendant further argues that, because

the death penalty was in fact unconstitutional following the enactment of P.A. 12-5, the trial court lacked jurisdiction to conduct the second penalty phase hearing. Second, the defendant contends that the trial court violated his due process rights by proceeding with the second penalty phase hearing without having first referred him for a competency hearing, despite the existence of substantial evidence that cast a reasonable doubt on his competence to stand trial.

In its brief, the state responds that there is no need for us to consider the merits of these claims. Under General Statutes § 53a-35a (1), and pursuant to our decisions in *Santiago* and *Peeler*, the defendant, having been convicted of a capital felony,[1] can be sentenced only to life imprisonment without the possibility of release; no more and no less. That is, in fact, the sentence that the defendant asked the trial court to impose on four separate occasions, in 2009, 2012, 2013, and 2014. The state readily concedes that the defendant is entitled to have his death sentence vacated and to be resentenced in accordance with *Santiago* and *Peeler*. The state further contends, relying on *State* v. *Peeler*, supra, 321 Conn. 377, that the fact that the defendant is entitled to be resentenced to what is undisputedly the only legally available punishment for his crimes renders moot any other appellate claims concerning the penalty phase of his trial or his death sentence.

The state's position is founded on the well established principle that a case is justiciable only if the defendant's appeal raises a claim from which the court can grant practical relief. See, e.g., *State* v. *McElveen*, 261 Conn. 198, 205, 216, 802 A.2d 74 (2002). As we recently explained, "[t]he fundamental principles underpinning

[1] The defendant does not raise any claims regarding the guilt phase of the trial or challenge the validity of his underlying convictions, other than claiming that he is entitled to have his murder convictions vacated rather than merged with his capital felony convictions.

the mootness doctrine are well settled. . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires [among other things] . . . that the determination of the controversy will result in practical relief to the complainant." (Internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 754, 183 A.3d 611 (2018). It is undisputed that the defendant is entitled to the sentencing relief that he seeks. Indeed, he could have obtained, and can obtain, the only available practical relief simply by filing a motion to correct his sentence in the trial court. See, e.g., Practice Book § 43-22; *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 704, 159 A.3d 1112 (2017).

The reason why the defendant sought our review of these issues, rather than simply obtaining in the trial court the relief to which he is unquestionably entitled, does not become apparent until the final page of his reply brief. In *McElveen*, we recognized that, "[when] the matter being appealed creates collateral consequences prejudicial to the interests of the appellant, we may retain jurisdiction despite developments . . . that would otherwise render it moot." (Internal quotation marks omitted.) *State* v. *McElveen*, supra, 261 Conn. 207. In the present case, the defendant posits that if we were not only to vacate his death sentence but also to declare that it was null and void from the outset, then he would avoid certain collateral consequences of having initially been sentenced to death. Specifically, the defendant contends that inmates in the custody of the Department of Correction who have been convicted of committing a capital felony prior to April 25, 2012, and who have a sentence of death reduced to a sentence of life imprisonment without the possibility of release, are subject to conditions of confinement that are less favorable than those enjoyed by inmates who were never

sentenced to death in the first place. See, e.g., General Statutes § 18-10b (a) (directing Commissioner of Correction to place inmates initially sentenced to death for a capital felony committed prior to April 25, 2012, "on special circumstances high security status" and to "house [them] in administrative segregation" pending establishment of reclassification process).

The defendant's argument, although perhaps facially attractive, is foreclosed by our decision in *State* v. *Campbell*, 328 Conn. 444, 180 A.3d 882 (2018), which was released after the present case was briefed and argued. The defendant in that case, Jessie Campbell III, argued that he should be permitted to challenge his prior death sentence, notwithstanding that the sentence no longer could be imposed, because, if he were merely resentenced to life imprisonment without the possibility of release, § 18-10b might expose him to the "enhanced punishment" of administrative segregation. Id., 461. We concluded that Campbell's penalty phase challenges were not ripe because (1) he had not yet been resentenced, making it impossible to say with reasonable certainty what his conditions of confinement would be; id., 464; (2) the record contained no factual findings concerning what procedures and rules otherwise would apply to Campbell, or what procedures and conditions of confinement other similarly situated inmates were then subject to; id., 465; and (3) a petition for a writ of habeas corpus represents a more appropriate vehicle for challenging an inmate's conditions of confinement. Id., 465–66.

The defendant's situation is not materially different from that of Campbell. Accordingly, we conclude that the defendant is entitled on remand to have his death sentence vacated and a sentence of life imprisonment without the possibility of release imposed for the second capital felony conviction. The defendant's challenges to his death sentence and to the procedures by

which that sentence was imposed are moot, insofar as prevailing on them can afford him no additional relief; see id., 463 and n.5; or unripe, insofar as there is not yet an adequate factual record to assess the conditions of confinement to which he will be subject. See id. The defendant's appeal is therefore dismissed with respect to his claims challenging the penalty phase.

II

We next consider the defendant's claim that the trial court improperly merged his three murder convictions into the corresponding capital felony convictions as lesser included offenses of those crimes. The defendant contends, and the state concedes, that, pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013), the trial court instead should have vacated the murder convictions. We agree and, therefore, remand the case to the trial court to vacate the defendant's murder convictions.

Prior to our decision in *Polanco*, when a defendant was convicted of both a greater offense and a lesser included offense in violation of the double jeopardy clause of the federal constitution, the appropriate remedy was to merge the convictions and to vacate the sentence for the lesser included offense. Id., 244. In *Polanco*, we determined, in the exercise of our supervisory authority, that the trial court must vacate not only the sentence for the lesser included offense but also the conviction itself. Id., 245. The state agrees that the present case is controlled by *Polanco* and that the trial court should have vacated the defendant's three murder convictions rather than merging them into the capital felony convictions.

The appeal is dismissed with respect to the defendant's claims regarding the penalty phase and the sentence of death; the judgment is reversed with respect to the merging of the three murder convictions and

the case is remanded with direction to vacate those convictions; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

PATRICK CALLAGHAN *v.* CAR PARTS INTERNATIONAL, LLC, ET AL. (SC 19755)

Palmer, McDonald, Robinson, D'Auria, Kahn and Vertefeuille, Js.*

Syllabus

Pursuant to statute (§ 31-293 [a]), either an employee or an employer may bring an action against a third-party tortfeasor responsible for an injury compensable under the Workers' Compensation Act, and, pursuant to 2011 legislation (P.A. 11-205) that amended § 31-293 (a), "[i]f [the third-party] action has been brought by the employee, the claim of the employer [to the proceeds from the third-party action] shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer . . . which reduction shall inure solely to the benefit of the employee . . . ."

The plaintiff employee appealed from the decision of the Compensation Review Board, which affirmed the decision of the workers' compensation commissioner that the defendant employer was entitled to a moratorium, established by preexisting case law interpreting § 31-293 (a), against having to pay future workers' compensation benefits in an amount equal to the one-third share that the plaintiff retained under § 31-293 (a). After the plaintiff was injured in a work related accident, he settled an action he had brought against the third party responsible for the accident, retaining his one-third share of the defendant's claim to the proceeds of that action. The plaintiff required additional medical care for the work related injury after the settlement, but the defendant denied payment, claiming that it was entitled to a moratorium in the amount of the one-third share the plaintiff had retained. The defendant argued before the workers' compensation commissioner that, although P.A. 11-205 permitted the plaintiff to keep his one-third share, it did not eliminate the moratorium. The plaintiff countered that the one-third reduction was not subject to a moratorium because P.A. 11-205 provided that the plaintiff's one-third share "shall inure solely to the benefit of the employee," which clearly and unambiguously indicated that the

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

legislature did not intend for the one-third reduction to benefit anyone other than the plaintiff. The commissioner agreed with the defendant, and the board upheld the commissioner's decision, concluding that the moratorium applied to the one-third reduction because the text and legislative history of P.A. 11-205 did not explicitly provide that the moratorium did not apply. On the plaintiff's appeal from the board's decision, *held* that the moratorium does not apply to the proceeds the plaintiff received from the one-third reduction of the defendant's claim: because applying the moratorium to the one-third reduction in favor of the employee would require the employee to use those proceeds in lieu of future workers' compensation benefits that otherwise would be paid by the employer, and thus would shift the benefit created by P.A. 11-205 from the employee to the employer, the application of the moratorium to the one-third reduction would conflict with and undermine the purpose and plain language of P.A. 11-205, which clearly intended to create a benefit in favor of an employee who brings the third-party action; moreover, the legislative history confirmed that the legislature intended for the employee alone to retain the benefit of the one-third reduction, as that benefit serves as an incentive to employees to pursue actions against responsible third parties whereas employees previously had little incentive to do so because any recovery was often exceeded by the employer's claim for reimbursement of workers' compensation benefits; furthermore, although concerns of a double recovery for the employee led this court to previously interpret § 31-293 (a) to include a moratorium, those concerns did not alter this court's conclusion in the present case because P.A. 11-205 expressly contemplated the possibility of providing the employee with a double recovery, a double recovery will not occur under circumstances in which an employee recovers an award of noneconomic damages because they are not compensable under the Workers' Compensation Act, and the employer controls whether the employee will receive a double recovery, as the employer can avoid the one-third reduction by bringing an action directly against the responsible third party.

Argued November 8, 2017—officially released July 31, 2018

Procedural History

Appeal from the decision of the workers' compensation commissioner for the first district determining that the named defendant was entitled to a moratorium against paying a certain amount of future workers' compensation benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed. *Reversed*; *judgment directed.*

Gary J. Strickland, for the appellant (plaintiff).

William J. Shea, for the appellees (defendants).

Patrick D. Skuret filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

Opinion

D'AURIA, J. In this appeal from the Compensation Review Board, we consider the extent of an employer's right to a credit against its obligation to pay workers' compensation benefits for an injured employee when that employee has recovered damages from a third-party tortfeasor who caused the employee's injuries. When an employee is injured in a work related accident, the Workers' Compensation Act (act), General Statutes § 31-275 et seq., bars the employee from bringing an action for damages against the employer but, also, requires employers to pay certain benefits to the injured employee. These benefits can include covering the employee's medical expenses or providing compensation for disabilities resulting from the injury. See General Statutes § 31-275 (4).[1]

When the employee's injury is caused by a third-party tortfeasor—someone other than the employee or the employer or its agents—the act allows either the employer or the employee to bring an action in tort to recover damages from the third party. General Statutes § 31-293 (a); *Libby* v. *Goodwin Pontiac-GMC Truck, Inc.*, 241 Conn. 170, 174, 695 A.2d 1036 (1997). If damages are recovered in the third-party action, § 31-293 (a) requires that, after deducting attorney's fees and litigation expenses, the employer must be reimbursed

[1] In this opinion, we use the phrase "workers' compensation benefits" to refer generally to the benefits or payments mandated by the provisions of the act, including, but not limited to, payments for medical expenses or payments to compensate for a resulting disability. See General Statutes § 31-275 (4) (defining compensation for purposes of act).

from the net proceeds of the action for any workers' compensation benefits the employer has paid to or on behalf of the injured employee. General Statutes § 31-293 (a). Any remaining proceeds from the third-party action must be "assessed in favor of the injured employee." General Statutes § 31-293 (a).

After the resolution of the third-party action, the employer remains liable to pay for any later arising workers' compensation benefits due the employee, but our case law interpreting § 31-293 (a) establishes that this subsection implicitly affords the employer a setoff, or a credit, against any later arising benefits in the amount of any proceeds the employee received in the action against the third party. See, e.g., *Enquist* v. *General Datacom*, 218 Conn. 19, 20–21, 587 A.2d 1029 (1991). This credit is often referred to as a " 'moratorium' " against future payments. Id., 27 n.7; see also R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation (Supp. 2017) § 15:6, p. 375. The moratorium remains in place until the workers' compensation benefits due after the judgment exceed the amount the employee received from the action against the third party. *Enquist* v. *General Datacom*, supra, 25–26. Once the employee's later arising workers' compensation benefits exceed the amount of the employee's recovery, the employer again becomes obligated to pay the employee's benefits. See id.

In 2011, the legislature amended § 31-293 (a) to allow the employee, if the employee initiated the third-party action, to keep one third of the net proceeds due to the employer from that action, regardless of how much the employer is owed for reimbursement. Public Acts 2011, No. 11-205, § 1 (P.A. 11-205). The relevant portion of P.A. 11-205 provides: "If the action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely

to the benefit of the employee . . . .'' Under this amendment, even if the employer is owed more than is recovered in the third-party action, the employee retains one third of the proceeds for his sole benefit.

The specific question we address in this appeal is whether the moratorium applies to the one-third portion of the employer's recovery that inures solely to the employee's benefit—that is, whether the employer has a right to a setoff against its obligation to pay for post-judgment workers' compensation benefits until those benefits exceed the one-third portion that the employee received from the proceeds of the third-party action. We conclude that the employee's one-third portion is not subject to the moratorium, and, as a result, the employer does not receive a credit against later arising benefits for the one-third portion paid to the employee.

I

In the present case, the plaintiff, Patrick Callaghan, was injured in a work related automobile collision while working for the defendant, Car Parts International, LLC.[2] The plaintiff brought an action for damages against a third party, who was also involved in the accident. The plaintiff also sought and received about $74,000 in workers' compensation benefits from the defendant. The plaintiff and the third party later settled the action for $100,000. The net proceeds of the settlement—after the deduction of attorney's fees and litigation costs—totaled about $66,000.

The plaintiff reimbursed the defendant out of the proceeds of the settlement, deducting for himself one third of the amount to be reimbursed, as required by § 31-293 (a). The defendant's two-thirds share of the net proceeds totaled about $44,000; the plaintiff's one-third share amounted to about $22,000.

[2] Peerless Insurance Company, the defendant's insurer, was also named as a defendant in this action. For purposes of clarity, in this opinion, we refer to Car Parts International, LLC, as the defendant.

After the settlement and reimbursement, the plaintiff required additional medical care for the work related injury and was treated by his authorized physician. The defendant denied payment for the service, claiming that it was entitled to a moratorium in the amount of the net proceeds from the settlement paid to the plaintiff, specifically, about $22,000.

The parties went before a workers' compensation commissioner to determine the status of the moratorium. The defendant claimed that, although P.A. 11-205 permitted the plaintiff to keep his one-third share of the net proceeds, it did not eliminate the moratorium, created by our case law, requiring the plaintiff to exhaust the proceeds from the third-party action before receiving additional workers' compensation benefits from the defendant. The plaintiff responded that P.A. 11-205 commanded that the plaintiff's one-third share "shall inure solely to the benefit of the employee," which clearly and unambiguously indicated that the legislature did not intend for those proceeds to benefit any party other than the plaintiff, and, thus, those proceeds were not subject to the moratorium. The commissioner concurred with the defendant and allowed the moratorium.

The plaintiff sought review by the Compensation Review Board (board), which upheld the commissioner's decision. The board concluded that, because the text and legislative history of P.A. 11-205 did not *explicitly* direct that the moratorium should not apply to the one-third reduction, the moratorium should continue to apply, notwithstanding the direction in P.A. 11-205 that the reduction should solely benefit the employee. This appeal by the plaintiff followed.[3]

[3] The plaintiff appealed from the decision of the board to the Appellate Court, and this court transferred the appeal to itself. See General Statutes § 51-199 (c); Practice Book § 65-1.

II

Contrary to the decisions of the commissioner and the board, we conclude that the moratorium does not apply to the one-third reduction in favor of the plaintiff. The text added to § 31-293 (a) by P.A. 11-205 clearly and unambiguously intended for the one-third reduction to be for the employee's sole benefit. Although we agree that the added text and the legislative history concerning its enactment do not specifically address the moratorium, applying the moratorium to the reduction would erode the benefit conferred on the employee by P.A. 11-205. The moratorium would require the employee to use the proceeds from the one-third reduction to pay any future expenses that otherwise would be covered by workers' compensation benefits from the employer and, thus, contradict the clear directive that the "reduction shall inure *solely* to the benefit of the employee . . . ." (Emphasis added.) General Statutes § 31-293 (a). Because application of the moratorium would conflict with and undermine the clear intent of the text added to § 31-293 (a) by P.A. 11-205, we conclude that the moratorium should not apply to the one-third reduction. We therefore reverse the decision of the board and direct it to deny the defendant's request for a moratorium on the plaintiff's workers' compensation benefits.

A

This case requires us to determine whether and to what extent the language added by P.A. 11-205 to § 31-293 (a) impacts our prior case law that has interpreted § 31-293 (a) to implicitly allow the employer a moratorium. This presents a question of statutory interpretation subject to plenary review. See, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 507, 43 A.3d 69 (2012). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to

determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) Id., 507–508. If, however, the statutory text at issue "is susceptible to more than one plausible interpretation," we may appropriately consider extratextual evidence. (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, 324 Conn. 277, 286, 151 A.3d 1271 (2016). In addition, because we have previously construed § 31-293 (a), we must consider its meaning in light of our prior cases interpreting the statute, including those cases establishing the moratorium. See, e.g., *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 527, 93 A.3d 1142 (2014) ("[i]n interpreting [statutory] language . . . we do not write on a clean slate, but are bound by our previous judicial interpretations of this language and the purpose of the statute" [internal quotation marks omitted]).

B

We start with the text of § 31-293 (a), as amended by P.A. 11-205. The relevant portion of P.A. 11-205 provides that, "[i]f the [third-party] action has been brought by the employee, the claim of the employer shall be reduced by one-third of the amount of the benefits to be reimbursed to the employer, unless otherwise agreed upon by the parties, which reduction shall inure solely to the benefit of the employee . . . ."[4]

[4] P.A. 11-205 made an additional change to § 31-293 (a), but that change is not relevant to the present appeal.

The text added by P.A. 11-205 altered the reimbursement procedures set forth in § 31-293 (a). Section 31-293 (a) generally allows the employer to receive reimbursement for workers' compensation benefits it has paid to or on behalf of an employee by giving the employer a "claim" against any proceeds obtained in a third-party action, whether that action was filed by the employer or the employee. According to § 31-293 (a), the "claim of the employer" consists of "(1) the amount of any compensation which [the employer] has paid on account of the injury which is the subject of the [third-party action] and (2) an amount equal to the present worth of any probable future payments which [the employer] has by award become obligated to pay on account of the injury." General Statutes § 31-293 (a). The employer's claim thus includes any benefits it has already paid at the time of the disposition of the third-party action and any future expenses that the employer has already become obligated to pay by the formal workers' compensation award.

Prior to the enactment of P.A. 11-205, General Statutes (Rev. to 2009) § 31-293 (a) gave the employer's claim complete precedence over the employee's right to receive damages from a third party, after deducting litigation costs and attorney's fees. In the absence of the language added by P.A. 11-205, the employee thus could not receive any damages from a third-party action unless the employer's claim had first been satisfied. Specifically, General Statutes (Rev. to 2009) § 31-293 (a) provided in relevant part that "the damages shall be so apportioned that the claim of the employer . . . shall take precedence over that of the injured employee in the proceeds of the recovery, after the deduction of reasonable and necessary expenditures, including attorneys' fees, incurred by the employee in effecting the recovery. . . ." Because the employer holds a superior claim to the proceeds, after accounting for litigation

costs, the employee could receive damages only if the proceeds from the third-party action were more than the amount necessary to fully reimburse the employer for its claim: "If the damages, after deducting the employee's [litigation] expenses . . . are more than sufficient to reimburse the employer, damages shall be assessed in [the employer's] favor in a sum sufficient to reimburse [the employer] for [its] claim, and the excess shall be assessed in favor of the injured employee." General Statutes (Rev. to 2009) § 31-293 (a).

The text added to § 31-293 (a) by P.A. 11-205 altered this arrangement. The current text ensures that, regardless of the amount of an employer's claim, an employee who had brought the third-party action will receive at least one third of the net proceeds due the employer. The text accomplishes this by reducing the employer's claim by one third of the amount the employer otherwise would receive as reimbursement and directing that this reduction instead "shall inure solely to the benefit of the employee . . . ." General Statutes § 31-293 (a). P.A. 11-205 thus creates a clear benefit in favor of the employee, to the detriment of the employer, by taking funds the employer otherwise would be entitled to receive and, instead, allowing them to pass to the injured employee, even if the net proceeds from the third-party action were not enough to reimburse the employer's claim.

C

The text of P.A. 11-205 is, however, silent on whether the moratorium applies to any proceeds paid to the employee because of the one-third reduction. To answer that question, we therefore consider our moratorium case law and how the moratorium would affect the reduction called for by P.A. 11-205. These considerations persuade us that extending the moratorium to the

one-third reduction would undermine and conflict with the plain language and purpose of P.A. 11-205.

We begin with an overview of our moratorium case law. The moratorium requires an employee who incurs additional workers' compensation expenses or who is entitled to additional workers' compensation benefits after a judgment has been rendered against a third party to use the employee's proceeds from that judgment, if any, to pay those additional expenses or to replace those benefits. As a general matter, the employer is required by § 31-293 (a) to continue paying workers' compensation benefits even if they arise after a favorable judgment against a third party. General Statutes § 31-293 (a) ("[t]he rendition of a judgment in favor of the employee or the employer against the [third] party shall not terminate the employer's obligation to make further compensation which the commissioner thereafter deems payable to the injured employee"). Nevertheless, our case law applying § 31-293 (a) has interpreted that section to *implicitly* allow a moratorium. *Enquist* v. *General Datacom*, supra, 218 Conn. 25–26; see also *Rosenbaum* v. *Hartford News Co.*, 92 Conn. 398, 401–402, 103 A. 120 (1918). Our moratorium cases have acknowledged that § 31-293 (a) is silent about a credit for the employer when the employee receives compensation from a third party. *Enquist* v. *General Datacom*, supra, 25. But drawing on the principle that we should construe the act, whenever possible, to avoid a double recovery for the employee, we have concluded that the employer should receive a credit against its obligation to pay workers' compensation benefits up to the amount the employee receives from an action against the responsible third party. Id., 25–26; *Rosenbaum* v. *Hartford News Co.*, supra, 401–403. "Otherwise," we have reasoned, "the injured employee might first settle with the [tortfeasor] . . . and then recover his statutory compensation also." *Rosenbaum* v. *Hart-*

ford News Co., supra, 403. Once the amount of postjudgment workers' compensation benefits exceeds the employee's recovery, however, the employer again becomes obligated to pay those excess benefits. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 403, 999 A.2d 682 (2010).

If the moratorium were applied to the one-third reduction mandated by P.A. 11-205, the employee would be required to use the proceeds from this one-third reduction in lieu of future benefits that otherwise would be paid by the employer. Doing so would erode the benefit that the public act provides to the employee. Suppose, for instance, that an employee was injured on the job and the employer paid $10,000 in workers' compensation benefits. The employee then brought an action against a third party responsible for the injury and recovered $10,000. After deducting attorney's fees and litigation costs, the net proceeds are $6600. In the absence of the text added by P.A. 11-205, the employer would be entitled to all $6600 as reimbursement for its claim, and the employee would receive nothing. But as a result of P.A. 11-205, the employer's reimbursement is reduced by one third, to $4400, and the remaining $2200 of the net proceeds would be paid to the employee for his sole use. Further suppose, however, that the employee needed additional treatment after the disposition of the third-party action. Applying the moratorium would relieve the employer of its obligation to pay the employee's future benefits up to the amount the employee received. The employee thus would be required to pay for the additional treatment out of the $2200 he had received, for his sole benefit, from the one-third reduction in the employer's reimbursement. Applying the moratorium would shift this benefit of the one-third reduction away from the employee, rendering the benefit only a temporary one. The moratorium would instead ultimately cause the one-third reduction

to benefit the employer by relieving it of its obligation to pay future workers' compensation benefits until the employee exhausted the proceeds he received.

D

In our view, shifting the benefit away from the employee, by requiring him to use the proceeds from the one-third reduction, would run contrary to the purpose and plain language of § 31-293 (a), which evidences a clear intent for the employee alone to retain the benefit of the one-third reduction. By stating that the reduction was to "inure solely to the benefit of the employee," the legislature expressed a clear intention with P.A. 11-205 that the employee, and no one else, should enjoy the use of that portion of the third-party proceeds.

Even if the text of P.A. 11-205 was unclear or ambiguous concerning the legislature's intent, the public act's legislative history confirms that the legislature intended for the employee, and not the employer, to retain sole use of the proceeds from the one-third reduction. This history clearly indicates the legislature intended that the employee's benefit from the one-third reduction would serve as an incentive to employees to pursue damages from responsible third parties. Legislators supporting the public act observed that employers and their insurance carriers often were not pursuing the third parties responsible for harm and that employees often had little incentive to do so because any recovery was often exceeded by the employer's claim, such that any recovery went entirely to the employer as reimbursement for workers' compensation benefits already incurred. The legislature passed P.A. 11-205 to provide an incentive to both employers and employees to pursue actions against the third parties who should bear primary responsibility for the employee's injury. The public act accomplished this by allowing employees to have the sole benefit of one third of the employer's claim.

And it provided an incentive to employers by allowing them to avoid having their claim reduced by one third if they initiated the action instead, because the one-third benefit to employees applies only if the employee initiates the third-party action. In addition, even if an employee gets the benefit of the one-third reduction, a partial recovery may ultimately benefit employers, which might not otherwise spend their resources to pursue actions against responsible third parties.

Senator Eric D. Coleman explained P.A. 11-205 in the Senate, noting that "this bill would provide for one third of the reimbursement for workers' compensation payments or settlements to be reserved for the employee in the case." 54 S. Proc., Pt. 22, 2011 Sess., p. 7052. When asked about the policy behind this change, Senator Coleman responded: "I think, fairly stated, the policy behind this legislation is simply to provide the employee some incentive to actually seek the recovery of whatever damages or award that could be secured from the third party that caused the accident." Id., p. 7054. The senator further clarified that, without the one-third portion, "there would be less incentive for the employee to pursue an action against the third party that caused the injury," primarily because the employee receives compensation from the employer for the injury, including some lost wages. Id., p. 7055.

Senator John A. Kissel, in support of the public act, observed that employees typically accept workers' compensation benefits for injuries rather than pursuing responsible third parties. He explained, "[i]f there is another, potential[ly] liable party, a third party, quite often those claims are tenuous and there really isn't that much of a motivation for the injured party, the employee, to bring that case to seek redress, especially if—if [the employee] go[es] through the process of seeking redress [and] the [employer] that paid the workers' compensation benefits gets most [or] all of the funds."

Id., pp. 7060–61. The one-third payment, Senator Kissel explained, would provide employees an incentive to pursue third parties: "By taking one third and setting it aside, it acts as motivation or—or—it allows for individuals who may be up in the air as to whether to pursue that third-party claim to have the motivation to do that." Id., p. 7061.

Senator Kissel noted that the two-thirds payment reserved for the employer would ultimately help employers and their insurance carriers, despite the one-third reduction in favor of the employee: "And the reason why I think that's good for all parties concerned is because if we, in this way, somehow incent[ivize] the employee to seek out a claim against the third party and they're successful, then at least there will be some reimbursement back to the insurance provider who paid on the workers' compensation claim. . . . It's a good bill. It [will] actually help insurers, I believe, down the road, because they don't pursue these claims on their own; they need the injured party to initiate these. And if the injured party is successful, not only will the injured party's benefits get enhanced by what they're allowed to keep, but at least some portion of those proceeds will go to the employer." Id., pp. 7061–62.

Senator Coleman also noted that employers could avoid the one-third reduction simply by bringing the third-party action themselves. When asked what motivation this would provide to an employer or insurer, Senator Coleman responded: "[T]he reservation of one third of whatever is recovered would only apply if the employee brought the [action]. If the insurance carrier or the employer brought the [action], then the one-third reservation would not apply." Id., p. 7056.

These sentiments were also reflected in the debate before the House of Representatives, which preceded the Senate's consideration of the legislation. Represen-

tative Gerald M. Fox brought out the bill in the House of Representatives. He remarked that the purpose of the bill was to encourage actions against third parties: "It certainly would be a benefit to the employee, this legislation. However, the testimony that came before the [Judiciary] Committee is that, many times, these cases are never brought because of the complications that can arise from reimbursement of 100 percent of [an employer's] lien [on the judgment in the third-party action]." 54 H.R. Proc., Pt. 10, 2011 Sess., p. 3183; see General Statutes § 31-293 (a) ("employer . . . shall have a lien upon any judgment received by the employee against the [third] party"). He continued: "[W]hat happens in many cases is, whether it could be a slip and fall situation or a motor vehicle accident . . . when 100 percent of the lien is required to be reimbursed, the case is simply never brought, in which case the workers' [compensation] carrier would be out all of the lien. They wouldn't even receive the two thirds that would come from a disposition from a tort action against a third party."[5] 54 H.R. Proc., supra, p. 3188.

[5] The defendant seizes upon other comments made by Representative Fox concerning the "solely to the benefit of the employee" language in P.A. 11-205 to argue that the one-third reduction should be subject to the moratorium. Specifically, Representative Fox stated the following during the House debate on the bill: "I do want to make one thing clear as well. There is language here that says the reduction shall inure solely to the benefit of the employee. . . . [T]he purpose of that line is to make it clear that the one-third reduction does not go . . . to the plaintiff's attorney in addition to any fee that they may already be entitled to." 54 H.R. Proc., supra, pp. 3174–75. The defendant asserts this passage demonstrates that the purpose of the "solely to the benefit of the employee" language in P.A. 11-205 was not to prevent the employer from later benefiting from the reduction by applying the moratorium but to simply make sure that the one-third reduction was not used to pay the plaintiff's attorney.

We disagree. The language that the legislature enacted sweeps more broadly than simply ensuring that the reduction does not get paid to the plaintiff's attorney. Its command that the reduction should "solely" benefit the employee unambiguously means that the reduction shall not benefit *any* other person or entity, including the employer, the attorney, the third-party tortfeasor, or anyone else.

Representative Vincent J. Candelora then asked a further question to confirm the purpose of the legislation: "And I just presume . . . the reason that [an employee would not bring an action against a responsible third party] is because the employee is made whole through workers' compensation, so it wouldn't make sense for them to bring a personal injury action if their employer is basically reimbursed 100 percent of the claim. . . . [I]s [P.A. 11-205] sort of giving a carrot to try to incentivize people for going after the appropriate parties?" Id., pp. 3183–84. Representative Fox replied: "[I]t might make it worthwhile to pursue a claim against the responsible party, the actual person who caused an injury, if it can be, if there's a better understanding of what it would be required to be reimbursed. . . . [W]hat this would do is allow for these claims to be brought, to be pursued. The workers' [compensation] carrier would receive two thirds of which, in many cases, they would receive nothing . . . ." Id., p. 3184.

The plain text of § 31-293 (a) clearly establishes, and the legislative history confirms, that the legislature intended the employee to receive the financial benefit from the one-third reduction in the employer's reimbursement as an incentive to pursue actions against third parties responsible for the employee's injuries. In this circumstance, we conclude that the moratorium must give way to the extent necessary to give full effect to P.A. 11-205. Although the legislature has acquiesced in our case law interpreting § 31-293 (a) to implicitly provide a moratorium; *Enquist* v. *General Datacom*, supra, 218 Conn. 25, 26–27 n.7; our application of our prior holdings must take into account the plain language and clear intent of later changes to the statute. Certainly, we must avoid construing statutory amendments so as to overrule the moratorium entirely without the legislature expressly stating an intent to do so. See id., 25 ("[i]n the absence of any express statutory language

or legislative history suggesting that our [moratorium] precedent was to be overruled, we decline to read the . . . amendment . . . as eliminating [the moratorium]"). But, in the present case, we are not asked to interpret P.A. 11-205 so as to entirely overrule our moratorium case law; we are asked only to recognize a limited exception to the moratorium for the one-third reduction. Given the plain and unambiguous language of § 31-293 (a) and the clear legislative intent behind P.A. 11-205, it is hardly a stretch to conclude that the legislature intended for the employee to retain the financial benefit from the reduction, even if the employee receives additional workers' compensation benefits after the disposition of the third-party action. As a result, we conclude that the moratorium should not apply to any proceeds the employee receives from a third-party action as a result of the one-third reduction mandated by P.A. 11-205. The moratorium would, however, continue to apply to any additional proceeds the employee received from the third-party action.

E

The defendant nevertheless argues that allowing the plaintiff to keep the one-third reduction while having future workers' compensation expenses paid for by the defendant would essentially give the plaintiff a duplicative recovery: the defendant would end up paying for all of the plaintiff's injury related expenses, while the plaintiff also recovers some damages for the same injury from a third party. For several reasons, we are not persuaded that concerns of duplicative recovery should alter our interpretation of the statute and our moratorium case law.

To be sure, allowing the employee to retain the one-third reduction and to continue to have injury related workers' compensation benefits paid by the employer might result in the employee's receiving some duplica-

tion in compensation. And we acknowledge that concerns of double recovery, in part, led this court to interpret § 31-293 (a) to include a right to a moratorium in the first place. See *Rosenbaum* v. *Hartford News Co.*, supra, 92 Conn. 403; see also *Enquist* v. *General Datacom*, supra, 218 Conn. 26. We explained in *Enquist* that, if we interpreted the statutory amendment at issue in that case to overrule our moratorium case law, "a claim made subsequent to the disposition of a [third-party] action would result in the employee receiving compensation from both the [third-party] wrongdoer and the employer. In the absence of explicit statutory language mandating such a result, we decline to adopt such a construction." *Enquist* v. *General Datacom*, supra, 26.

In the present case, and unlike in *Enquist*, however, the statutory amendment before us *does* contemplate the possibility of providing the employee with duplicative sources of recovery. The text of P.A. 11-205 expressly requires that the employer's claim for reimbursement, including for expenses already paid, be reduced and the reduction be given instead to the employee, even though the employer has already paid the employee's workers' compensation benefits. Because the legislature's command that the employee shall receive the sole benefit of this reduction gives rise to the potential for a duplicative recovery, we are not persuaded that these concerns should alter our construction of § 31-293 (a) in the present case. See *Weinberg* v. *ARA Vending Co.*, 223 Conn. 336, 348, 350, 612 A.2d 1203 (1992) (noting that principle against double recovery "is not inviolate" and carries less force when legislative language clearly created possibility of duplicative recovery).

Moreover, a double recovery will not arise in all cases. For instance, an employee may receive compensation under the act for only physical injuries, not pain and

suffering, but may pursue these damages from a third party. See, e.g., *Cruz* v. *Montanez*, 294 Conn. 357, 371, 984 A.2d 705 (2009). Nevertheless, if an employee recovers damages for pain and suffering in a third-party action, even though the act does not compensate for these damages, they must be used to satisfy the employer's claim for its payment of economic damages. Id., 369–71 (employer's right to reimbursement from third-party proceeds extends to recovery for noneconomic damages, even though act does not provide compensation for noneconomic harms). In any case in which an employee recovers an award for noneconomic damages, like pain and suffering, the one-third reduction would allow the employee to obtain compensation for some of those damages without creating duplication.

Lastly, the principle cautioning against allowing duplicative recovery is less persuasive when, as in the present case, the employer has control over whether the employee will receive duplicative compensation at the employer's expense. See *Goodyear* v. *Discala*, 269 Conn. 507, 524–25, 849 A.2d 791 (2004) (giving less weight to double recovery concerns when employer could have avoided duplicative compensation to employee by exercising its rights under General Statutes [Rev. to 1995] § 31-293 [a]). As mentioned previously, the one-third reduction mandated by P.A. 11-205 applies only when the employee brings the third-party action; the employer can avoid the reduction in its claim by instead bringing the action itself. The defendant in the present case did not do so, giving rise to the reduction in favor of the plaintiff. Because the defendant did not pursue its right under § 31-293 (a) to proceed against the third party directly, the defendant's actions are at least partly responsible for any duplicative recovery the plaintiff might receive by retaining the benefit of the one-third reduction. See id., 524 ("[a]lthough we agree with the [employer] that we pre-

viously have considered the goal of preventing double recovery when construing legislation in [workers' compensation] cases . . . we do not agree that this means that the policy against double recovery compels us to recognize the [employer's interpretation of the statute] in light of the [employer's] failure to exercise its rights under [General Statutes (Rev. to 1995)] § 31-293 [a]" [citations omitted]).

The decision of the Compensation Review Board is reversed and the case is remanded to the board with direction to reverse the decision of the commissioner.

In this opinion the other justices concurred.

DAVID EUBANKS *v.* COMMISSIONER OF CORRECTION (SC 19780)

Palmer, McDonald, Robinson, D'Auria, Kahn and Vertefeuille, Js.*

Syllabus

The petitioner, who had been convicted of various crimes in connection with an incident in which he was a passenger in a motor vehicle driven by his girlfriend, M, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to specifically object to the admission at trial of a certain transcript of M's testimony at a prior court hearing. M, who was unavailable to testify at the petitioner's criminal trial, testified at the prior hearing that, while she was driving a vehicle in which the petitioner and her brother were passengers, she heard gunshots and drove away. She was stopped by the police, and all three occupants were arrested. M further testified that she had not seen a gun in the vehicle but admitted that, at the police station during questioning, she had provided a statement that incriminated the petitioner and her brother in the shooting only because she felt pressured by the police to do so. The petitioner's trial counsel, who also had represented the petitioner at the prior hearing, argued that, because M was not an unavailable witness and he had not had an adequate opportunity to cross-examine her at the prior hearing, the transcript was inadmissible because its admission would violate the

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

petitioner's right of confrontation. The trial court rejected both of the bases on which trial counsel relied, and, following certain redactions to which trial counsel agreed, the transcript was admitted. The habeas court denied the petitioner's habeas petition, finding that trial counsel had adequately objected to the admission of the transcript. Thereafter, the habeas court denied the petitioner's petition for certification to appeal. During the pendency of his subsequent appeal to the Appellate Court from the habeas court's denial of his petition for certification to appeal, the petitioner sought an articulation from the habeas court as to whether that court's finding that trial counsel had adequately objected constituted a finding that counsel had objected to the transcript and to the hearsay contained in it, or, in the alternative, that trial counsel had failed to raise any hearsay objections but that the failure to do so was reasonable. In its articulation, the habeas court clarified that it found that trial counsel had not raised any hearsay objections to the transcript but also observed that the petitioner had failed to present any evidence during the habeas trial in support of his claim that trial counsel had rendered deficient performance in failing to object, on the basis of double hearsay, to that portion of the transcript that referred to M's prior statement to the police. Thus, the habeas court concluded that it lacked an evidentiary basis to find that trial counsel's failure to object on that basis was unreasonable. On appeal, the Appellate Court concluded that the evidence presented at the habeas trial demonstrated that trial counsel's failure to identify the hearsay within M's prior testimony and his subsequent failure to object to the use of the transcript as substantive evidence constituted deficient performance and that the petitioner was prejudiced by that deficient performance. Accordingly, the Appellate Court reversed the judgment of the habeas court and remanded the case with direction to grant the habeas petition. On the granting of certification, the respondent Commissioner of Correction appealed to this court. *Held* that the Appellate Court improperly addressed the question of whether the petitioner's trial counsel rendered ineffective assistance of counsel by failing to object to the admission of the transcript on the basis that portions of the transcript referring to M's prior statement to the police constituted double hearsay, and, accordingly, this court reversed the judgment of the Appellate Court and remanded with direction to dismiss the petitioner's appeal; although there was an allegation in the habeas petition alluding to trial counsel's failure to object to M's hearsay statements to the police, the petitioner did not pursue that allegation during the habeas trial, as he presented no evidence or testimony that would have supported that allegation and presented no argument that would have alerted either the habeas court or opposing counsel that he was pursuing that allegation, and, because there was no evidence or argument concerning trial counsel's failure to object on the basis of double hearsay, the habeas court made no findings regarding whether trial counsel had rendered deficient perfor-

mance by failing to object on that basis or regarding whether that failure to object prejudiced the petitioner; moreover, this court rejected the petitioner's contention that the Appellate Court's judgment could be affirmed on the alternative ground that that court correctly concluded that trial counsel's failure to object on the basis of double hearsay was objectively unreasonable, as there was no testimony, evidence or argument presented to the habeas court on that issue, and this court declined to second-guess trial counsel's decision.

Argued December 20, 2017—officially released July 31, 2018

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, *Kwak*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to the Appellate Court, *Beach*, *Keller* and *West*, *Js.*, which reversed the habeas court's judgment and remanded the case to that court with direction to grant the petition, and the respondent, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *David Clifton*, assistant state's attorney, and *Adrienne Russo*, deputy assistant state's attorney, for the appellant (respondent).

Deren Manasevit, assigned counsel, for the appellee (petitioner).

Opinion

KAHN, J. Sometimes, the dispositive issue in an appeal is whether the reviewing court properly should reach the merits. Upon this court's grant of his petition for certification, the respondent, the Commissioner of Correction, appeals from the Appellate Court's judgment reversing the judgment of the habeas court, which had denied the petition for a writ of habeas corpus

filed by the petitioner, David Eubanks.[1] The respondent claims that the Appellate Court improperly reached the merits of the petitioner's claim that his trial counsel rendered ineffective assistance of counsel by failing to object to certain portions of the prior testimony of Tanika McCotter on the basis that those portions of her testimony constituted double hearsay. *Eubanks* v. *Commissioner of Correction*, 166 Conn. App. 1, 22, 140 A.3d 402 (2016). The respondent contends that because the petitioner raised this argument for the first time on appeal, the petitioner's claim is unreviewable. The petitioner responds that the Appellate Court properly addressed the double hearsay issue and reasserts the alternative ground for affirmance that he raised in the Appellate Court. Specifically, the petitioner contends that the Appellate Court's judgment may be affirmed on the basis that defense counsel's failure to object to double hearsay as substantive evidence was objectively unreasonable under *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Our review of the record reveals that the petitioner presented no evidence and made no argument to the habeas court that would have alerted either that court or opposing counsel to the petitioner's intent to argue that his trial counsel's failure to object to portions of the prior testimony on the basis of double hearsay was objectively unreasonable. Accordingly, we agree with the respondent that the Appellate Court improperly reached the merits of the petitioner's claim. For the same reason, we reject the petitioner's alternative

[1] This court granted the respondent's petition for certification, limited to the following issue: "Did the Appellate Court correctly determine that the habeas court incorrectly rendered judgment for the respondent on the petitioner's claim that his trial counsel was ineffective in failing to object to portions of the testimony of Tanika McCotter in a transcript admitted under the former testimony exception to the hearsay rule, on the ground that they were 'double hearsay'?" *Eubanks* v. *Commissioner of Correction*, 323 Conn. 911, 149 A.3d 980 (2016).

ground for affirmance. Accordingly, we reverse the judgment of the Appellate Court.

In its 2012 decision affirming the petitioner's judgment of conviction on direct appeal, the Appellate Court set forth the following relevant facts. "At approximately 6 a.m. on November 22, 2008, Bennett Hines, an officer with the New Haven [P]olice [D]epartment, was sitting in his patrol car. At that hour in the morning there was no vehicle traffic and no cars were parked by the side of the street. Hines heard several gunshots come from the New Haven green in the vicinity of Elm and College Streets, which location was approximately two blocks from where he was parked. When Hines looked in the general direction from which he heard the gunshots fired, he saw a dark colored sport utility vehicle (SUV) turn left from Elm Street onto Church Street. As the SUV turned onto Wall Street, Hines noticed that the tires of the SUV were 'screeching . . . .' Based on the speed at which the SUV was traveling and the way it turned onto Wall Street, Hines believed that it was likely that the occupants of the vehicle had discharged the gunshots; as a result he began to follow the SUV. Hines reported the incident to dispatch and activated his cruiser's lights and sirens.

"The SUV traveled through the city and onto the entrance ramp to Interstate 91; it 'would not stop.' Hines observed a 'dark colored item come out of the passenger side window' and 'a silver colored item come out of the driver side window.' Based on his training and experience, Hines believed the items thrown out of the windows to be guns. Officer Edward Dunford, who was following behind Hines' cruiser, also saw 'something dark colored come flying out of the passenger side of the vehicle . . . .'

"Before entering the highway, the SUV stopped. Hines drew his gun and went to the driver's side of the car.

Dunford drew his gun and went, with other officers, to the passenger side of the vehicle. . . . McCotter was operating the SUV, the [petitioner], her boyfriend, was in the front passenger seat and her brother . . . was in the rear passenger seat. The [petitioner] initially disobeyed commands from the officers, stepped over the guardrail and 'look[ed] around him.' The [petitioner] eventually complied with orders to lie on the ground and was arrested. . . . McCotter and [her brother] also were arrested. The officers then searched the area where they believed the items were tossed from the windows of the SUV. Using a thermal imager, Sergeant Peter Moller found a semiautomatic .45 caliber black Ruger handgun, with the safety off and its magazine empty, lying on top of a pile of leaves. No other weapon was found.

"Detective Joshua Armistead investigated the area of College and Elm Streets where the gunshots reportedly had been fired. Armistead found eight .40 caliber shell casings spread out over several car lengths. He stated that the casings 'looked like they were fired from somebody moving on Elm Street.' Lieutenant Joseph Rainone, a firearms examiner with the Waterbury [P]olice [D]epartment, determined that the Ruger handgun was operable. He also determined that although the eight shell casings had similar class characteristics, he was unable to conclude whether they had been fired from the same firearm. He was able to determine, however, that the shell casings did not come from the Ruger handgun.

"The [petitioner] was charged with [various weapons offenses and with violation of a protective order]." (Footnote omitted.) *State* v. *Eubanks*, 133 Conn. App. 105, 106–108, 33 A.3d 876, cert. denied, 304 Conn. 902, 37 A.3d 745 (2012).

At the petitioner's criminal trial, the state sought to introduce McCotter's prior testimony at a hearing con-

ducted pursuant to this court's decision in *State* v. *Stevens*, 278 Conn. 1, 12–13, 895 A.2d 771 (2006).[2] The state claimed that the prior testimony was admissible pursuant to § 8-6 (1) of the Connecticut Code of Evidence[3] because McCotter was unavailable as a witness, the issues at the *Stevens* hearing were substantially similar to those presented at the criminal trial, and the petitioner had been given an adequate opportunity to cross-examine McCotter at the *Stevens* hearing.

The petitioner's trial counsel, Walter Bansley IV, who also had represented the petitioner at the *Stevens* hearing, objected to the admission of the transcript of McCotter's testimony on two bases. Although the state expressly had relied on the prior testimony exception to the hearsay rule in seeking to have the *Stevens* hearing transcript admitted; see footnote 3 of this opinion; Bansley did not argue that the references in the transcript to McCotter's prior statement to the police constituted inadmissible double hearsay.[4] Instead, he argued that

[2] The purpose of a *Stevens* hearing is to determine whether probable cause exists for finding that a defendant violated a "no subsequent arrests" condition of a plea agreement. *State* v. *Stevens*, supra, 278 Conn. 12–13.

[3] Section 8-6 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (1) . . . Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing. . . ."

[4] At the criminal trial, Bansley did not object on hearsay grounds to the admission of the transcript of McCotter's testimony at the *Stevens* hearing. We observe, however, that Bansley's "failure" to *expressly* object to the admission of the transcript generally on the basis of hearsay is not relevant to the petitioner's claim that Bansley rendered ineffective assistance of counsel. As we recount in this opinion, the state offered the transcript pursuant to § 8-6 (1) of the Connecticut Code of Evidence, which sets forth an exception to the hearsay rule. Although Bansley did not mention hearsay in opposing the admission of the transcript, it was not necessary for him to do so, given the state's proffer of it under a hearsay exception. The due process grounds that Bansley relied on in objecting—namely, that McCotter was available, and that he had not had an adequate opportunity to cross-

the transcript was inadmissible in its entirety. Both grounds on which he expressly relied in objecting to the admission of the transcript were predicated on the petitioner's right to confrontation. See *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). First, he argued that, because the state had not exercised due diligence in its attempts to locate McCotter, she was not an unavailable witness. Second, Bansley contended that, because he had not had an adequate opportunity to cross-examine McCotter at the *Stevens* hearing, the admission of the transcript would violate the petitioner's right to confront the witness against him.

The trial court rejected both of the bases on which Bansley relied to argue that the admission of the *Stevens* hearing transcript would violate the petitioner's right to confront witnesses. Specifically, after hearing testimony regarding the state's efforts to locate McCotter, the court found that those efforts were reasonable and that she was unavailable. The court also implicitly found that the petitioner had had an adequate opportunity to cross-examine McCotter at the *Stevens* hearing. The court therefore ruled that the transcript was admissible pursuant to § 8-6 (1) of the Connecticut Code of Evidence and that its admission would not violate the petitioner's right to confrontation.

The court then noted, on the record, that for the sake of efficiency, in the event that the court ruled that the

examine her at the prior proceeding—are not only relevant to the question of whether the admission of the transcript implicated the petitioner's due process rights pursuant to *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), but also are directly relevant to whether the transcript fell under the exception to the hearsay rule set forth in § 8-6 (1). See footnote 3 of this opinion. Finally, in rejecting Bansley's opposition to the state's proffer of the transcript, the trial court expressly held that it was admissible under § 8-6 (1). Accordingly, the trial court clearly understood the state and Bansley to be advancing arguments, respectively, for and against admission of the transcript pursuant to both the hearsay exception set forth in § 8-6 (1) and the due process claims under *Crawford*.

Stevens hearing transcript was admissible, Bansley and the prosecutor had been reviewing it with the goal of arriving at an agreement as to any redactions. Counsel informed the court that, with a few exceptions, they already had arrived at an agreement as to redactions. The court heard argument and made rulings on the minor points of disagreement that remained between the parties. The following material was redacted from the transcript: an exchange in which the court excused McCotter to allow her to consult with her attorney regarding her fifth amendment privilege against self-incrimination; testimony to which Bansley had successfully objected at the *Stevens* hearing; testimony regarding whether McCotter wanted the protective order against the petitioner modified or removed; and testimony regarding the facts that gave rise to the protective order. With the redactions in place, the transcript of McCotter's testimony at the *Stevens* hearing was admitted in full.

Because it will be helpful to our discussion, we also summarize McCotter's testimony at the *Stevens* hearing. At that hearing, she testified that sometime between 4 and 4:30 a.m. on November 22, 2008, she, her brother and the petitioner left a party at her sister's house on Fitch Street in New Haven. She drove the petitioner's Ford Expedition, with the petitioner riding in the front passenger seat and her brother riding in the backseat, on the passenger side. She heard gunshots, "freaked out" and drove away from the sound toward the highway. When she noticed a police cruiser behind her, she pulled over. All three occupants of the vehicle, including McCotter, were arrested, and McCotter was brought to the police station for questioning.

McCotter further testified that on the morning in question, she heard gunshots but had not seen a gun. As to what she had told police during questioning at the police station, she testified that, initially, she told

them that she had not seen a gun. When the police pressed further and asked if there had been a gun in the car, she responded that there was not and reiterated that she had not seen one. Although she admitted that she eventually provided a recorded statement to the police in which she incriminated the petitioner and her brother in the shooting, she claimed that she did so only because the police had pressured her over a period of hours, she wanted to go home to her children, and she believed that the police would not allow her to leave until she told them what they wanted to hear. When the prosecutor showed McCotter her prior statement to the police, she again conceded that, ultimately, she had told the officers that the petitioner and her brother took guns out and were firing up into the air.

McCotter's testimony at the *Stevens* hearing was less than clear regarding whether she had told the truth in her prior statement to police. In response to her repeated avowals that she had given the police her recorded statement incriminating the petitioner and her brother only in order to be able to leave the station, the prosecutor asked her whether she had lied in that statement. Initially, McCotter failed to answer the question directly, maintaining that she had not seen a gun and that she told the police otherwise only because they pressured her. When the prosecutor asked her again whether she had told the truth in her statement, she answered: "No, I don't know where the shots came from." Subsequently, however, she testified that she had been truthful with the police "when [she] gave that interview . . . ."

"At the conclusion of the jury trial, the [petitioner] was found guilty of unlawful possession of a weapon in a motor vehicle and of criminal violation of a protective order. He was found not guilty on all other counts. The court imposed a total effective sentence of seven years imprisonment." *State* v. *Eubanks*, supra, 133 Conn. App.

110. The Appellate Court affirmed the judgment of conviction on appeal, rejecting, inter alia, the petitioner's challenge to the sufficiency of the evidence. Id., 106, 110. In arriving at its conclusion that the evidence was sufficient to support the petitioner's conviction of unlawful possession of a weapon in a motor vehicle, the Appellate Court relied on the fact that the portions of the *Stevens* hearing transcript that referred to McCotter's prior statement to the police had been admitted as substantive evidence. Id., 113. The Appellate Court also observed that McCotter's prior recorded statement to the police was corroborated by the "testimony of police officers regarding gunshots fired, the location and direction of the SUV and the spent .40 caliber shell casings . . . ." Id., 115.

The petitioner subsequently filed this amended petition for a writ of habeas corpus, alleging, inter alia, that Bansley had rendered ineffective assistance of counsel because he "failed to specifically object to the admission of . . . McCotter's *Stevens* testimony—including her hearsay statements to the police—as substantive evidence, and erroneously conceded to admission thereof as substantive evidence . . . ." Following a trial, the habeas court denied the petition, finding that Bansley had "adequately objected" to the admission of the *Stevens* hearing transcript.

The petitioner appealed from the habeas court's denial of his petition for certification to appeal to the Appellate Court. *Eubanks* v. *Commissioner of Correction*, supra, 166 Conn. App. 3. During the pendency of the appeal, the petitioner sought an articulation from the habeas court as to five questions. The first two questions asked whether the habeas court's finding that Bansley adequately objected constituted a finding that (1) Bansley objected both to the *Stevens* hearing transcript and to the hearsay within it, or, in the alternative, (2) Bansley had failed to raise *any* hearsay objections,

but that the failure to do so was reasonable. The petitioner also sought articulation as to three additional questions: whether Bansley's failure to object to the double hearsay in the *Stevens* hearing transcript fell below an objective standard of reasonableness; whether the failure to so object had prejudiced the petitioner; and whether the redactions that Bansley and the prosecutor had agreed upon addressed any resulting prejudice. After the habeas court denied the motion for articulation, the petitioner filed a motion for review with the Appellate Court. The Appellate Court granted the petitioner's motion and ordered the habeas court to issue an articulation, limited to the first two questions.

In its articulation, the habeas court began by observing that the evidentiary portion of the habeas trial lasted scarcely longer than thirty minutes and that Bansley testified for a total of approximately twenty minutes. Although the court clarified that it found that Bansley did not raise any hearsay objections to the introduction of the *Stevens* hearing transcript, it also emphasized that "[n]o testimony was elicited from [Bansley] about objecting to the *Stevens* testimony on hearsay grounds, nor his reasons for raising some grounds and not others and the trial strategy he employed." The habeas court further observed that the petitioner had failed to present *any* evidence during the habeas trial in support of the claims that he alleged in his motion for articulation, namely, that Bansley rendered deficient performance for failing to object on the basis of double hearsay to the portions of the transcript that referred to McCotter's prior statement to the police. Put another way, the court stated, the motion for articulation effectively requested that the court "articulate as to issues where the petitioner's evidence is wholly lacking." Accordingly, the habeas court concluded, it lacked an evidentiary basis to find that Bansley's failure to object to those portions of the transcript was unreasonable.

The Appellate Court disagreed that there was insufficient evidence to reach the merits of the petitioner's claim that, in failing to object on the basis of double hearsay, Bansley had not exercised reasonable judgment. *Eubanks* v. *Commissioner of Correction*, supra, 166 Conn. App. 11–13. The court explained that the evidence presented at the habeas trial demonstrated that there was "no conceivable tactical justification" for Bansley's failure to object on that basis. Id., 12. The court relied on Bansley's testimony that his aim was to keep out the *Stevens* hearing transcript and also pointed to his testimony that when he was working with the prosecutor to obtain redactions, he sought redactions of every portion of the transcript that he believed was objectionable. Id., 12–13. In light of that testimony, the Appellate Court concluded that Bansley was unaware that he could have objected to the portions of the transcript that referred to McCotter's prior statement to the police on the basis of double hearsay. Id., 13, 16–17. The court also relied on what Bansley had *not* testified to at the habeas hearing. Specifically, the court observed that Bansley did not testify that he "made a reasonable tactical judgment to refrain from objecting based on hearsay grounds, nor did he offer a reasonable professional judgment that an objection based on hearsay grounds would not have succeeded." Id., 13. The Appellate Court concluded that Bansley's "failure to identify the second level of hearsay within . . . McCotter's *Stevens* testimony and subsequent failure to object to its use as substantive evidence was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in criminal law." (Internal quotation marks omitted.) Id., 17.

The court further concluded that the petitioner had been prejudiced by Bansley's deficient performance. Id., 21. It cited its prior decision in the direct appeal, in which it had relied on the *Stevens* hearing transcript,

as corroborated by the remainder of the evidence, to conclude that if the transcript had not come in for its substance, there would have been "very little evidence to establish that the petitioner was in actual possession of a gun in a motor vehicle." Id., 20. The court observed that, even at the *Stevens* hearing, McCotter's testimony regarding her prior statement to the police was admitted solely for impeachment purposes. Id., 13. In contrast, at trial, the portions of the transcript that referred to McCotter's prior statement to the police came in for their substance. Id. Without the admission of those portions of the transcript as substantive evidence, the court determined, its confidence in the verdict would be undermined. Id., 21. Accordingly, the court reversed the judgment of the habeas court. Id., 22. This certified appeal followed.

The respondent contends that the Appellate Court improperly addressed the question of whether Bansley rendered ineffective assistance of counsel by failing to object to the admission of the *Stevens* hearing transcript on the basis that the portions of the transcript referring to McCotter's prior statement to the police constituted double hearsay. We agree.

"As we previously have noted, we will not review a claim unless it was distinctly raised at trial." *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009); id., 202–204 (declining to review petitioner's claim that habeas court improperly failed to apply due process analysis to his claim of right to appeal); see also Practice Book § 60-5 ("[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"). We have explained that principles of fairness dictate that both the opposing party and the trial court are entitled to have proper notice of a claim. *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). Our review of a claim not distinctly raised at

the trial court violates that right to notice. As we have explained, appellate review of "newly articulated claim[s]" not raised before the habeas court "would amount to an ambuscade of the [habeas] judge . . . ." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 580, 941 A.2d 248 (2008). Accordingly, "the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court [and the opposing party] on reasonable notice of that very same claim." (Internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 465, 174 A.3d 770 (2018). We also observe that restricting our review to those claims that were distinctly raised at the habeas trial serves yet another, practical purpose—ensuring that an adequate record exists for such review.

In our review, it is important to keep in mind precisely what the petitioner was obligated to "distinctly raise" at the habeas court in order both to provide proper notice to the court and the respondent and to ensure an adequate record for review. "A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 678, 51 A.3d 948 (2012). As to the performance prong, the question is whether "counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, supra, 466 U.S. 688. It is well settled that it is the petitioner who bears the burden to prove that his counsel's performance was objectively unreasonable. See *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 79, 967 A.2d 41 (2009) ("[a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no

. . . tactical justification for the course taken" [internal quotation marks omitted]); see also *Strickland* v. *Washington*, supra, 689 (petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy" [internal quotation marks omitted]).

Given these principles, we review the habeas trial record in order to determine whether the petitioner distinctly raised the claim that Bansley's performance was objectively unreasonable on the basis that Bansley failed to object to the references within the *Stevens* hearing transcript to McCotter's prior statement to the police on the basis of double hearsay. At the habeas court, the only allusion to the petitioner's claim that Bansley rendered ineffective assistance of counsel for failing to object on the basis of double hearsay is in the petition itself, which alleges that Bansley "failed to specifically object to the admission of . . . McCotter's *Stevens* testimony—*including her hearsay statements to the police*—as substantive evidence, and erroneously conceded to admission thereof as substantive evidence . . . ." (Emphasis added.) The petitioner, however, did not pursue that allegation during the habeas trial. He did not elicit any testimony that would have supported the allegation or present any argument that would have alerted either opposing counsel or the habeas court that he was pursuing that allegation.

As we have already noted, the single day habeas trial was quite brief, and Bansley testified for approximately twenty minutes, including direct, cross- and redirect examinations. Our review of the habeas trial transcript reveals that the petitioner elicited no testimony from Bansley regarding his failure to object to the admission of any portion of the *Stevens* hearing transcript on the

basis that it constituted double hearsay.[5] As a result, the petitioner asked no questions regarding whether such failure was the result of error or incompetence, or part of a trial strategy, and, if so, what that strategy was. In closing argument, neither habeas counsel nor the respondent evinced any understanding that the question of Bansley's failure to raise a double hearsay objection had been presented to the habeas court.[6] Furthermore, because there was no testimony, evidence or argument as to Bansley's failure to object on the basis of double hearsay, the habeas court made no findings regarding whether Bansley had rendered deficient performance for failing to do so or whether the petitioner had been prejudiced by that failure.

The habeas court's oral decision makes clear that, if the petitioner intended to argue at the habeas trial that Bansley had rendered ineffective assistance of counsel by failing to object on the basis of double hearsay, the court had not been placed on notice that the petitioner was making that argument. The court expressed its understanding that the petitioner was claiming generally that Bansley improperly had failed to "object to

[5] The habeas trial transcript reveals that the petitioner questioned Bansley regarding two issues: whether Bansley had provided the petitioner with effective assistance in connection with the petitioner's decision to withdraw his guilty plea and proceed to trial and whether Bansley had rendered deficient performance in failing to exclude the *Stevens* hearing transcript in its entirety. The petitioner's primary focus, however, was on the plea withdrawal. As to the transcript, the petitioner's habeas counsel asked a total of eight questions during his direct examination of Bansley regarding his failure to exclude that evidence. Those questions and Bansley's responses did not address the double hearsay issue. As would be expected given the petitioner's failure to ask any questions that even alluded to double hearsay, the respondent's cross-examination of Bansley also did not delve into that issue.

[6] Habeas counsel merely stated generally that Bansley did not object to the admission of the *Stevens* hearing transcript for its substance. The respondent argued that there had been no testimony elicited during the trial regarding Bansley's reasons for "not objecting" to the admission of the *Stevens* hearing transcript.

the admission of [the transcript] as substantive evidence . . . .'' The court's explanation of its rejection of the petitioner's claim echoed that same understanding. The court stated: ''Bansley also adequately objected to . . . McCotter's testimony from the *Stevens* hearing being introduced into evidence, which the trial court overruled; but, at any rate, he was able to redact portions of the testimony that may have been prejudicial to the petitioner.'' The court's ruling supports the conclusion that it understood the petitioner's claim to be focused on Bansley's failure to persist in objecting to the admission of the transcript generally, and that it did not perceive that the petitioner made any specific arguments regarding particular portions of the transcript. Moreover, nothing in the court's decision suggests that it understood the petitioner to be making any argument based on the failure to object on the basis of *hearsay* particularly, much less double hearsay.

Our review of the record persuades us that the Appellate Court improperly addressed the petitioner's claim that Bansley rendered ineffective assistance of counsel by failing to raise a double hearsay objection to the admission of those portions of the *Stevens* hearing transcript that referenced McCotter's prior statement to police. As we have observed, the petitioner alluded to the issue of double hearsay only once, in the petition itself, which includes a reference to McCotter's ''hearsay statements to the police . . . .'' That fleeting reference is insufficient to provide a basis for review. If we were to conclude on the basis of that brief mention of the issue that the petitioner had ''distinctly raised'' the claim he now pursues on appeal, it would be difficult to say that any issue, no matter how briefly and generally alluded to, had not been raised before the habeas court. Specifically, as we have detailed herein, the petitioner failed to elicit any testimony at the habeas trial that would have proved the allegation, and would have

alerted both opposing counsel and the habeas court that he was presenting an argument predicated on Bansley's failure to raise a double hearsay objection. The petitioner also failed to make any argument to the habeas court that would have alerted it to his reliance on this theory. Setting forth the allegation in the petition was not sufficient—without more—to alert either the court or the respondent that the petitioner intended to pursue this argument.[7]

The habeas court's subsequent articulation confirmed that it had not been on notice during the habeas trial that the petitioner was arguing that Bansley rendered ineffective assistance of counsel for failure to object on the basis of double hearsay. The court specifically stated that, due to the failure of the petitioner to advance this theory at trial, the record was inadequate to allow it to make findings as to that issue. Accordingly, we decline to review the merits of the petitioner's claim.

Because we conclude that the petitioner failed to present *any* evidence or pursue an argument before the habeas court that Bansley's failure to object on the basis of double hearsay constituted deficient performance, we also reject the petitioner's alternative ground for affirmance. Specifically, the petitioner contends that the Appellate Court's judgment could be affirmed on

[7] We emphasize that our conclusion that the petitioner failed to distinctly raise the claim that Bansley rendered deficient performance for failing to object on the basis of double hearsay relies on the fact that the petitioner both presented no evidence and made no argument to the habeas court on the issue. If the petitioner had argued that claim to the habeas court, but had failed to present evidence to prove that Bansley's actions were objectively unreasonable, that failure alone would not require the conclusion that he had failed to distinctly raise the issue before the habeas court. For example, if the petitioner had simply argued to the habeas court that Bansley's failure to object on the basis of double hearsay was objectively unreasonable as a matter of law, an appellate court would be able to review an appeal from the judgment of the habeas court, because the petitioner would have distinctly raised the claim.

the alternative ground that the court properly concluded that Bansley's failure to object on the basis of double hearsay was objectively unreasonable. In arriving at that conclusion, however, the Appellate Court relied on its observation that "[t]he petitioner's trial counsel did not indicate that he made a reasonable tactical judgment to refrain from objecting based on hearsay grounds, nor did he offer a reasonable professional judgment that an objection based on hearsay grounds would not have succeeded." *Eubanks* v. *Commissioner of Correction*, supra, 166 Conn. App. 13. Although we agree that Bansley failed to testify to these matters, it is significant that the reason for this lacuna in the record was that the petitioner failed to pursue this theory at the habeas trial.

The Appellate Court also acknowledged the principle that there is a strong presumption in favor of concluding that counsel's performance was competent. Id., 12. That principle bears emphasis. In order to overcome that presumption, *the petitioner bears the burden* of proving "that counsel's representation fell below an objective standard of reasonableness." *Strickland* v. *Washington*, supra, 466 U.S. 688. "[T]he performance inquiry must be whether counsel's assistance was reasonable *considering all the circumstances*." (Emphasis added.) Id. Thus, the question of whether counsel's behavior was objectively unreasonable is not only one on which the petitioner bears the burden of proof; its resolution turns on a fact intensive inquiry.

For these reasons, *Strickland* makes clear that "[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment

of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Citation omitted.) Id., 689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct *on the facts of the particular case, viewed as of the time of counsel's conduct*. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and [to have] made all significant decisions in the exercise of reasonable professional judgment." (Emphasis added.) Id., 690.

In light of the fact intensive nature of the inquiry, its highly deferential nature, and, most important, in light of the fact that it is the petitioner who bears the burden of proving that counsel's performance was objectively unreasonable, it will be the rare case in which it is appropriate to conclude—particularly on such a scant record—that a petitioner has borne that burden. The Appellate Court, concluding that this was such a case, indicated that "no conceivable tactical justification for counsel's actions existed." *Eubanks* v. *Commissioner of Correction*, supra, 166 Conn. App. 12. We disagree. The Appellate Court, however, did not indicate on what basis it determined it was appropriate to reach this issue, and we are not aware of any such basis.[8] In the

[8] We observe that the petitioner did not request that his unpreserved claim be reviewed pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), which allows a party to raise an unpreserved constitutional claim under certain circumstances. Even if such a request had been made, it would have been unavailing. This court has previously held that a petitioner is not entitled to "*Golding* review of a claim that he raised for the first time in his habeas appeal but *could have raised in his habeas petition*" [because] [i]f we were to allow *Golding* review under such circumstances, a habeas

absence of any testimony, evidence or argument advanced to the habeas court on the issue, we decline to second-guess counsel's decisions.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to render judgment dismissing the petitioner's appeal.

In this opinion the other justices concurred.

DENIS HICKEY *v.* COMMISSIONER OF CORRECTION
SC 19781

Palmer, McDonald, Robinson, D'Auria and Kahn, Js.*

Syllabus

The petitioner, who had been convicted of certain crimes in connection with the sexual assault of a child, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to request instructions limiting the jury's consideration of uncharged sexual misconduct evidence to the issue of propensity. Specifically, the petitioner claimed that his trial counsel should have requested a contemporaneous instruction following certain testimony and the inclusion of corresponding language in the trial court's final charge. The habeas court concluded that trial counsel's performance was deficient and that, because the trial court's instructions on uncharged sexual misconduct did not conform to certain requirements set forth in this court's decision in *State* v. *DeJesus* (288 Conn. 418), the petitioner had satisfied his burden of demonstrating prejudice. The habeas court rendered judgment granting the habeas petition, from which the respondent, the Commissioner of Correction, on the granting of certification, appealed to the Appellate Court. The Appellate Court concluded that the habeas court had failed to substantiate its conclusion

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petitioner would be free to raise virtually any constitutional claim on appeal, regardless of what claims he raised in his habeas petition or what occurred at his habeas trial. Such a rule would also undermine the principle that a habeas petitioner is limited to the allegations in his petition, which are intended "to put the [respondent] on notice of the claims made, to limit the issues to be decided, and to prevent surprise." (Emphasis in original; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 316 Conn. 779, 789, 114 A.3d 925 (2015).

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

that the petitioner suffered prejudice with a factual analysis of how trial counsel's deficient performance resulted in an unfair trial, and had not assessed the trial court's instructions in the context of the state's evidence or closing arguments. The Appellate Court reversed the judgment of the habeas court and remanded the case for a new trial on the question of prejudice, and the commissioner, on the granting of certification, appealed to this court. *Held* that the petitioner could not prevail on his ineffective assistance claim, the petitioner having failed to prove prejudice: this court's review of the record led to the conclusion that any of the alleged errors by trial counsel did not deprive the petitioner of a fair trial, as the language of the trial court's final charge, when read as a whole, was legally correct and sufficient to limit any prejudicial effect of the uncharged sexual misconduct evidence, and, because the state's case against the petitioner was relatively strong, it was not reasonably likely that the result of the petitioner's criminal trial would have been different but for trial counsel's purportedly deficient performance; moreover, in the absence of any challenge to the factual findings of the habeas court, the Appellate Court should have engaged in a plenary review of the evidence in the record to resolve the commissioner's claim that the petitioner had failed to satisfy his burden of proving prejudice as a matter of law, and, therefore, the Appellate Court improperly remanded the case to the habeas court for further proceedings.

Argued March 26—officially released July 31, 2018

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, *Mullins*, *J.*; judgment granting the petition; thereafter, the respondent, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Alvord* and *Mihalakos*, *Js.*, which reversed the trial court's judgment and remanded the case with direction to deny the petition in part and for a new trial, and the respondent, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Marjorie Allen Dauster, senior assistant state's attorney, with whom, on the brief, were *David Shepack*, state's attorney, and *Erika L. Brookman*, assistant state's attorney, for the appellant (respondent).

Alan Jay Black, for the appellee (petitioner).

Opinion

ROBINSON, J. The sole issue in this certified appeal is whether a criminal defendant received the effective assistance of counsel at his trial when his attorney failed to request (1) a limiting instruction contemporaneous with testimony about prior, uncharged sexual misconduct, and (2) the inclusion of language in the trial court's final charge limiting the use of that testimony to the issue of propensity. The respondent, the Commissioner of Correction (commissioner), appeals, upon our grant of his petition for certification, from the judgment of the Appellate Court, which remanded the case to the habeas court, in part, for a new trial on the amended petition for a writ of habeas corpus filed by the petitioner, Denis Hickey.[1] *Hickey* v. *Commissioner of Correction*, 162 Conn. App. 505, 524, 133 A.3d 489 (2016). On appeal, the commissioner contends that the Appellate Court improperly created a per se rule requiring defense counsel, upon the introduction of prior, uncharged sexual misconduct evidence, to ask for a contemporaneous limiting instruction and a final charge restricting the use of such evidence to propensity and, in so doing, failed to hold the petitioner to his burden of proof under *Strickland* v. *Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The commissioner also contends that, after concluding that the habeas court improperly analyzed prejudice, the Appellate Court should have engaged in a plenary review of the evidence in the record and determined that the petitioner had

[1] We granted the commissioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly determine that the conduct of the petitioner's attorney at his criminal trial was not sound trial strategy 'as a matter of law?' " And (2) "[i]f the answer to the first question is in the affirmative, did the Appellate Court properly remand the matter to the habeas court for a new hearing rather than engaging in plenary review of the prejudice prong of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)?" *Hickey* v. *Commissioner of Correction*, 323 Conn. 914, 914–15, 149 A.3d 498 (2016).

failed to prove prejudice. We agree with the commissioner, and conclude that even if we assume, without deciding, that the performance of the petitioner's trial counsel was deficient, the petitioner failed to prove prejudice. We therefore conclude that the petitioner cannot prevail on his claim of ineffective assistance of trial counsel and, accordingly, reverse in part the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the relevant facts and procedural history. "In June, 2009, the petitioner was convicted of one count of sexual assault in the first degree in violation of General Statutes [Rev. to 2001] § 53a-70 (a) (2) and one count of risk of injury to a child in violation of General Statutes [Rev. to 2001] § 53-21 (a) (2). . . . At trial, the jury reasonably could have found that the petitioner digitally penetrated the anus of his then girlfriend's five year old daughter (victim)[2] while she and her family were living with the petitioner. . . . The petitioner was sentenced to a term of thirty years in the custody of the respondent, execution suspended after twenty years, and thirty-five years of probation." (Citations omitted; footnotes added and omitted.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 506–507; see also *State* v. *Hickey*, 135 Conn. App. 532, 535–36, 43 A.3d 701, cert. denied, 306 Conn. 901, 52 A.3d 728 (2012).

"Prior to trial, the state gave notice that it would present evidence of the petitioner's prior, uncharged sexual misconduct through the testimony of R.N., a cousin of the petitioner's former wife. [The petitioner's trial] counsel filed a motion in limine with respect to

[2] In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify victims or others through whom their identities may be ascertained. See General Statutes § 54-86e; see also *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 507 n.1.

R.N.'s proffered testimony,[3] arguing that the difference in age between the victim and R.N. was too great for them to be similar, that their relationships with the petitioner were dissimilar, and that the events were not proximate in time. . . . After analyzing the proffer under the [three prong test set forth in *State* v. *DeJesus*, 288 Conn. 418, 441, 953 A.2d 45 (2008)] the trial court ruled that the state could present R.N.'s proffered testimony.[4] . . . At the time R.N. testified in accordance with the proffer, the [trial] court did not provide a cautionary instruction to the jury.

"Prior to the conclusion of evidence, [the petitioner's] trial counsel submitted a request to charge that included a charge on prior, uncharged misconduct. The petitioner's request to charge stated in relevant part: 'You have also heard testimony in this case about what is called uncharged misconduct. In criminal cases which contain charges such as those in this trial, evidence of a defendant's commission of another offense or offenses may be admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence

[3] "R.N., a cousin of the petitioner's spouse at the time, testified that she [babysat] for the petitioner's children in the spring or summer of 1999, when she was twelve or thirteen years old. . . . She testified that the petitioner 'touched her on three separate occasions while she was sleeping at the [petitioner's] house.' . . . R.N. frequently [babysat] at night and slept in her clothes on the couch. The first time the petitioner touched R.N., she was sleeping on the couch when she woke up and saw the petitioner's hand on her breast. The second time the petitioner touched R.N., she woke up and found that the petitioner's hand was 'down her pants' in the area of her vagina and her 'jeans were unbuttoned and unzipped.' In each of the first two instances, R.N. rolled over, and the petitioner retreated to his room. The third time the petitioner touched R.N., she awoke and found the petitioner's hand in her underwear, in her vagina. When she rolled over, the petitioner ran his hand down her leg and asked if she was cold. He then put more pellets in the pellet stove." (Citations omitted.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 511 n.6.

[4] "[The petitioner's trial] counsel objected to R.N.'s testimony regarding the petitioner's prior, uncharged sexual misconduct." *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 511 n.7.

of a prior offense on its own is not sufficient to prove [the petitioner] guilty of the crimes charged in this trial. Bear in mind as you consider this evidence that at all times the state has the burden of proving beyond a reasonable doubt that [the petitioner] committed each of the elements of the offenses charged in this trial. I remind you that [the petitioner] is not on trial for any act, conduct or offense not charged in the information for this case.'[5]

[5] "[T]he record [contains] the following colloquy . . . regarding the [trial] court's proposed charge.

" 'The Court: All right. And then we go to the issue of the—I will term it the *DeJesus* charge on propensity evidence. I know that in chambers the defense had an objection to some of the language.

" '[Defense Counsel]: Yes, Your Honor, specifically, to the aberrant and compulsive behavior language. I have requested that in criminal cases, which contain charges such as those in this trial, evidence of the defendant's commission of another offense may be considered and so forth. My objection is to the compulsive language—aberrant and compulsive criminal sexual behavior because that modifies in a criminal case in which the defendant is charged . . . with one—two offenses, but one incident here. I don't think that qualifies as compulsive, Your Honor.

" 'The Court: Does the state want to be heard?

" '[The Prosecutor]: Well, this is obviously new ground, and this is the *DeJesus* instruction—the canned instruction that's recommended by the [Judicial Branch] website, and so because it's such a new area, the state would ask the court to follow the [Judicial Branch] website.

" 'I would point out, I guess, that it is equally plausible for the jury to consider that the crime with which the defendant is charged is not aberrant and compulsive and so it almost allows them to make the decision that it's not aberrant and compulsive and therefore they can disregard all the misconduct evidence. That's perhaps another reading of that, which inures to the defendant's benefit.

" '[Defense Counsel]: Well, if I may, Your Honor, I believe the instruction as offered here, or as proposed here, labels this as aberrant and compulsive criminal behavior.

" 'The Court: Well, they say a crime exhibiting aberrant and compulsive sexual behavior. [I]t is uncharted territory, this is the language that came from the case. I think the case, in terms of—it was one—it was one victim, I know there were—obviously, there was prior misconduct evidence, but it wasn't as if there were multiple offenses, it was one offense of kidnapping and sexual assault, I think, in . . . *DeJesus*. So they allowed this language to come from that fact pattern. So the court is going to allow it to stand.

" '[Defense Counsel]: Again, objection, Your Honor.'

"The trial court charged the jury with respect to prior, uncharged sexual conduct as follows. 'In a criminal case in which the defendant is charged with a crime exhibiting aberrant and compulsive criminal sexual behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered for its bearing on any matters to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the . . . crimes charged in the information. Bear in mind, as you consider this evidence that at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.'[6]

"Following his conviction, the petitioner appealed claiming, in part, that the trial court abused its discre-

"[T]he model jury instruction regarding evidence of prior, uncharged sexual misconduct states: 'When the defendant is charged with criminal sexual behavior, evidence of the defendant's commission of another offense or offenses is admissible and may be considered if it is relevant to prove that the defendant had the propensity or a tendency to engage in the type of criminal sexual behavior with which [he or she] is charged. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the information. Bear in mind as you consider this evidence that at all times, the state has the burden of proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the information.' Connecticut Criminal Jury Instructions (4th Ed. Rev. 2015) § 2.6-13, available at http://www.jud.ct.gov/ji/Criminal/part2/2.6-13.htm (last visited January 15, 2016).

" 'The phrase "aberrant and compulsive sexual behavior" was changed to "criminal sexual behavior." The latter phrase was thought to be more neutral and less prejudicial.' " *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 512–13 n.8.

[6] "We note a transcription error in the habeas court's memorandum of decision regarding the [trial] court's charge. The memorandum of decision states 'may be considered for its bearing on any matter to which it is *not* relevant.' " (Emphasis in original.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 513 n.9.

tion by admitting evidence of his prior, uncharged sexual misconduct involving another minor. . . . The petitioner argued that the ages of the victim and R.N. were not similar and the time of the alleged misconduct involving R.N. and the manner in which it occurred were not similar to the petitioner's sexual assault on the victim. . . . [The Appellate Court] concluded, after distinguishing the cases cited by the petitioner in his brief, that the trial court did not abuse its discretion by admitting R.N.'s testimony under *DeJesus*. . . . On direct appeal, the petitioner did not claim that the trial court improperly instructed the jury with respect to prior, uncharged misconduct." (Citations omitted; footnotes in original.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 510–14; see *State* v. *Hickey*, supra, 135 Conn. App. 543–48.

After the petitioner's conviction was affirmed on direct appeal, the petitioner's appointed habeas counsel amended a habeas petition that the petitioner had previously filed as a self-represented party. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 515. The amended petition alleged in relevant part that the petitioner's trial counsel "rendered deficient performance by 'fail[ing] to ask the trial judge to instruct the jury concerning prior bad acts and the uses a jury could make of them immediately after the evidence was introduced'; 'fail[ing] to object to an inadequate jury instruction concerning evidence of prior uncharged conduct introduced at trial'; and 'fail[ing] to posit an adequate jury instruction that would limit the use of the evidence to the issue of propensity and one that would instruct the jury on the uses of bad character as a tendency to commit criminal acts in general.' The amended petition also alleged in relevant part . . . that appellate counsel rendered ineffective assistance by failing to 'raise the deficient jury instruction on appeal . . . .'

"In its memorandum of decision, the habeas court made the following relevant factual findings and legal conclusions. With respect to the petitioner's trial counsel, the court found that he filed a motion in limine to preclude R.N.'s testimony, which was denied by the trial court. During trial, however, trial counsel did not ask the court to provide a cautionary instruction to the jury immediately prior to or after R.N. testified about the petitioner's prior, uncharged sexual misconduct. Moreover, the habeas court found that trial counsel's request to charge as to prior, uncharged sexual misconduct did not limit the use of such evidence to the issue of propensity. The habeas court found that the only instruction the trial court gave the jury with respect to the uncharged misconduct came after the close of evidence and before the case went to the jury, and that the instruction 'did not limit the use of the evidence to the issue of propensity.' The habeas court concluded that trial counsel's failure to request the appropriate cautionary jury instruction at the proper times constituted deficient performance.

"The habeas court also found that the petitioner had satisfied his burden of demonstrating prejudice because 'there is a reasonable probability that the outcome of the proceedings would have been different had it not been for [the] deficient performance [of petitioner's trial counsel].' The habeas court quoted the summary of R.N.'s testimony as set forth in the concurring opinion of *State* v. *Hickey*, supra, 135 Conn. App. 559, but it did not refer to other evidence presented at the petitioner's criminal trial. Rather, the habeas court concluded that in *DeJesus*, [the court] 'stressed that it was adopting "a *limited* exception to the prohibition on the admission of uncharged misconduct evidence in sexual assault cases to prove that the defendant had a propensity to engage in aberrant and compulsive criminal sexual behavior" . . . and "*to minimize the risk* of undue

prejudice to the defendant, the admission of evidence of uncharged sexual misconduct under the limited propensity exception adopted . . . must be accompanied by an appropriate cautionary instruction to the jury . . . .'' ' The habeas court stated that 'while the court's instruction in the petitioner's case was based on language from *DeJesus*, it did not follow all of the timing and content requirements of a cautionary instruction repeatedly set forth [in *DeJesus*]. Given the impact this uncharged sexual misconduct evidence *likely* had in the petitioner's case, the court finds that there is a reasonable probability that the outcome of the proceedings would have been different had it not been for [the] deficient performance [of the petitioner's trial counsel].' . . . The court, therefore, granted the petition for a writ of habeas corpus on the ground of ineffective assistance of trial counsel.'' (Citations omitted; emphasis in original.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 515–17; see also *State* v. *DeJesus*, supra, 288 Conn. 473–74. The habeas court also granted the petitioner's habeas petition on the ground that the petitioner's appellate counsel rendered ineffective assistance by failing to challenge on direct appeal the trial court's uncharged sexual misconduct jury instruction. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 517. The commissioner subsequently filed a petition for certification to appeal, which the habeas court granted. Id., 518.

The commissioner then appealed to the Appellate Court, claiming, inter alia, that the habeas court improperly determined that the petitioner's trial counsel ''rendered ineffective assistance because . . . the petitioner did not establish that trial counsel did not have a reasonable strategic reason for not requesting a limiting instruction at the time of R.N.'s testimony . . . the trial court's instruction was consistent with *DeJesus* and [trial] counsel reasonably could have chosen not to

request that the instruction limit the use of the evidence to propensity, and . . . any deficiency did not prejudice the petitioner . . . .'"[7] Id. The Appellate Court agreed with the habeas court that trial counsel's performance was deficient, explaining that, "the habeas court properly could have concluded pursuant to *State* v. *DeJesus*, supra, 288 Conn. 418, that [trial] counsel's failure to request a [limiting instruction] at the time R.N. testified and a propensity jury instruction . . . could not have been sound trial strategy as a matter of law."[8] *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 519. The Appellate Court, however, agreed with the commissioner's argument that the habeas court had improperly analyzed prejudice. Id., 518. The Appellate Court explained that the habeas court did not substantiate its conclusion that the petitioner suffered prejudice from trial counsel's deficient performance "with a factual analysis of how the trial court's failure to give a cautionary instruction at the time R.N. testified and to give a propensity instruction at the close of evidence misled the jury, or resulted in

[7] The commissioner also claimed that the habeas court improperly concluded that the petitioner's appellate counsel rendered ineffective assistance. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 518. The Appellate Court agreed with the commissioner and concluded that the "habeas court . . . improperly determined that the petitioner's appellate counsel rendered deficient performance that prejudiced the petitioner." Id., 524. Thus, the Appellate Court reversed the judgment of the habeas court with respect to the claims regarding the performance of the petitioner's appellate counsel. Id. The performance of the petitioner's appellate counsel is not, however, at issue in this certified appeal. See footnote 1 of this opinion.

[8] We note that the Appellate Court, whose decision was released on January 26, 2016, originally remanded the case to the habeas court for further proceedings on the question of prejudice and declined to address whether the petitioner had failed to prove deficient performance. See Connecticut Law Journal, Vol. 77, No. 30 (January 26, 2016) pp. 16A, 22A. The commissioner subsequently filed a motion for reconsideration, asking the Appellate Court to address the merits of both issues. On July 26, 2016, the Appellate Court modified its original opinion to address deficient performance, but left its remand on the question of prejudice unaltered. See Connecticut Law Journal, Vol. 78, No. 4 (July 26, 2016) pp. vi, xii.

an unfair trial or reasonable doubt as to the petitioner's guilt." Id., 520. Importantly, the Appellate Court explained that the habeas court "did not assess the charge in the context of the state's evidence or the final arguments of counsel." Id., 521. Finally, the Appellate Court noted that the charge given by the trial court conformed to the example set forth in *State* v. *DeJesus*, supra, 474 n.36[9] and the model provided on the Judicial Branch website. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 522. The Appellate Court then reversed the judgment of the habeas court and remanded the case for further proceedings on the question of whether the deficient performance of the petitioner's trial counsel resulted in prejudice. Id., 524. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the commissioner claims that the Appellate Court improperly determined that the conduct of the petitioner's trial counsel could not have been sound trial strategy as a matter of law. The commissioner also claims that, after concluding that the habeas court improperly analyzed prejudice, the Appellate Court should have reviewed the record, determined that the petitioner failed to meet his burden of proving prejudice, and remanded the case to the habeas court with direction to render judgment denying the petition on

[9] In *DeJesus*, this court noted "that the following instruction regarding the admission of evidence of uncharged misconduct under rule 413 of the Federal Rules of Evidence . . . has been approved by the Tenth Circuit Court of Appeals: 'In a criminal case in which the defendant is [charged with a crime exhibiting aberrant and compulsive criminal sexual behavior], evidence of the defendant's commission of another offense or offenses . . . is admissible and may be considered for its bearing on any matter to which it is relevant. However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crimes charged in the [information]. Bear in mind as you consider this evidence [that] at all times, the government has the burden of proving that the defendant committed each of the elements of the offense charged in the [information]. I remind you that the defendant is not on trial for any act, conduct, or offense not charged in the [information].' " *State* v. *DeJesus*, supra, 288 Conn. 474 n.36.

that claim, rather than ordering a new habeas trial on the issue of prejudice. The petitioner disagrees and argues that the Appellate Court properly determined that the conduct of his trial counsel was not sound trial strategy as a matter of law. Additionally, although the petitioner concedes that the Appellate Court improperly remanded the case to the habeas court, he nevertheless contends that the Appellate Court should have concluded that he did establish prejudice. We agree with the commissioner and conclude that even if we assume, without deciding, that the performance of petitioner's trial counsel was deficient, the petitioner failed to prove prejudice.

We begin by setting forth the applicable standard of review. The issue of whether the representation that a defendant received at trial was constitutionally inadequate is a mixed question of law and fact. *Strickland* v. *Washington*, supra, 466 U.S. 698. As such, the question requires plenary review "unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 470, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

"The sixth amendment provides that in all criminal prosecutions, the accused shall enjoy the right to the effective assistance of counsel. U.S. Const., amend. VI. This right is [made applicable] to the states through the due process clause of the fourteenth amendment. See U.S. Const., amend. XIV, § 1; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). *Strickland* . . . set[s] forth the framework for analyzing ineffective assistance of counsel claims. Under the two-pronged *Strickland* test, a defendant can only prevail on an ineffective assistance of counsel claim if he proves that (1) counsel's performance was deficient, and (2) the deficient performance resulted in actual

prejudice. *Strickland* v. *Washington*, supra, 466 U.S. 687." *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554–55, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). It is well settled that "[a] court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 91, 52 A.3d 655 (2012).

"As we have previously indicated, to satisfy the prejudice prong—that his trial counsel's deficient performance prejudiced his defense—the petitioner must establish that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . The petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." (Citations omitted; internal quotation marks omitted.) Id., 101–102. As the United States Supreme Court has explained, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland* v. *Washington*, supra, 466 U.S. 691. Moreover, "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Id., 695–96.

As a preliminary matter, we note that we agree with both the petitioner and the commissioner that, after

concluding that the habeas court improperly analyzed prejudice, the Appellate Court should have engaged in a plenary review of the evidence in the record to resolve the commissioner's claim that the petitioner failed to satisfy his burden of proving prejudice as a matter of law, rather than remanding the case for a new habeas trial. On appeal to the Appellate Court, the commissioner did not challenge any of the factual findings made by the habeas court. Rather, the commissioner challenged the legal sufficiency of the habeas court's prejudice analysis and claimed that, applying the correct legal standard to the facts found by the habeas court and the evidence in the record of the underlying criminal trial, the petitioner could not establish prejudice from trial counsel's deficient performance. Given that the habeas court relied on facts from the criminal trial and its own, undisputed historical factual findings, the Appellate Court had no reason to remand the case to the habeas court to conduct a proper prejudice analysis that the Appellate Court itself could have performed. See, e.g., *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 637, 153 A.3d 1264 (2017) ("[t]he application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice . . . is a mixed question of law and fact subject to our plenary review" [citation omitted]).

A review of the record in the present case leads us to the conclusion that any of the alleged errors by the petitioner's trial counsel did not deprive the petitioner of a fair trial. We first address the question of whether trial counsel's failure to request a propensity-only instruction in the court's final charge was prejudicial. The petitioner bears the burden of establishing that it is reasonably probable that, had such an instruction been given, it is reasonably likely that the result of the trial would have been different. See *Strickland* v. *Washington*, supra, 466 U.S. 696. The petitioner has

failed to meet that burden. Cf. *State* v. *Flores*, 301 Conn. 77, 93, 17 A.3d 1025 (2011) ("Individual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . [W]e must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." [Internal quotation marks omitted.]).

The instruction given in this case by the trial court at the end of the trial noted that "evidence of the defendant's commission of another offense or offenses is admissible and may be considered for its bearing on any matters to which it is relevant." (Internal quotation marks omitted.) *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 513. This instruction, however, was limited by the court's instructions that the jury could not find the petitioner guilty solely on the basis of the prior misconduct testimony, that it must find that the state had proven each element of the charged offenses, and that the petitioner was not on trial for the uncharged conduct.[10] Id. These instructions, read as a whole and considered in conjunction with the court's general instructions on the presumption of innocence, the elements of the crimes charged, and the state's burden of proving those elements beyond a

[10] Moreover, we note that, during closing arguments, the prosecutor further narrowed the state's use of the prior, uncharged sexual misconduct testimony by explaining that R.N.'s testimony demonstrated that the petitioner had a *propensity* to target young girls and to digitally penetrate them.

reasonable doubt, were legally correct and sufficient to limit any prejudicial effect of the uncharged sexual misconduct testimony. Given that, under *DeJesus*, the jury was permitted to use the evidence for propensity purposes, the language contained in the final charge—which mirrored, almost exactly, the language set forth in *State* v. *DeJesus*, supra, 288 Conn. 474 n.36—provided sufficient legal guidance for the jury such that it is not reasonably likely that the result of the trial would have been different.

We note that, in other contexts, it is important to direct a jury *not* to use prior, uncharged misconduct evidence as proof of propensity. These circumstances include when the evidence of prior, uncharged misconduct is admitted to prove, among other things, intent, identity, or motive. See Conn. Code Evid. § 4-5 (c). In such cases, the timing and the precise wording of the instruction are most important when testimony is presented for a limited use. When, as in the present case, testimony is offered for the broader purpose of propensity, however, the timing and precise wording of the limiting instruction are less important. Moreover, we have stated in other contexts that, "[w]hile a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 808–809, 91 A.3d 384 (2014). Likewise, in the present case, because we conclude that the charge given by the trial court adequately conveyed to the jury the proper use of the prior, uncharged sexual misconduct testimony, trial counsel's failure to request specific propensity language is not a sufficient ground to disturb

the petitioner's conviction. Moreover, had the trial court emphasized that the testimony could be used for propensity, it is likely that this would have *hurt* the petitioner's case because, the instruction, as given, did not specifically advise the jury that it could find that the petitioner had a propensity to sexually assault young girls. Thus, far from establishing prejudice, the omission of the word "propensity" from the instruction likely inured to the benefit of the petitioner.

We next consider whether trial counsel's failure to request, and the trial court's failure to provide, a contemporaneous jury instruction was prejudicial. We conclude that this did not prejudice the petitioner because, as we have already explained, the court's final charge admonished the jury that it could not find the petitioner guilty solely on the basis of the prior, uncharged sexual misconduct testimony, that it must find that the state had proven each element of the charged offenses, and that the petitioner was not on trial for the uncharged conduct. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 513. The jury is presumed to have followed these instructions. See, e.g., *State* v. *McKenzie-Adams*, 281 Conn. 486, 544, 915 A.2d 822 ("[t]he jury is presumed, in the absence of a fair indication to the contrary, to have followed the court's instructions" [internal quotation marks omitted]), cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007). Accordingly, although the petitioner should have received a contemporaneous instruction pursuant to *DeJesus*,[11] we conclude that the trial counsel's failure to request one was not likely to affect the outcome of the trial.[12] See

[11] In *DeJesus*, this court explained that, "prior to admitting evidence of uncharged sexual misconduct under the propensity exception adopted . . . the trial court must provide the jury with an appropriate cautionary instruction regarding the proper use of such evidence." *State* v. *DeJesus*, supra, 288 Conn. 477.

[12] We note that the petitioner claims that the Appellate Court "appropriately affirmed [the] habeas court's determination that, had a contemporaneous instruction been properly given . . . the outcome of the trial would

William C. v. *Commissioner of Correction*, 126 Conn. App. 185, 191, 10 A.3d 115 (trial court's final instruction properly charged jury, and because jury is presumed to follow court's instructions, failure to give contemporaneous charge regarding constancy of accusation testimony did not prejudice petitioner), cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

We further note that, in concluding that the absence of a contemporaneous limiting instruction and propensity language in the final charge caused the petitioner prejudice, the habeas court failed to assess the alleged deficiencies in the context of the state's evidence or the final arguments of counsel. The state's case was relatively strong. The state relied on evidence corroborating the assault, such as physical evidence of hymenal scarring, and evidence that the victim suffered from post-traumatic stress. Moreover, a pediatric nurse-practitioner and forensic medical examiner for child abuse testified that, during her examinations of the victim, the victim "made repeated spontaneous disclosures that the [petitioner] had touched her in the areas that [the nurse-practitioner] was examining." *State* v. *Hickey*, supra, 135 Conn. App. 536. When viewed in the context of all of the evidence offered at trial, the alleged deficient performance in the present case does not establish that it is reasonably likely that there would have been a different result at the petitioner's criminal trial. See *Anderson* v. *Commissioner of Correction*, 313 Conn. 360, 377, 98 A.3d 23 (2014) ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support" [internal quotation marks omit-

have been different." (Citation omitted.) The Appellate Court made no such conclusion; rather, it concluded that "the [habeas] court failed to provide an analysis of prejudice the petitioner sustained as a consequence of trial counsel's deficient performance," and remanded the case for further proceedings on that issue. *Hickey* v. *Commissioner of Correction*, supra, 162 Conn. App. 524.

ted]), cert. denied sub nom. *Anderson* v. *Semple*, U.S. , 135 S. Ct. 1453, 191 L. Ed. 2d 403 (2015). Accordingly, because we conclude that the petitioner was not prejudiced by any alleged deficient performance of his trial counsel, the petitioner cannot prevail on his ineffective assistance of counsel claim.

The judgment of the Appellate Court is reversed insofar as the case was remanded for further proceedings on the petitioner's claim of ineffective assistance of trial counsel, and the case is remanded to that court with direction to remand the case to the habeas court to render judgment denying the amended habeas petition as to that claim; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

DANIEL JACOB D'ATTILO ET AL. *v.* STATEWIDE GRIEVANCE COMMITTEE ET AL.
(SC 20059)

Robinson, C. J., and Mullins, Sheldon, Keller and Bright, Js.

Syllabus

The plaintiff parents, individually and on behalf of their minor child, sought a writ of mandamus compelling further action by the defendant local grievance panels in connection with certain grievance complaints that the plaintiffs had filed, which had been referred to the local panels by the defendant Statewide Grievance Committee. In their complaints, the plaintiffs alleged that seven attorneys had engaged in misconduct by misappropriating funds from a settlement agreement in a previous medical malpractice action. The local panels found that there was no probable cause to believe that five of those attorneys had engaged in unethical conduct and, therefore, dismissed the grievance complaints against them. The complaints against the remaining two attorneys, which were found to be supported by probable cause, were referred back to the Statewide Grievance Committee, which issued reprimands as to both attorneys. While the grievance proceedings were still pending, the plaintiffs brought the present action, claiming that the local panels had improperly dismissed the complaints against the five attorneys and seeking independent review of all seven complaints by the trial court under

its inherent authority to oversee attorney conduct. The defendants subsequently filed a motion to dismiss, which the trial court granted, concluding that the plaintiffs lacked standing because they were neither statutorily nor classically aggrieved by the actions of the defendants. The trial court rendered judgment dismissing the action, from which the plaintiffs appealed. *Held* that the trial court having fully addressed in its memorandum of decision the arguments raised in this appeal, this court adopted that concise and well reasoned decision as a proper statement of the facts and the applicable law on the issues, and, accordingly, the judgment of the trial court was affirmed.

Argued May 4—officially released July 31, 2018

Procedural History

Action seeking, inter alia, a writ of mandamus compelling further action by the defendant grievance panels in connection with the dismissal of certain grievance complaints brought by the plaintiffs against their former attorneys, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed. *Affirmed.*

Howard Altschuler for the appellants (plaintiffs).

Jane R. Rosenberg, solicitor general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The plaintiffs, Daniel Jacob D'Attilo, Cathy M. D'Attilo, and Domenic D'Attilo,[1] appeal[2] from the judgment of the trial court dismissing the present

[1] We note that the present action was commenced on behalf of Daniel Jacob D'Attilo, a minor child, by and through his parents, Cathy M. D'Attilo and Domenic D'Attilo, as next friends. We further note that Cathy M. D'Attilo and Domenic D'Attilo are also named as plaintiffs in their individual capacity. For the sake of simplicity, we refer to these parties collectively as the plaintiffs and to them individually by name.

[2] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

action, which was brought against the defendants, the Statewide Grievance Committee, the Fairfield Grievance Panel (Fairfield panel), and the Stamford-Norwalk Grievance Panel (Stamford panel),[3] seeking a writ of mandamus and injunctive relief in challenging their handling of the plaintiffs' grievance complaints against seven attorneys. On appeal, the plaintiffs claim that they were statutorily and classically aggrieved by certain decisions of those local panels dismissing their grievance complaints against five of those attorneys, and by certain other actions of the Statewide Grievance Committee with respect to the proceedings against the other two. We disagree and, accordingly, affirm the judgment of the trial court dismissing the present action for lack of standing.

The record reveals the following relevant facts and procedural history. On March 21, 2003, the plaintiffs retained the law firm of Koskoff, Koskoff & Bieder, P.C. (Koskoff firm), to represent them in a civil action, claiming that medical malpractice during Daniel's birth had left him disabled for life. In January, 2012, after a jury had awarded the plaintiffs a verdict of $58.6 million, the plaintiffs ultimately settled their medical malpractice case for $25 million. In February, 2012, while still represented by the Koskoff firm, the plaintiffs retained the law firm of Day Pitney, LLP (Day Pitney), to advise them on numerous financial and tax issues related to the settlement. A dispute subsequently arose between the plaintiffs and their attorneys from both firms con-

[3] In addition to the Statewide Grievance Committee, the Fairfield Panel, and the Stamford Panel, the plaintiffs also named as defendants: Michael P. Bowler, in his official capacity as statewide bar counsel; Eugene J. Riccio, in his official capacity as counsel for the Stamford panel; Steven P. Kulas, in his official capacity as counsel for the Fairfield panel; the Office of the Chief Disciplinary Counsel; and Karyl L. Carrasquilla, in her official capacity as chief disciplinary counsel. For the sake of convenience, we refer to these parties collectively as the defendants and, where appropriate, individually by title.

cerning the fees and expenses charged; the plaintiffs claimed that the Koskoff firm attorneys defrauded them and illegally misappropriated funds by retaining 28 percent of the $25 million settlement in violation of the 10.64 percent fee cap set by General Statutes § 52-251c, which governed their retainer agreement, as well by charging more than $600,000 in litigation expenses for which they had no original invoices or other proof of validity. The plaintiffs further claimed that the Day Pitney attorneys committed legal malpractice when they set up a trust for Daniel in a way that caused him to have to pay them $65,000 annually in trustee fees, potentially for decades, including by the creation of a foundation that would be funded by at least $5 million upon Daniel's death, to be controlled by the Day Pitney attorneys or their successor, who would receive "unspecified legal fees 'forever.' " In December, 2014, the plaintiffs brought a civil action against the Koskoff firm, Day Pitney, and seven individual attorneys at those law firms alleging conversion, a violation of § 52-251c (g), and statutory theft in violation of General Statutes § 52-564. In that action, the plaintiffs are seeking both treble damages and the complete return of all legal fees paid. That action remains pending.

In February, 2015, the plaintiffs filed grievance complaints against five attorneys from the Koskoff firm and two attorneys from Day Pitney, alleging that those attorneys had committed numerous violations of the Rules of Professional Conduct while representing them, in particular the misappropriation of client funds. The complaints against the Koskoff firm attorneys were referred to the Fairfield panel, which, on July 17, 2015, dismissed claims against William M. Bloss, James D. Horwitz, and Joel H. Lichtenstein, but found probable cause of unethical conduct against Kathleen L. Nastri and Michael Koskoff. The complaints against the Day Pitney attorneys, Keith Bradoc Gallant and Rebecca

Iannantuoni, were referred to the Stamford panel, which dismissed them on August 26, 2015.

Because the Fairfield panel had found probable cause to believe that Koskoff and Nastri had engaged in unethical conduct, it referred those grievances to the Statewide Grievance Committee for further action. The chief disciplinary counsel offered to settle the grievances in exchange for a reprimand for failing to provide the plaintiffs with a full accounting. Following several hearings on the grievances, the Statewide Grievance Committee rejected the plaintiffs' requests for a proposed decision pursuant to General Statutes §§ 51-90g (f)[4] and 51-90h (a) and (b),[5] informing the plaintiffs that it no longer issued proposed decisions, and stating that its actions are "governed by the Practice Book rules and not the General Statutes." Ultimately, on November 18, 2016, the Statewide Grievance Committee issued a final decision reprimanding Nastri for failing to keep billing records and failing to explain to the plaintiffs that a particular provision in the retainer agreement drafted by Koskoff, which affected the applicability of the fee cap statute, could be subject to different interpreta-

[4] General Statutes § 51-90g (f) provides: "The subcommittee shall submit its proposed decision to the State-Wide Grievance Committee, with copies to the complainant and respondent. The proposed decision shall be a matter of public record."

[5] General Statutes § 51-90h provides in relevant part: "(a) Within fourteen days of the issuance to the parties of the proposed decision, the complainant and respondent may submit to the State-Wide Grievance Committee a statement in support of, or in opposition to, the proposed decision. The State-Wide Grievance Committee may, in its discretion, request oral argument.

"(b) Within sixty days after the end of the fourteen-day period for the filing of statements, the State-Wide Grievance Committee shall review the record before the subcommittee and any statements filed with it, and shall issue a decision dismissing the complaint, reprimanding the respondent, imposing conditions in accordance with the rules established by the judges of the Superior Court, directing the State-Wide Bar Counsel to file a presentment against the respondent or referring the complaint to the same or a different reviewing subcommittee for further investigation and proposed decision . . . ."

tions. On March 3, 2017, the Statewide Grievance Committee reprimanded Koskoff for failing to keep proper records. Throughout these proceedings, the Statewide Grievance Committee denied the plaintiffs' attempts to supplement the record, and the chief disciplinary counsel refused their requests to submit certain evidence unfavorable to the Koskoff firm attorneys.

While the grievance proceedings were pending, in February, 2016, the plaintiffs brought this action seeking a writ of mandamus and injunctive relief. In the first count of the complaint, the plaintiffs claimed that the decisions of the Fairfield panel and the Stamford panel to dismiss the grievance complaints were void as a matter of law because those local panels had failed to forward the complaints to the Statewide Grievance Committee, as required by Practice Book § 2-32 (i) (2),[6] for further review pursuant to Practice Book § 2-34A

[6] Practice Book § 2-32 (i) provides: "The panel shall, within 110 days from the date the complaint was referred to it, unless such time is extended pursuant to subsection (j), do one of the following: (1) If the panel determines that probable cause exists that the respondent is guilty of misconduct, it shall file the following with the statewide grievance committee and with the disciplinary counsel: (A) its written determination that probable cause exists that the respondent is guilty of misconduct, (B) a copy of the complaint and response, (C) a transcript of any testimony heard by the panel, (D) a copy of any investigatory file and copies of any documents, transcripts or other written materials which were available to the panel. These materials shall constitute the panel's record in the case. (2) If the panel determines that no probable cause exists that the respondent is guilty of misconduct, it shall dismiss the complaint unless there is an allegation in the complaint that the respondent committed a crime. Such dismissal shall be final and there shall be no review of the matter by the statewide grievance committee, but the panel shall file with the statewide grievance committee a copy of its decision dismissing the complaint and the materials set forth in subsection (i) (1) (B), (C) and (D). In cases in which there is an allegation in the complaint that the respondent committed a crime, the panel shall file with the statewide grievance committee and with disciplinary counsel its written determination that no probable cause exists and the materials set forth in subsection (i) (1) (B), (C) and (D). These materials shall constitute the panel's record in the case."

(b) (1).[7] The plaintiffs sought a writ of mandamus directing the local panels to reissue their opinions, removing the dismissals, and forwarding them and the case files to the Statewide Grievance Committee. In the second count of the complaint, the plaintiffs asked the trial court to invoke its inherent authority to oversee attorney conduct, enjoin the Statewide Grievance Committee from taking any further action, and to take control of the pending grievance proceedings.

The defendants moved to dismiss the amended complaint on February 19, 2016. The trial court held oral arguments on the motion to dismiss on April 11, 2016. On July 18, 2016, the trial court issued a memorandum of decision granting the motion to dismiss, concluding that the plaintiffs lacked standing because they were neither statutorily nor classically aggrieved, and rendered judgment accordingly.[8] This appeal followed.

On appeal, the plaintiffs contend that the trial court improperly concluded that they, as complainants in an attorney disciplinary proceeding, lack standing to seek court intervention in those proceedings. The plaintiffs claim, in particular, standing to address the Statewide Grievance Committee's deprivation of their statutory rights under § 51-90g (a),[9] which requires review of local

[7] Practice Book § 2-34A (b) (1) provides in relevant part: "When, after a determination of no probable cause by a grievance panel, a complaint is forwarded to the statewide grievance committee because it contains an allegation that the respondent committed a crime, and the statewide grievance committee or a reviewing committee determines that a hearing shall be held concerning the complaint pursuant to Section 2-35 (c), the disciplinary counsel shall present the matter to such committee."

[8] We note that, although the trial court addressed the substance of count two of the complaint and, "in the exercise of its discretion, decline[d] to invoke its inherent powers to displace the ongoing disciplinary process"; see *Burton* v. *Mottolese*, 267 Conn. 1, 28, 835 A.2d 998 (2003), cert. denied, 541 U.S. 1073, 124 S. Ct. 2422, 158 L. Ed. 2d 983 (2004); it ultimately dismissed that count of the complaint on the ground that the plaintiffs lacked standing to affirmatively request such relief.

[9] General Statutes § 51-90g (a) provides: "The State-Wide Grievance Committee may designate at least three members of the committee, including

panels' findings of lack of probable cause, and an infringement of their statutory right to a proposed decision under §§ 51-90g (f) and 51-90h (a) and (b). The plaintiffs further contend that the trial court improperly declined to use its inherent power to intervene in the disciplinary process, given the "deplorable" allegations against the attorneys and the Statewide Grievance Committee. They argue that they are classically aggrieved and statutorily aggrieved by implication.

Our examination of the record on appeal and the briefs and arguments of the parties persuades us that the judgment of the trial court should be affirmed. Because the trial court's memorandum of decision fully addresses the arguments raised in the present appeal, we adopt its concise and well reasoned decision as a statement of the facts and the applicable law on the issues. See *D'Attilo* v. *Statewide Grievance Committee*,

at least one-third who are not attorneys, to serve as a reviewing subcommittee for each determination made by a panel on a complaint. The committee shall regularly rotate membership on reviewing subcommittees and assignments of complaints from the various judicial districts. The State-Wide Grievance Committee or the subcommittee, if any, shall hold a hearing concerning the complaint if the panel determined that probable cause exists that the attorney is guilty of misconduct. If the grievance panel determined that probable cause does not exist that the attorney is guilty of misconduct, the committee or subcommittee shall review the determination of no probable cause, take evidence if it deems it appropriate and, if it determines that probable cause does exist that the attorney is guilty of misconduct, shall take the following action: (1) If the State-Wide Grievance Committee reviewed the determination of the grievance panel it shall hold a hearing concerning the complaint or assign the matter to a subcommittee to hold the hearing; or (2) if a subcommittee reviewed the determination of the grievance panel it shall hold a hearing concerning the complaint or refer the matter to the State-Wide Grievance Committee which shall assign it to another subcommittee to hold the hearing. The committee or subcommittee shall not make a probable cause determination based, in full or in part, on a claim of misconduct not alleged in the complaint without first notifying the respondent that it is considering such action and affording the respondent the opportunity to be heard. An attorney who maintains his office for the practice of law in the same judicial district as the respondent may not sit on the reviewing subcommittee for that case."

Superior Court, judicial district of Hartford, Docket No. CV-16-6065012-S, (July 18, 2016) (reprinted at 329 Conn. 632, A.3d [2018]). It would serve no useful purpose for us to repeat the discussion therein contained. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010).

The judgment is affirmed.

APPENDIX

DANIEL JACOB D'ATTILO ET AL. v. STATEWIDE GRIEVANCE COMMITTEE ET AL.*

Superior Court, Judicial District of Hartford
File No. CV-16-6065012-S

Memorandum filed July 18, 2016

Proceedings

Memorandum of decision on defendants' motion to dismiss. *Motion granted.*

Howard Altschuler, for the plaintiffs.

Jane R. Rosenberg, assistant attorney general, for the defendants.

Opinion

SHERIDAN, J., This is an action seeking an order of mandamus and injunctive relief in connection with the dismissal of grievance complaints brought against five attorneys that had previously represented the plaintiffs. The defendants have moved to dismiss the plaintiffs' action based on lack of subject matter jurisdiction, asserting that the plaintiffs do not have standing to challenge the dismissal of the grievance complaints because they are neither statutorily nor classically

* Affirmed. *D'Attilo* v. *Statewide Grievance Committee*, 329 Conn. 624, A.3d (2018).

aggrieved. For the reasons set forth below, the motion is granted.

I

FACTS

Cathy and Domenic D'Attilo are the parents of Daniel D'Attilo. In 2003, they retained the law firm of Koskoff, Koskoff, & Bieder, P.C. (KK&B) to represent them in connection with medical negligence that occurred during Daniel's birth. Suit was commenced and, after trial, the jury awarded the D'Attilos $58.6 million in compensatory damages. In January, 2012, while the verdict was on appeal, the D'Attilos settled their medical malpractice claim for $25 million. The D'Attilos hired the law firm of Day Pitney, LLP (Day Pitney) to advise them on various issues related to the settlement.

In February, 2015, the plaintiffs filed grievance complaints against seven attorneys—five from KK&B and two from Day Pitney. The grievances alleged that the KK&B attorneys had taken a 28 percent contingency fee from the D'Attilos' $25 million settlement proceeds rather than the approximately 10 percent fee permitted under the fee cap statute, General Statutes § 52-251c. The statewide bar counsel referred the plaintiffs' complaints against the five KK&B attorneys to a Fairfield grievance panel and the complaints against the two Day Pitney attorneys to a Stamford grievance panel.

On July 17, 2015, the Fairfield Judicial District Grievance Panel issued decisions finding probable cause that two of the five KK&B attorneys had violated the Rules of Professional Conduct. The panel found no probable cause that the remaining three KK&B attorneys had engaged in professional misconduct.

On August 26, 2015, the Stamford-Norwalk Judicial District Grievance Panel found no probable cause that

either of the Day Pitney attorneys had engaged in professional misconduct.

On January 4, 2016, the plaintiffs filed the present complaint against the Connecticut Statewide Grievance Committee, the statewide bar counsel, the Stamford-Norwalk Judicial District Grievance Panel, its counsel Eugene J. Riccio, the Fairfield Judicial District Grievance Panel, its counsel Steven P. Kulas, the chief disciplinary counsel, and the Office of the Chief Disciplinary Counsel. The plaintiffs claim that the defendant grievance panels violated Practice Book § 2-32 (i) (2) by dismissing the plaintiffs' grievance complaints rather than forwarding them to the Statewide Grievance Committee for further review. The plaintiffs claim that their grievances alleged that the KK&B and Day Pitney attorneys engaged in criminal conduct; therefore the defendant grievance panels should not have dismissed their complaints and the other defendants had no power to accept the dismissals.

In count one of their complaint, the plaintiffs seek relief by way of mandamus, ordering the defendant grievance panels to "reissue their [decisions] removing the complete or partial dismissals of the above attorneys pursuant to Practice Book § 2-32 (i) (2), and then forwarding the grievance files in their entirety for the seven grievances listed [in the amended complaint] for further review pursuant to Practice Book § 2-34A (b) (1)."

In count two, plaintiffs seek relief by way of a temporary or permanent injunction preventing the grievance defendants from taking any further action, and exercising the court's inherent power "to take over all of the D'Attilo grievances against the Day Pitney and KK&B respondents, to hold a scheduling conference, and to proceed toward a hearing on all grievances as this court directs."

The defendants have moved to dismiss the plaintiffs' complaint for lack of standing. The plaintiffs filed their opposition, with documentary exhibits, on March 21, 2016. The parties were heard at oral argument on April 11, 2016.

II

STANDARD OF REVIEW

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346, 977 A.2d 636 (2009). A motion to dismiss may be brought to assert, inter alia, "lack of jurisdiction over the subject matter . . . ." Practice Book § 10-30 (a) (1). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003).

"The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Burton* v. *Commissioner of Environmental Protection*, 291 Conn. 789, 802, 970 A.2d 640 (2009); see *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 601 n.9, 119 A.3d 1153 (2015); see also Practice Book § 10-33 (lack of subject matter jurisdiction cannot be waived). "Whenever the absence of jurisdiction is brought to the notice of the court or tribunal, cognizance of it must be taken and the matter passed upon before it can move one further step in the cause; as any movement is necessarily the exercise of jurisdiction." (Internal quotation marks omitted.) *Federal Deposit Ins. Co.* v. *Peabody N.E., Inc.*, 239 Conn. 93, 99, 680 A.2d

1321 (1996). Because standing implicates the court's subject matter jurisdiction, it is a proper basis for granting a motion to dismiss. *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 413, 35 A.3d 188 (2012); *Connecticut Associated Builders & Contractors* v. *Anson*, 251 Conn. 202, 205–206, 740 A.2d 804 (1999).

In reviewing a motion to dismiss, the court must presume "the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." *Sullins* v. *Rodriguez*, 281 Conn. 128, 132, 913 A.2d 415 (2007). "[W]henever a court discovers that it has no jurisdiction, it is bound to dismiss the case . . . ." (Internal quotation marks omitted.) *Pet* v. *Department of Health Services*, 207 Conn. 346, 351, 542 A.2d 672 (1988).

III

ANALYSIS

"Standing is the legal right to set judicial machinery in motion." (Internal quotation marks omitted.) *Briggs* v. *McWeeny*, 260 Conn. 296, 308, 796 A.2d 516 (2002). "One cannot rightfully invoke the jurisdiction of the court unless [one] has, in an individual or representative capacity, some real interest in the cause of action . . . . Standing is established by showing that the party claiming it [1] is authorized by statute to bring suit or [2] is classically aggrieved." (Internal quotation marks omitted.) Id.

When a plaintiff is neither statutorily nor classically aggrieved, the court lacks subject matter jurisdiction over his claims.

A

Statutory Aggrievement

"Statutory aggrievement . . . exists by legislative fiat, not by judicial analysis of the particular facts of the

case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *Lewis* v. *Slack*, 110 Conn. App. 641, 644, 955 A.2d 620, cert. denied, 289 Conn. 953, 961 A.2d 417 (2008).

In determining whether a statute regulating certain conduct also affords a private remedy, Connecticut courts generally hold to the rule that when the legislature intends to create a new cause of action it does so explicitly in the statute itself. *Antinerella* v. *Rioux*, 229 Conn. 479, 495, 642 A.2d 699 (1994), overruled on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003).

Although the operating presumption is that a statute does not create a private right of action unless explicitly stated, that presumption may be overcome on rare occasions. See *Provencher* v. *Enfield*, 284 Conn. 772, 780, 936 A.2d 625 (2007) ("it is a rare occasion that [the Connecticut Supreme Court] will be persuaded that the legislature intended to create something as significant as a private right of action but chose not to express such an intent in the statute"). In *Napoletano* v. *CIGNA Healthcare of Connecticut, Inc.*, 238 Conn. 216, 249, 680 A.2d 127 (1996) (overruled on other grounds by *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 284–85, 914 A.2d 996 [2007]), cert. denied, 520 U.S. 1103, 117 S. Ct. 1106, 137 L. Ed. 2d 308 (1997), the Connecticut Supreme Court held that a party asserting the existence of an implicit private remedy must satisfy an exacting three part test: "First, is the plaintiff one of the class for whose . . . benefit the statute was enacted . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?"

(Internal quotation marks omitted.) *Rollins* v. *People's Bank Corp.*, 283 Conn. 136, 142, 925 A.2d 315 (2007).

Additionally, in order to overcome the presumption that no private right of action is implied in the statutory enactment, the plaintiff must demonstrate that "no factor weighs against affording an implied right of action and [that] the balance of factors weighs in [the plaintiffs'] favor." (Internal quotation marks omitted.) Id. "In examining these three factors, each is not necessarily entitled to equal weight. Clearly, these factors overlap to some extent with each other, in that the ultimate question is whether there is sufficient evidence that the legislature intended to authorize [the plaintiff] to bring a private cause of action despite having failed expressly to provide for one." (Internal quotation marks omitted.) Id.

Applying the *Napoletano* factors to the present case, it appears that the plaintiffs are within the class of persons intended to be protected by the grievance process established under General Statutes § 51-90g and the parallel rules of practice. That process was created "to protect the public and the court from unfit practitioners." *Massameno* v. *Statewide Grievance Committee*, 234 Conn. 539, 554, 663 A.2d 317 (1995). Plainly, the plaintiffs are members of the public who have had dealings with a legal practitioner that they consider to be unfit. Cf. *Pane* v. *Danbury*, 267 Conn. 669, 680, 841 A.2d 684 (2004) (the class of persons for whom Freedom of Information Act was enacted "consists of members of the general public who desire information about the conduct of their government"), overruled on other grounds by *Grady* v. *Somers*, 294 Conn. 324, 349, 984 A.2d 684 (2009). Accordingly, the first *Napoletano* factor is satisfied or, at the very least, does not weigh against recognizing a private remedy for these plaintiffs.

Turning to the second *Napoletano* factor, the plaintiffs concede that there is no provision in either the

Practice Book rules or the General Statutes that expressly grants them permission to commence a civil action of any sort to challenge the dismissal of an attorney grievance complaint. Also, the parties have not provided anything in the nature of a "legislative history" that would contain an expression of intent (or lack thereof) to create such a remedy. The record before this court is silent in this respect, and therefore fails to indicate any intent to create a private right to challenge Statewide Grievance Committee decisions or procedure.

In seeking to discern the intent behind a legislative enactment, the court may also look to the "circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter." (Internal quotation marks omitted.) *Maxwell* v. *Freedom of Information Commission*, 260 Conn. 143, 147–48, 794 A.2d 535 (2002).

General Statutes § 51-90e grants any person the right to file a written complaint alleging attorney misconduct. From that point forward, by design, further action on the complaint becomes the responsibility of the statewide bar counsel, not the complainant. Should proceedings be conducted, § 51-90g (b) and General Statutes § 51-90h expressly define the role of the complainant in those grievance proceedings. Section 51-90g (b) grants the complainant the right to be present and represented by counsel at all hearings, and the opportunity to make a statement at the conclusion of the evidence. Section 51-90h grants a complainant a right to submit a statement in support or against any proposed decision. Had the legislature intended the complainant to have some right to challenge the outcome of any proceeding, or to challenge procedural irregularities in any proceeding, it could have easily inserted appropriate

provisions. The fact that it did not militates against any finding of legislative intent to create a private remedy for the complainant.

In this case, the plaintiffs seek review of the defendant grievance panels' alleged violation of Practice Book § 2-32 (i) (2) in dismissing the plaintiffs' grievance complaints rather than forwarding them to the Statewide Grievance Committee for further review. It is undisputed that § 2-32 (i) makes no mention whatsoever of a complainants' right to appeal that determination. However, a similar or parallel provision, § 2-32 (c), expressly states that where the statewide bar counsel dismisses a complaint pursuant to § 2-32 (a) (2), the "complainant shall have fourteen days . . . *to file an appeal of the dismissal*" with the statewide bar counsel. (Emphasis added.) The fact that § 2-32 (c) expressly provides for an appeal by the complainant, whereas § 2-32 (i)—in which a grievance panel dismisses a complaint pursuant to § 2-32 (a) (1)—makes no mention of any right of appeal, compels a conclusion that the omission in § 2-32 (i) was deliberate and that no intent can be implied to grant the complainant a right to seek a review of the dismissal. See *State* v. *Kevalis*, 313 Conn. 590, 603, 99 A.3d 196 (2014) ("[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed" [internal quotation marks omitted]).

The court concludes with respect to the second *Napoletano* factor that the plaintiffs have failed to demonstrate that either the legislature or the drafters of the Practice Book rules evidenced any intention, express or implicit, to grant a complainant the right to seek review of a dismissal of a grievance complaint by a grievance panel.

Finally, turning to the third *Napoletano* factor (consistency of a private cause of action with the underlying purpose of the legislative scheme), the plaintiffs suggest that finding an implicit right to challenge a dismissal through appeal, writ, or injunction is consistent with the underlying purposes of the legislative scheme in that it gives those who file complaints "remedies to protect their rights." The argument appears to be that, without the remedy of an appeal from a dismissal, persons who file grievance complaints will be denied procedural rights to appear and be heard, and deprived of any chance of restitution ("the grievance defendants' failure to follow the law and the rules has denied the plaintiff specific procedural rights as well as the extreme likelihood that the grievances will result in restitution and an accounting").

At the outset, although an award of restitution may be a "virtual certainty" in cases where attorney misconduct relates to moneys properly due to a client, it is not a "right" guaranteed to a person making a grievance complaint. A statutory right of action cannot be implied in a statute to protect a "right" that is not expressly stated in that statute. As to the denial of "procedural rights" which are expressed in the statutes, those same statutes authorize the Statewide Grievance Committee to adopt rules of procedure as a mechanism for protecting procedural rights. See General Statutes § 51-90a. It has not been shown how creating a remedy of appeal by the complainant for procedural deviations is consistent with an evident statutory scheme to vest authority for creating and implementing the procedural framework for grievance proceedings in the Statewide Grievance Committee.

The attorney disciplinary process exists "within the broader framework of the relationship between attorneys and the judiciary. . . . This unique position as officers and commissioners of the court . . . casts

attorneys in a special relationship with the judiciary and subjects them to its discipline." (Internal quotation marks omitted.) *Massameno* v. *Statewide Grievance Committee*, supra, 234 Conn. 554. Thus, an attorney grievance proceeding is not a civil action whose objective is to provide restitution to a victim or redress civil wrongs inflicted upon a victim. Its purpose is to investigate and regulate the conduct of court officers in order to safeguard the courts from persons unfit to practice before them. See *In re Application of Pagano*, 207 Conn. 336, 339, 541 A.2d 104 (1988), abrogated in part on other grounds by *Scott* v. *State Bar Examining Committee*, 220 Conn. 812, 823–24 n.8, 601 A.2d 1021 (1992). Against this background, granting an individual complainant the right to challenge the outcome of the grievance process is not necessarily consistent with the underlying purposes of the scheme of attorney discipline. A person who files an attorney grievance has only a limited role in the resulting proceedings. It is not essential to superintending the relationship between an attorney and the court that the client/complainant have a right to challenge the outcome of those proceedings. Input from the complaining party is a logical component of the attorney discipline process. Granting the complainant the right to challenge, or appeal from, the outcome of the process, is not.

For these reasons, the court concludes with respect to the third *Napoletano* factor that the plaintiffs have failed to demonstrate that the implication of a remedy of appeal by a complaining party from a local panel's dismissal of a grievance complaint is consistent with the underlying purposes of the disciplinary process.

"[A]s the party seeking to invoke an implied right of action, the plaintiffs bear the burden of demonstrating that such an action is created implicitly in the statute." *Asylum Hill Problem Solving Revitalization Assn.* v. *King*, 277 Conn. 238, 246, 890 A.2d 522 (2006). The

plaintiffs have not carried their burden and have not met the rigorous requirements for creation of a private cause of action by implication from the enactment of a statute. They have not shown statutory aggrievement.

B

Classical Aggrievement

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved . . . The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *May* v. *Coffey*, 291 Conn. 106, 112, 967 A.2d 495 (2009).

The relevant case authority has repeatedly held that persons filing attorney grievance complaints lack any cognizable specific, personal and legal interest in the discipline of an attorney. See, e.g., *Rousseau* v. *Statewide Grievance Committee*, 163 Conn. App. 765, 769–71, 133 A.3d 947, cert. denied, 321 Conn. 908, 135 A.3d 280 (2016); *Lewis* v. *Slack*, supra, 110 Conn. App. 647–48.

The plaintiffs attempt to distinguish these cases and establish a specific personal and legal interest in the decision as to whether to discipline the grieved attor-

neys in their particular case. They argue that since they are entitled to—and will invariably receive—an award of restitution if their complaint is reviewed by the Statewide Grievance Committee, the decision as to whether to discipline these attorneys directly affects the plaintiffs' receipt of monetary restitution, which is an interest separate and apart from that of the general public. On this basis, the plaintiffs argue, they have been "harmed in a unique fashion" by the conduct of the defendants and have established a "colorable claim of injury . . . ." (Internal quotation marks omitted.) *Lewis* v. *Slack*, supra, 110 Conn. App. 647.

The court is not persuaded. Regardless of the statistical probabilities the plaintiffs may bring to bear, the potential for restitution is theoretical and conjectural, rather than established fact. It is impossible to know with certainty whether the Statewide Grievance Committee, if it conducted a review, would ultimately decide to discipline the attorneys involved, much less the sanctions or penalties the Statewide Grievance Committee, in its discretion, would deem appropriate for the offense. Under the statutes, rules and case law governing attorney grievance proceedings, the plaintiffs have no legally protected *right* to restitution. Moreover, the decision as to whether or not to require restitution from a grieved attorney is made in the context of a sanction or punitive measure, and not for the purpose of compensating the victim. It is the interest in appropriate attorney discipline that is arguably affected by the decision to require restitution—not the financial interest of the person making the complaint. In that regard, the plaintiffs' stake in the outcome of these proceedings is no different from that of all members of the community—that attorney misconduct be discouraged and deterred through a comprehensive system of attorney discipline.

The plaintiffs cannot demonstrate a colorable claim of injury to an interest which is arguably protected by

the statute in question and, therefore, have failed to establish classical aggrievement.

C

Exercise of Discretionary Authority To Intervene in Grievance Proceedings

In the alternative, the plaintiffs suggest that this court has inherent equitable powers that would permit it, in certain circumstances, to intervene, investigate, and control the attorney discipline process. To alleviate the "cumulative effect" of the defendants' purported multiple abuses of discretion, the plaintiffs urge the court to exercise those powers and "take over the grievance process" in this case in order to "protect [the] rights" of the plaintiff. The exact "rights" that would be protected by this court (acting in place of the Statewide Grievance Committee) are not specified; the court assumes it would be protection of the plaintiffs' "near certain" potential for an award of restitution. But, as already explained, attorneys are not disciplined by the courts so as to compensate a victimized client, and the plaintiffs have already commenced a separate civil action to recover compensation for any losses attributable to misconduct of their attorneys.

This court, in the exercise of its discretion, declines to invoke its inherent powers to displace the ongoing disciplinary process. Discretion involves "something more than leeway in decision-making. . . . It means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Tuccio* v. *Garamella*, 114 Conn. App. 205, 209, 969 A.2d 190 (2009).

It is true that judges possess the inherent authority to regulate attorney conduct and to discipline members of the bar, and that is a responsibility this court takes

quite seriously. However, "[i]n exercising their inherent supervisory authority, the judges have authorized grievance panels and reviewing committees to investigate allegations of attorney misconduct and to make determinations of probable cause. . . . In carrying out these responsibilities, these bodies act as an arm of the court." (Internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 552–53, 69 A.3d 880 (2013). "Allowing parties to circumvent the established grievance procedures, at least in the absence of a compelling justification for doing so, would so undermine the process as to render it ineffectual. Such a result reasonably could not have been contemplated by the framers of the administrative scheme, who created the [Statewide Grievance Committee] and its subcommittees to act as an arm of the court in safeguarding the administration of justice, preserving public confidence in the system, and protecting the public and the court from unfit practitioners." *Johnson* v. *Statewide Grievance Committee*, 248 Conn. 87, 99–100, 726 A.2d 1154 (1999).

The case the plaintiffs have cited, *Bradley* v. *Statewide Grievance Committee*, Superior Court, judicial district of New Haven, Docket No. CV-08-4029843-S (July 14, 2008) (45 Conn. L. Rptr. 846), highlights the exceptional and extremely serious circumstances warranting court intervention in the established grievance process: "Although a complainant, under certain circumstances may have an equitable right of review, such is not necessarily the case when a complainant is seeking judicial review of the [Statewide Grievance Committee's] dismissal of her complaint. See also *Pinsky* v. *Statewide Grievance Committee*, 216 Conn. 228, 234 n.4, 578 A.2d 1075 (1990) (court observed that plaintiff may not be able to use equitable arguments to obtain judicial review of 'the decision of the [Statewide Grievance Committee] dismissing her complaint against her former attorney [a]s the complainant, her interest in

that decision was not equivalent to the right of an attorney . . . in preserving his professional reputation'). While it is true that the judiciary has the powers necessary to grant review of acts violating constitutional rights under article fifth of the Connecticut constitution, courts may only use these powers if 'egregious and otherwise irreparable violations of state and federal constitutional guarantees are being or have been committed by such proceedings.' . . . *Circle Lanes of Fairfield, Inc.* v. *Fay*, [195 Conn. 534, 542–43, 489 A.2d 363 (1985)]."

The court is keenly aware of the plaintiffs' frustration with and disappointment in the handling, if not the outcome, of the grievance proceedings. The facts and circumstances outlined in the complaint, if true, are deplorable. But these proceedings are not marked by "egregious and otherwise irreparable violations of state and federal constitutional guarantees." Mere disagreement with how the grievance process has been handled, standing alone, does not provide appropriate justification for this court to supplant or usurp the established disciplinary process.

IV

CONCLUSION

Because the plaintiffs are neither statutorily nor classically aggrieved, the court lacks subject matter jurisdiction over their claims. The motion to dismiss is therefore granted.