

590

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

RECLAIMANT CORP. v. WILLIAM J. DEUTSCH ET AL.
(SC 20133)

McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeulle, Js.

Syllabus

The plaintiff corporation sought to recover from the defendants for unjust enrichment in connection with the alleged overpayment of funds to them by the plaintiff's predecessor in interest, V Co., a Delaware limited partnership in which the defendants had invested pursuant to a limited partnership agreement. In early 2008, the defendants, who are Connecticut residents, each redeemed approximately 90 percent of the funds from their capital accounts in V Co. and thereafter withdrew from the partnership. The plaintiff alleged that, when the defendants redeemed their investments, V Co. had miscalculated the net value of the partnership's assets, and, consequently, the net values of the defendants' interests had been overstated, resulting in overpayments to the defendants. After the plaintiff filed its action in 2013, the defendants raised various special defenses, including, inter alia, that the plaintiff's unjust enrichment claims were time barred by either Delaware's three year limitation period (§ 17-607 [c]) in the Delaware Revised Uniform Limited Partnership Act or Connecticut's statutory (§ 52-577) three year limitation period generally applicable to tort actions, or were barred by the doctrine of laches. The plaintiff and the defendants each moved for summary judgment on certain of the defendants' special defenses. The trial court denied the plaintiff's motion for summary judgment, granted the defendants' motion as to their special defense that the plaintiff's claims were barred by the three year limitation period set forth in § 17-607 (c) and rendered judgment for the defendants. The trial court reasoned that the choice of law provision in the limited partnership agreement, which provided that the rights and liabilities of the parties were to be governed by and construed in accordance with the laws of Delaware, reflected an intent that both the substantive and procedural law of Delaware would govern the relationship between the parties and concluded that the plaintiff's claims were time barred by Delaware's three year limitation period because the plaintiff commenced its action more than three years after V Co. dispensed the funds to the defendants. The trial court also explicitly rejected the plaintiff's contention that the choice of law provision governed only substantive law and not procedural issues such as the statute of limitations. On appeal, the plaintiff claimed, inter alia, that the trial court improperly granted the defendants' motion for summary judgment because the procedural law of Connecticut, rather than that of Delaware, governed its unjust enrichment claims, under Connecticut procedural law, an equitable action for unjust enrichment was not subject to any statutory limitation period or, in the alternative, is subject to the six year statutory (§ 52-576 [a]) limitation period applicable to contracts, and that its action, therefore, was timely filed. *Held:*

332 Conn. 590

AUGUST, 2019

591

Reclaimant Corp. v. Deutsch

1. The trial court incorrectly determined that Delaware law, rather than Connecticut law, governed the issue of whether the plaintiff's unjust enrichment claims were time barred: in a choice of law scenario, the forum state generally will apply the substantive law of the state chosen by the parties to govern their rights and duties under a contractual agreement but will apply its own law to matters of judicial administration and procedure, and, in Connecticut, whether a statute of limitations properly is characterized as substantive or procedural depends on the nature of the underlying right that forms the basis of the cause of action; in the present case, the choice of law provision in the limited partnership agreement was clear that the parties had agreed that Delaware law controlled the substantive rights and liabilities of the parties, and, therefore, Delaware substantive law governed the plaintiff's unjust enrichment claims; because, however, the plaintiff's claims for unjust enrichment were claims for restitution that derived from equitable principles under Delaware's common law, the limitation period applicable to those claims properly was characterized as procedural, as that limitation period functioned only as a qualification on the remedy to enforce a preexisting common-law right, and, accordingly, Connecticut law governed the timeliness issue; moreover, the fact that § 17-607 (c) properly is classified as a statute of repose, rather than a statute of limitations, had no bearing on whether that provision was deemed substantive or procedural for choice of law purposes, and the limited partnership agreement did not expressly incorporate that Delaware provision or otherwise indicate an intent that Delaware's procedural law would apply.
2. The defendants could not prevail on their claim, as an alternative ground for affirming the trial court's judgment, that the plaintiff's unjust enrichment claims were barred under Connecticut law by the three year limitation period generally applicable to tort actions, because the plaintiff's claims were equitable claims for relief and, thus, were not subject to any statute of limitations; furthermore, this court declined to address the issue of whether the defendants could prevail on their affirmative defense of laches, as the trial court made no factual findings with respect to that affirmative defense, and, accordingly, the case was remanded for the trial court's consideration of that defense, as well as any remaining grounds for summary judgment that the defendants raised in their summary judgment motion.

Argued November 7, 2018—officially released August 6, 2019

Procedural History

Action to recover damages for unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Stamford, where the defendants filed a counterclaim; thereafter, the court, *Genuario, J.*, granted the defendants' motion for summary judg-

592

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

ment and rendered judgment for the defendants as to the plaintiff's complaint, from which the plaintiff appealed. *Reversed; further proceedings.*

David S. Golub, with whom, on the brief, was *Jonathan M. Levine*, for the appellant (plaintiff).

Howard Graff, pro hac vice, with whom, on the brief, were *Stephen G. Walko* and *Andrea C. Sisca*, for the appellees (defendants).

Opinion

ECKER, J. The narrow issue presented by this appeal is whether the statute of limitations of the state of Connecticut or the state of Delaware governs the unjust enrichment claims brought by the plaintiff, Reclaimant Corp., against the defendants, William J. Deutsch and Laurence B. Simon, seeking recovery for alleged overpayments issued to the defendants by the plaintiff's putative predecessor in interest pursuant to a limited partnership agreement. The trial court rendered summary judgment in favor of the defendants, concluding that the plaintiff's unjust enrichment claims were governed by Delaware law and were time-barred under the three-year statute of limitations in the Delaware Revised Uniform Limited Partnership Act (DRULPA), Del. Code Ann. tit. 6, § 17-607 (c) (2005).¹ On appeal, the plaintiff contends that summary judgment was improper because Connecticut law governs the timeliness of its unjust enrichment claims and that those claims timely were filed under Connecticut law.

We conclude that Delaware law governs the substantive rights and liabilities of the parties arising out of the limited partnership agreement but that Connecticut

¹ Section 17-607 of DRULPA provides that, "[u]nless otherwise agreed, a limited partner who receives a distribution from a limited partnership shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution."

332 Conn. 590

AUGUST, 2019

593

Reclaimant Corp. v. Deutsch

law governs matters of judicial administration and procedure. We further conclude that, because the plaintiff's unjust enrichment claims have a common-law origin, the limitation period properly is "characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right." *Baxter v. Sturm, Ruger & Co.*, 230 Conn. 335, 347, 644 A.2d 1297 (1994). Thus, Connecticut law, rather than Delaware law, controls the timeliness of the plaintiff's claims. We therefore reverse the judgment of the trial court and remand the case for further proceedings.

I

The record reveals the following relevant facts and procedural history. In 2007, the defendants entered into a limited partnership agreement with SV Special Situations Fund LP (SV Fund), a Delaware limited partnership formed for the purpose of investing in and trading securities and other investments. In early 2008, the defendants redeemed their respective investments and withdrew from the partnership as of March 31, 2008. Deutsch received approximately 90 percent of the funds in his capital account, for a total distribution in the amount of \$22,309,473.03, and Simon received approximately 90 percent of the funds in his capital account, for a total distribution in the amount of \$2,176,785.80.²

By letters dated September 4, 2012, Scott A. Stagg, the director of SV Fund, informed each of the defendants that the "net asset value of your interest in the . . . Fund was . . . overstated [at the time you redeemed your investment], resulting in . . . overpayment" Stagg alleged that Deutsch had received a total overpayment in the amount of \$7,047,974.03 and that Simon had received a total overpayment in the

² Deutsch received the following distributions: (1) \$15,000,000 in January, 2008; (2) \$5,305,029.10 on May 8, 2008; (3) \$2,000,000 on May 13, 2008; and (4) \$4,443.93 on May 14, 2008. Simon received the following distributions: (1) \$1,250,000 in January, 2008; and (2) \$926,785.80 on May 2, 2008.

594

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

amount of \$724,557.80, and he demanded that the defendants return the alleged overpayments within thirty days.

The defendants responded by requesting documentation and clarification of the alleged overpayments. The defendants also requested payment of the remaining funds in their capital accounts, which had been held back at the time of redemption. Specifically, Deutsch asked for the payment of \$807,127.97 and Simon asked for the payment of \$102,753.

SV Fund was liquidated in February, 2013, and its claims against the defendants were assigned to the plaintiff. On May 8, 2013, the plaintiff filed a two-count complaint against the defendants, both of whom reside in Connecticut. In the first count, the plaintiff alleged that Deutsch had been “unjustly enriched as a result of receiving and retaining” the alleged overpayment in the amount of \$7,047,974.03. In the second count, the plaintiff alleged that Simon had been “unjustly enriched as a result of receiving and retaining” the alleged overpayment in the amount of \$724,557.80.

The defendants moved to strike the complaint as time-barred under the three-year statute of limitations in § 17-607 (c) of DRULPA because “the distributions were made in 2008 and the complaint was not filed until 2013” The plaintiff opposed the defendants’ motion to strike, contending that, “if any statute of limitations applies to the plaintiff’s equitable unjust enrichment claims . . . it is [Connecticut’s] six-year statute [of limitations applicable to contracts] set forth in [General Statutes] § 52-576 (a), and the plaintiff’s claims are, therefore, not time-barred.” The trial court determined that it was “inappropriate to decide this potentially dispositive issue within the context of a motion to strike” and, therefore, denied the defendants’ motion.

332 Conn. 590

AUGUST, 2019

595

Reclaimant Corp. v. Deutsch

The defendants filed an answer denying that they had been unjustly enriched and raising the following affirmative defenses: (1) the plaintiff's claims are barred by § 17-607 (b) of DRULPA, "which specifies that a limited partner who unknowingly receives an alleged overpayment is not liable for returning the amount of that distribution"; (2) the plaintiff's claims are barred by the three-year statute of limitations in § 17-607 (c) of DRULPA; (3) the plaintiff's complaint fails to state a claim on which relief may be granted because SV Fund "could have prevented and/or addressed any potential alleged overpayments"; (4) the plaintiff's claims are barred by the three-year statute of limitations governing torts in General Statutes § 52-577; (5) the plaintiff "lacks standing because [it] has not established its right to bring a cause of action on behalf of SV Fund"; (6) the plaintiff "lacks standing because [it] has not established that SV Fund or its assignees have a right to bring a cause of action on behalf of 3V Capital Partners, LP";³ (7) the plaintiff's claims are barred by the doctrine of laches due to its "inexcusable delay" in filing suit; (8) the plaintiff's claims are "barred by the doctrine of waiver"; (9) the plaintiff's claims are "barred by the doctrine of estoppel"; (10) the plaintiff's claims "are barred by the equitable doctrine of unclean hands"; (11) the plaintiff's claims "are barred by the doctrine of satisfaction and accord"; and (12) the plaintiff "failed to mitigate its damages, if any exist." The defendants also filed a counterclaim against the plaintiff on the basis of SV Fund's alleged failure to distribute the funds remaining in their capital accounts.

The plaintiff moved for summary judgment on the defendants' second and fourth special defenses, contending that "Connecticut's statute of limitations law applies to the plaintiff's common-law unjust enrichment

³ 3V Capital Partners, LP, was a predecessor partnership to SV Fund, of which the defendants were limited partners.

596

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

claims” and “Connecticut law provides that either no statute of limitations applies to an equitable action for unjust enrichment, or, at a minimum, that a six-year statute of limitations applies, and this action is timely under either measure.” The defendants opposed the plaintiff’s motion for summary judgment and moved for summary judgment on their first, second, third, fourth, and seventh special defenses. The essence of the defendants’ argument was that the plaintiff’s “contention that Connecticut law applies to [this] dispute is academic since neither Connecticut nor Delaware law . . . permit[s] parties to pursue unjust enrichment claims as a means to rewrite the express terms of a written agreement governing the payments at issue” and the plaintiff’s unjust enrichment claims are time-barred under both Delaware and Connecticut law.

The trial court’s resolution of the parties’ competing motions for summary judgment was guided largely by the fact that the limited partnership agreement contains a choice of law provision, which states: “This [a]greement and all rights and liabilities of the parties hereto shall be governed by and construed in accordance with the laws of the [s]tate of Delaware, without regard to its conflicts of law principles.” The trial court observed that § 187 (1) of the Restatement (Second) of Conflict of Laws “requires that the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue was one which the parties could have resolved by an explicit provision in their agreement directed to that issue.” The trial court determined that the contractual choice of law provision here “expressly elects Delaware law for all issues regarding the parties’ rights and liabilities including those set forth in [§] 17-607 (c) of . . . DRULPA.” In arriving at its decision, the trial court rejected the plaintiff’s contention that the choice of law provision governed the substantive law of the contract but not pro-

332 Conn. 590

AUGUST, 2019

597

Reclaimant Corp. v. Deutsch

cedural matters like the applicable statute of limitations, reasoning that the “broad and clear” language of the contract “evidences an intent to include all issues (whether substantive or procedural) concerning rights, and all issues concerning liabilities, to be governed by Delaware law within the breadth of the choice of law election.” Having determined that “the parties clearly and unambiguously elected to have Delaware law govern their relationship, even when it provides time limits on liabilities that are different [from] the time limits on liabilities that may be imposed by the state of Connecticut,”⁴ the trial court granted the defendants’ motion for summary judgment on their second special defense, denied the plaintiff’s motion for summary judgment, and rendered judgment in favor of the defendants.

The plaintiff filed an appeal with the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the plaintiff claims that the trial court improperly rendered summary judgment in favor of the defendants because the choice of law provision in the limited partnership agreement “refers only to Delaware substantive law; it does not encompass Delaware procedural law,” and the limitation period governing common-law claims properly is characterized as procedural rather than substantive. Alternatively, the plaintiff contends that, even if Delaware procedural law controls the timeliness of its claims, § 17-607 (c) of DRULPA is inapplicable because the defendants withdrew from the

⁴ Additionally, the trial court rejected the plaintiff’s argument that “[§] 17-607 (c) [of DRULPA] is not applicable because, upon their withdrawal, the defendant[s] ceased to be limited partners under the terms of the [limited partnership agreement].” The trial court determined that “a thorough reading of [§] 17-607 as a whole makes it clear that the words ‘limited partner’ refer to the person or entity who receives the distribution by virtue of the partner’s status as a limited partner and applies even to withdrawing limited partners.” The trial court did not reach the issue of “whether . . . the Connecticut statute of limitations would bar the plaintiff’s claim[s].”

598

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

limited partnership in 2008 and, therefore, were not limited partners at the time the action was filed. Lastly, the plaintiff claims that its complaint was filed timely under Connecticut law because “unjust enrichment is either not subject to any statute of limitations at all (as an equitable claim) or is governed by the six-year [limitation] period [applicable to contracts] set forth in . . . § 52-576 (a).”

The defendants respond that the judgment of the trial court should be affirmed because that court properly concluded that the limited partnership agreement expressly incorporated Delaware law, including the three-year limitation period in § 17-607 (c) of DRULPA. They also argue that Connecticut law requires the application of § 17-607 (c) because General Statutes § 34-38f (1) provides that “the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners.” Alternatively, the defendants contend that, even if we were to conclude that Connecticut law, rather than Delaware law, governs the timeliness of the plaintiff’s claims, the trial court’s judgment nonetheless should be affirmed on the ground that the plaintiff’s unjust enrichment claims are time-barred under either the three-year statute of limitations in § 52-577 or the doctrine of laches. Lastly, the defendants argue that the judgment of the trial court may be affirmed on the alternative ground that “the equitable remedy of unjust enrichment is unavailable where there is a written contract between the parties on the subject.”

II

The applicable standard of review is not in dispute. “Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the

332 Conn. 590

AUGUST, 2019

599

Reclaimant Corp. v. Deutsch

moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Cogan v. Chase Manhattan Auto Financial Corp.*, 276 Conn. 1, 6–7, 882 A.2d 597 (2005). It is well settled that "[c]hoice of law questions are subject to de novo review." *Western Dermatology Consultants, P.C. v. VitalWorks, Inc.*, 322 Conn. 541, 558, 153 A.3d 574 (2016); see also *American States Ins. Co. v. Allstate Ins. Co.*, 282 Conn. 454, 461, 922 A.2d 1043 (2007) (noting that "choice of law issues present questions of law over which our review is plenary").

Nor do the parties disagree about the fundamental starting point of the conflict of laws analysis, which requires initial resort to Connecticut conflict of laws rules. "In determining the governing law, a forum applies its own [conflict of laws] rules" *Gibson v. Fullin*, 172 Conn. 407, 411, 374 A.2d 1061 (1977). The applicable Connecticut conflict of laws rule depends upon the nature of the plaintiff's claim. See *Macomber v. Travelers Property & Casualty Corp.*, 277 Conn. 617, 640, 894 A.2d 240 (2006) (applying different choice of law rules to tort and contract claims). This court previously has referred to unjust enrichment as both a tort⁵

⁵ See, e.g., *LaSalla v. Doctor's Associates, Inc.*, 278 Conn. 578, 595, 898 A.2d 803 (2006); *Macomber v. Travelers Property & Casualty Corp.*, supra, 277 Conn. 640; *Fink v. Golenbock*, 238 Conn. 183, 193, 680 A.2d 1243 (1996).

600

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

and a quasi-contractual claim;⁶ however, we also have recognized, more accurately, that it is neither a species of tort nor contract but, rather, an equitable “means of recovery in restitution.” *Walpole Woodworkers, Inc. v. Manning*, 307 Conn. 582, 587 n.9, 57 A.3d 730 (2012) (clarifying that unjust enrichment is a “noncontractual means of recovery in restitution”); see also *Vertex, Inc. v. Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006) (“[u]njust enrichment is, consistent with the principles of equity, a broad and flexible remedy,” and there is “no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable” [internal quotation marks omitted]); *Connecticut National Bank v. Chapman*, 153 Conn. 393, 399, 216 A.2d 814 (1966) (noting that unjust enrichment “is essentially equitable,” and, in order to recover in restitution under that doctrine, there is no requirement that “the party unjustly enriched should have been guilty of any tortious or fraudulent act”).

Section 221 of the Restatement (Second), titled “Restitution,” “is concerned with what law governs a person’s right to recover from another, on grounds of fairness and good conscience, the amount by which the other has been unjustly enriched at his expense.” 1 Restatement (Second), Conflict of Laws c. 8, topic 6, introductory note, p. 726 (1971). Section 221 provides in relevant part that “[i]n actions for restitution, the rights and liabilities of the parties with respect to the particular issue are determined by the local law of the state which, with respect to that issue, has the most

⁶ See, e.g., *Habetz v. Condon*, 224 Conn. 231, 236 n.9, 618 A.2d 501 (1992); *Sidney v. DeVries*, 215 Conn. 350, 351–52 n.1, 575 A.2d 228 (1990); *Liljedah Bros., Inc. v. Grigsby*, 215 Conn. 345, 346 n.1, 576 A.2d 149 (1990); see generally *Meaney v. Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 511, 735 A.2d 813 (1999) (“[a]lthough, linguistically, such a claim is sometimes denominated an implied-in-law claim, or a quasi contract claim, it is more descriptive to call it what it is, a claim in restitution whose basis is the alleged unjust enrichment of one person at the expense of another”).

332 Conn. 590

AUGUST, 2019

601

Reclaimant Corp. v. Deutsch

significant relationship to the occurrence and the parties under the principles stated in § 6.”⁷ *Id.*, § 221 (1), p. 727. Under subsection (2) of § 221, one of the “[c]ontracts to be taken into account in applying the principles of § 6” is “the place where a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship.” *Id.*, § 221 (2) (a), p. 727. According to the commentary, “[t]he place where a relationship between the parties was centered, provided that this relationship was substantially related to the receipt of enrichment, is the contact that, as to most issues, is given the greatest weight in determining the state of the applicable law.” *Id.*, comment (d), pp. 729–30. For example, “[w]hen the enrichment was received in the course of the performance of a contract between the parties, the law selected by application of the rules of §§ 187–188 [of the Restatement (Second)] will presumably govern one party’s rights in restitution against the other. The applicable law will be that chosen by the parties if they have made an effective choice under the circumstances stated in § 187.” *Id.*, comment (d), p. 730.

In the present case, the alleged unjust enrichment occurred in the course of the performance of the limited partnership agreement, and, therefore, we must turn to § 187 of the Restatement (Second) to resolve the con-

⁷ We recognize that, in *Macomber v. Travelers Property & Casualty Corp.*, supra, 277 Conn. 640, we held that unjust enrichment was a tort for choice of law purposes, and, therefore, “we apply the law of the state in which the plaintiff was injured, unless to do so would produce an arbitrary or irrational result.” As this court recently clarified, however, “we have completely abandoned the lex loci test in tort actions” and adopted “the most significant relationship test outlined in §§ 6 (2) and 145 of the Restatement (Second) of Conflict of Laws [as] the proper test to apply in tort actions to determine which state’s law applies.” *Western Dermatology Consultants, P.C. v. VitalWorks, Inc.*, supra, 322 Conn. 551 n.9. Thus, regardless of whether a claim for unjust enrichment is characterized as a tort or an equitable claim for restitution, the same conflict of law principles apply, namely, the most significant relationship test set forth in the Restatement (Second).

602

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

flict of law inquiry. Section 187 of the Restatement (Second) provides in relevant part that “[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.” *Id.*, § 187 (1), p. 561; see *Elgar v. Elgar*, 238 Conn. 839, 850, 679 A.2d 937 (1996) (noting that, under § 187, “parties to a contract generally are allowed to select the law that will govern their contract”). This “is a rule providing for incorporation by reference and is not a rule of choice of law. The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intention of the parties.” 1 Restatement (Second), *supra*, § 187, comment (c), p. 563.

The limited partnership agreement here contains a choice of law provision that provides: “This [a]greement and all rights and liabilities of the parties hereto shall be governed by and construed in accordance with the laws of the [s]tate of Delaware, without regard to its conflicts of law principles.” Pursuant to this choice of law provision, as well as the other parts of the contract evidencing the signatories’ intent “to form a limited partnership . . . in accordance with the provisions of [DRULPA],” we conclude that Delaware substantive law controls the plaintiff’s unjust enrichment claims.⁸

⁸ There is no contention that either of the exceptions listed in § 187 (2) of the Restatement (Second) is applicable to the present case. See 1 Restatement (Second), *supra*, § 187 (2), p. 561 (providing that law of state chosen by parties will be applied unless either “the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties’ choice” or “application of the law of

332 Conn. 590

AUGUST, 2019

603

Reclaimant Corp. v. Deutsch

This does not end our analysis, however, because it is well established that “in a choice of law situation the forum state will apply its own procedure” *Paine Webber Jackson & Curtis, Inc. v. Winters*, 22 Conn. App. 640, 650, 579 A.2d 545, cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990); see, e.g., *Ferri v. Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017) (“[a]lthough the choice of law provision in the 1983 trust dictates that matters of substance will be analyzed according to Massachusetts law, procedural issues such as the standard of review [and standing] are governed by Connecticut law”); *Montoya v. Montoya*, 280 Conn. 605, 612 n.7, 909 A.2d 947 (2006) (“[a]lthough the agreement’s choice of law provision dictates that the substance of the contract will be analyzed according to New York law, procedural issues such as the applicable standard of review are governed by Connecticut law”); *People’s United Bank v. Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012) (“because the 1998 note and the guarantee contain choice of law clauses stating that they are to be governed and construed in accordance with Massachusetts law . . . we are guided by Massachusetts substantive law in deciding the defendant’s claims, but we must apply the procedural laws of Connecticut”). This approach is consistent with § 122 of the Restatement (Second), which provides that “[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.” 1 Restatement (Second), *supra*, § 122, p. 350. As

the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties”); see also *Elgar v. Elgar*, *supra*, 238 Conn. 850 (holding that “parties to a contract generally are allowed to select the law that will govern their contract, unless either” exception in § 187 [2] of Restatement [Second] is applicable).

604

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

the commentary to that section explains, “[t]he forum has compelling reasons for applying its own rules” to procedural issues, even if the substantive law of another jurisdiction applies, because, “in matters of judicial administration, it would often be disruptive or difficult for the forum to apply the local rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state’s local law is designed to promote.” *Id.*, comment (a), p. 350. Additionally, “[p]arties do not usually give thought to matters of judicial administration before they enter into legal transactions,” and, therefore, “the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum’s rules in such matters.” *Id.*, p. 351. Even if the application of the forum’s procedural rule would alter the outcome of a case, “the forum will usually apply its own rule if the issue primarily concerns judicial administration. The statute of limitations is a striking example of such an issue” *Id.*

In *Baxter v. Sturm, Ruger & Co.*, *supra*, 230 Conn. 339, we addressed whether a “statute of limitation[s] is procedural or substantive for choice of law purposes.” We noted that it is “undisputed that . . . remedies and modes of procedure depend upon the *lex fori*” and that statutes of limitations typically are procedural because they “relate to the remedy as distinguished from the right.” (Internal quotation marks omitted.) *Id.*; see also *Thomas Iron Co. v. Ensign-Bickford Co.*, 131 Conn. 665, 668, 42 A.2d 145 (1945) (“[i]t is undisputed that, as a principle of universal application, remedies and modes of procedure depend upon the *lex fori*”). Nonetheless, a statute of limitations may be deemed substantive, rather than procedural, “if the limitation is so interwoven with . . . the cause of action as to become one of the congeries of elements necessary to

332 Conn. 590

AUGUST, 2019

605

Reclaimant Corp. v. Deutsch

establish the right” (Internal quotation marks omitted.) *Baxter v. Sturm, Ruger & Co.*, supra, 340; see also *Thomas Iron Co. v. Ensign-Bickford Co.*, supra, 668–69 (observing that, if “the remedial law of the foreign jurisdiction is inseparable from the cause of action,” then “the lex loci and not the lex fori governs”). We determined that neither statutes of limitations nor statutes of repose are “substantive [or] procedural per se for choice of law purposes,” but, rather, the characterization of the applicable limitation period “depends on the nature of the underlying right that forms the basis of the lawsuit. If the right existed at common law, then the [limitation period] is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right. If, however, the right is newly created by the statute, then the [limitation period] is properly characterized as substantive because the period of repose is so integral a part of the cause of action as to warrant saying that it qualifie[s] the right.” (Internal quotation marks omitted.) *Baxter v. Sturm, Ruger & Co.*, supra, 346–47; see also 1 Restatement (Second), supra, § 143, p. 400 (“[a]n action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy”).⁹ Applying these principles to the

⁹ We recognize that §§ 142 and 143 of the Restatement (Second) were repealed and replaced with an amended § 142 in the 1988 revision of the Restatement (Second), which abandoned the procedural/substantive distinction and embraced “the emerging trend” that “a claim will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the state of most significant relationship to the occurrence and the parties under the principles stated in § 6.” 1 Restatement (Second), Conflict of Laws § 142, comment (e), p. 125 (Supp. 1989). The parties in the present case have not asked us to overrule our prior precedent employing the traditional approach and adopt the 1988 revision to § 142 of the Restatement (Second), and, therefore, we have no reason to address the issue here. See *Spencer v. Hartford Financial Services Group, Inc.*, 256 F.R.D. 284, 300 (D. Conn. 2009) (noting that, although “Connecticut courts are trending [toward] following the Restatement’s ‘most significant relationship’ test in place of traditional rules,” this court’s 1994 decision in *Baxter*,

facts at issue in *Baxter*, we held that the timeliness of the plaintiff's product liability claims was governed by Connecticut's statute of limitations, rather than Oregon's statute of repose, "in light of the [common-law] origin of the law of products liability" *Baxter v. Sturm, Ruger & Co.*, supra, 347.

Pursuant to *Baxter*, the procedural or substantive nature of the limitation period depends on whether the plaintiff's right to relief existed under Delaware common law. See *id.*, 341 (examining Oregon law to determine whether plaintiff's claims existed at common law).¹⁰ Under Delaware law, unjust enrichment is a claim for restitution. See *Fleer Corp. v. Topps Chewing*

which postdated 1988 revision to § 142 of Restatement [Second], reflects that Connecticut courts continue to "follow the traditional rule" with respect to statutes of limitations); see also *Doe No. 1 v. Knights of Columbus*, 930 F. Supp. 2d 337, 356 n.25 (D. Conn. 2013); *Bilodeau v. Vlack*, Docket No. 07-CV-1178 (JCH), 2009 WL 1505571, *4 (D. Conn. 2009).

¹⁰ In *Baxter*, the term "common law" is used broadly to include all rights preexisting "new right[s] created by statute." *Baxter v. Sturm, Ruger & Co.*, supra, 230 Conn. 340. Thus, although the term may be used more narrowly in other contexts, in the present context, the "common law" includes "judicial precedent," "case law," and "natural law," as opposed to statutory law. (Internal quotation marks omitted.) *Moore v. Ganim*, 233 Conn. 557, 599, 660 A.2d 742 (1995); see also *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("[a]s distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs" [internal quotation marks omitted]); *State v. Courchesne*, 296 Conn. 622, 674 n.36, 998 A.2d 1 (2010) ("[t]he common law is generally described as those principles, usage, and rules of action applicable to the government and security of persons and property which do not rest for their authority [on] any express and positive declaration of the will of the legislature" [internal quotation marks omitted]). We recognize that there is a distinction between "legal" and "equitable" claims, which derives from the historical distinction in England between "courts of law and courts of equity." *Blumberg Associates Worldwide, Inc. v. Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 145, 84 A.3d 840 (2014); see *id.* (noting that, "[i]n the United States, most jurisdictions, including Connecticut and the federal courts, have merged law and equity courts"). This distinction, however, is irrelevant to the procedural/substantive analysis of a limitation period under *Baxter* and our use of the term "common law" here.

332 Conn. 590

AUGUST, 2019

607

Reclaimant Corp. v. Deutsch

Gum, Inc., 539 A.2d 1060, 1062 (Del. 1988). The right to relief is not created by statute but, rather, derives from equitable principles under the common law. See, e.g., *Schock v. Nash*, 732 A.2d 217, 232 (Del. 1999) (“[u]njust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience” [internal quotation marks omitted]). Given the common-law origin of the plaintiff’s unjust enrichment claims, we conclude that the limitation period “is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right.”¹¹ *Baxter v. Sturm, Ruger & Co.*, supra, 230 Conn. 347. Accordingly, Connecticut law, rather than Delaware law, governs the timeliness of the plaintiff’s claims.

The defendants contend that § 17-607 (c) of DRULPA is substantive, rather than procedural, because it extinguishes the liability of a limited partner after the expiration of three years. To support this contention, the defendants rely on *Century City Doctors Hospital, LLC v. Friedman*, 466 B.R. 1, 12–13 (Bankr. C.D. Cal. 2012), and *Freeman v. Williamson*, 890 N.E.2d 1127, 1133–34 (Ill. App. 2008), both of which held that § 17-607 (c) is substantive because it is a statute of repose, not a statute of limitations. We agree with the courts in *Century*

¹¹ The defendants, quoting *Baxter v. Sturm, Ruger & Co.*, supra, 230 Conn. 340, contend that DRULPA “created rights based on unique statutory relationships that did not exist at common law,” and, therefore, the three-year statute of limitations in § 17-607 (c) is “one of the ‘congeries of elements necessary to establish the right.’” Although DRULPA created a statutory framework that did not exist at common law, the plaintiff does not seek to recover under DRULPA or any of the statutory rights created therein; it seeks recovery solely under the common-law doctrine of unjust enrichment. As the master of the complaint, the plaintiff is free to decide what theory of recovery to pursue, and, under *Baxter*, the theory of recovery chosen by the plaintiff is dispositive of whether a statute of limitations is deemed procedural or substantive for choice of law purposes. See *Baxter v. Sturm, Ruger & Co.*, supra, 347.

608

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

City Doctors Hospital, LLC, and Freeman that § 17-607 (c) properly is characterized as a statute of repose because it “clearly terminates the possibility of the limited partner’s liability after a defined period of time, three years after receiving a distribution, regardless of whether a potential plaintiff knows of his or her cause of action.” *Century City Doctors Hospital, LLC v. Friedman*, *supra*, 13, quoting *Freeman v. Williamson*, *supra*, 1134; see *Baxter v. Sturm, Ruger & Co.*, *supra*, 230 Conn. 341 (recognizing that “statutes of repose differ in some respects from statutes of limitation” because they terminate “any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury” [internal quotation marks omitted]). Labeling the statute as such does not resolve the issue at hand, however, because this court in *Baxter* explicitly rejected the notion that “statutes of repose . . . are always substantive”; *Baxter v. Sturm, Ruger & Co.*, *supra*, 341; instead, concluding that statutes of repose should be treated the same as statutes of limitations for choice of law purposes because they both “serve the same public policy of avoiding the litigation of stale claims.” *Id.*, 344. Under Connecticut’s choice of law rules, the dispositive inquiry is not whether the statute at issue properly is characterized as a statute of repose or a statute of limitations, but whether the “nature of the underlying right that forms the basis of the lawsuit” existed at common law.¹² *Id.*, 347. Because

¹² The defendants point out that “numerous Connecticut cases” have held “that a statute of limitation[s] is substantive.” Nothing in the cases cited by the defendants is inconsistent with our holding in *Baxter* or the principles elucidated in this opinion, because, in all of those cases, the limitation period was part of a statutory scheme that did not exist at common law. See *Lostritto v. Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 26, 848 A.2d 418 (2004) (holding that 120-day limitation in General Statutes § 52-102b is substantive because it is part of statutory scheme that “confers rights that did not exist at common law”); *Ecker v. West Hartford*, 205 Conn. 219, 233, 530 A.2d 1056 (1987) (holding that three-year limitation in General Statutes § 52-555 is substantive because wrongful death statute “creates liability where none formerly existed” at common law); *Diamond National*

332 Conn. 590

AUGUST, 2019

609

Reclaimant Corp. v. Deutsch

Delaware law recognizes a common-law claim for unjust enrichment, § 17-607 (c) of DRULPA is a procedural limitation on that preexisting right to relief.

The defendants next contend that the choice of law provision in the limited partnership agreement is worded broadly to include all of Delaware's procedural law as well as its substantive law. We disagree. "Choice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitation[s]." *Federal Deposit Ins. Corp. v. Peterson*, 770 F.2d 141, 142 (10th Cir. 1985). Thus, "[a]bsent an express statement that the parties intended another state's limitations statute to apply, the procedural law of the forum governs time restrictions" *Cole v. Mileti*, 133 F.3d 433, 437 (6th Cir.), cert. denied, 525 U.S. 810, 119 S. Ct. 42, 142 L. Ed. 2d 32 (1998); see also *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1179 (3d Cir. 1992) ("[c]hoice of law provisions in contracts do not apply to statutes of limitations, unless the reference is express"); *Des Brisay v. Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981) (Choice of law "clauses generally do not contemplate application to statutes of limitation. [Limitation] periods are usually considered to be related to judicial administration and thus governed by the rules of local law, even if the substantive law of another jurisdiction applies."); *Portfolio Recovery Associates, LLC v. King*, 14 N.Y.3d 410, 416, 927

Corp. v. Dwelle, 164 Conn. 540, 543, 325 A.2d 259 (1973) (holding that time limitation in General Statutes § 49-39 is substantive because "[a] mechanic's lien is a creature of statute and gives a right of action which did not exist at common law"); *Simmons v. Holcomb*, 98 Conn. 770, 774-75, 120 A. 510 (1923) (holding that statute of limitations for worker's compensation claim is substantive because "right of action . . . did not exist at common law," and, therefore, "it is a limitation of the liability itself, as created, and not of the remedy alone" [internal quotation marks omitted]); *Federal National Mortgage Assn. v. Jessup*, Docket No. CV-98-0169417-S, 1999 WL 624453, *11 (Conn. Super. August 3, 1999) (holding that statute of limitations for claim under Connecticut Unfair Trade Practices Act [CUTPA] is substantive because "CUTPA is a statutory creation").

N.E.2d 1059, 901 N.Y.S.2d 575 (2010) (“Choice of law provisions typically apply to only substantive issues . . . and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right There being no express intention in the agreement that Delaware’s statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that [limitation] period.” [Citations omitted; internal quotation marks omitted.]).

The choice of law provision in the limited partnership agreement does not mention, much less expressly incorporate, the three-year limitation period in § 17-607 (c) of DRULPA.¹³ A “standard choice of law provision,” such as the one at issue in the present case, which does not mention the procedural law of another state, “will not be interpreted as covering a statute of limitations.” *Federal Deposit Ins. Corp. v. Peterson*, supra, 770 F.2d 142–43; see also *Generali-U.S. Branch v. Lachel & Associates, Inc.*, Docket No. 3:16-cv-595-DJH, 2017 WL 6999998, *3 (W.D. Ky. August 7, 2017) (holding that “the phrase ‘governed by’ is not an express statement indicating that Indiana law should apply to the statute of limitations”); *American Energy Technologies, Inc. v. Colley & McCoy Co.*, Docket No. CIV A. 98-398 MMS,

¹³ The limited partnership agreement provides that the limited partnership is “create[d] and form[ed]” in accordance with DRULPA but is “governed by and construed in accordance with the laws of the [s]tate of Delaware” (Emphasis added.) Thus, although the parties may have incorporated DRULPA with respect to the creation and formation of the partnership, the agreement itself and “all rights and liabilities of the parties” arising out of the agreement are governed by Delaware law generally. In any event, as explained in the text of this opinion, § 187 of the Restatement (Second) “is a rule providing for incorporation by reference and is not a rule of choice of law.” 1 Restatement (Second), supra, § 187, comment (c), p. 563. Accordingly, even where the law of another state expressly has been incorporated into a contract by reference, the procedural law of the forum applies in the absence of an express statement to the contrary. See *id.*, § 122 and comments (a) through (c), pp. 350–53.

332 Conn. 590

AUGUST, 2019

611

Reclaimant Corp. v. Deutsch

1999 WL 301648, *2 (D. Del. April 15, 1999) (holding that choice of law provision, providing in relevant part that “[t]he agreement shall be interpreted according to the laws of the [c]ommonwealth of Virginia,” did “not expressly provide for the laws of the [c]ommonwealth of Virginia to apply to the statute of limitations,” and, therefore, “Virginia’s five-year statute of limitations for contract cases [was] inapplicable”).

Finally, the defendants contend that § 17-607 (c) of DRULPA must apply to the plaintiff’s unjust enrichment claims pursuant to the Connecticut Uniform Limited Partnership Act (CULPA), General Statutes § 34-9 et seq., which provides in relevant part that “[s]ubject to the Constitution of this state . . . the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners” General Statutes § 34-38f (1). Again, we disagree. Consistent with CULPA and the choice of law provision in the limited partnership agreement, Delaware law governs the substantive liability of the defendants with respect to the plaintiff’s unjust enrichment claims. As we have explained, however, the time in which to file a Delaware unjust enrichment action is a matter of judicial administration and procedure that is controlled by Connecticut law. Therefore, Connecticut law governs the timeliness of the plaintiff’s claims.

III

Having concluded that Connecticut law governs the timeliness of the plaintiff’s unjust enrichment claims, we next address the defendants’ contention that the judgment of the trial court may be affirmed on the alternative ground¹⁴ that the plaintiff’s claims are barred

¹⁴ We note that the defendants did not file a preliminary statement of the issues “present[ing] for review alternative grounds upon which the judgment may be affirmed,” as required Practice Book § 63-4 (a) (1). Nonetheless, we may consider the defendants’ alternative grounds for affirmance as properly raised if “neither party would be prejudiced by our doing so” (Internal

612

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

by the three-year statute of limitations in § 52-577 generally applicable to tort actions.¹⁵ The plaintiff responds that § 52-577 is inapplicable to the present case because unjust enrichment is not a tort but an equitable claim for relief. The plaintiff contends that its unjust enrichment claims are not subject to any limitation period at all or, in the alternative, are subject to the six-year statute of limitations applicable to contract actions. See General Statutes § 52-576 (a).¹⁶

As a preliminary matter, we note that the trial court did not reach the issue of which statute of limitations, if any, governs the plaintiff's unjust enrichment claims under Connecticut law. When a trial court has not ruled on all of the grounds raised in a motion for summary judgment, we have the discretion either to "remand for further trial court proceedings" or "to consider whether, as a matter of law, the trial court's judgment can be sustained on . . . [alternative] grounds." *Skuzinski v. Bouchard Fuels, Inc.*, 240 Conn. 694, 703, 694 A.2d 788 (1997); see also *Vollemans v. Wallingford*, 103 Conn. App. 188, 219, 928 A.2d 586 (2007) ("[a]lthough the trial court did not rule on those [alternative] grounds for summary judgment, it is within our discretion to do so on appeal"), *aff'd*, 289 Conn. 57, 956 A.2d 579 (2008). Because the issue presents a pure question of law¹⁷ that

quotation marks omitted.) *Gerardi v. Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010). Because the applicability of § 52-577 was discussed extensively in its principal appellate brief, we conclude that the plaintiff would not be prejudiced by our consideration of the defendants' alternative grounds for affirmance. See, e.g., *Connecticut Ins. Guaranty Assn. v. Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006).

¹⁵ General Statutes § 52-577 provides that "[n]o action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

¹⁶ General Statutes § 52-576 (a) provides in relevant part that "[n]o action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues"

¹⁷ See, e.g., *Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 407-08, 957 A.2d 836 (2008) ("[t]he question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo" [internal quotation marks omitted]).

332 Conn. 590

AUGUST, 2019

613

Reclaimant Corp. v. Deutsch

has been briefed extensively by the parties on appeal, the interest of judicial economy induces us to consider whether the plaintiff's unjust enrichment claims are barred by the three-year limitation period in § 52-577.

As explained in part II of this opinion, unjust enrichment is not a legal claim sounding in either tort or contract—it is an equitable claim for relief. As an equitable claim, its timeliness is not subject to a statute of limitations but, rather, to the equitable doctrine of laches. See *Dunham v. Dunham*, 204 Conn. 303, 326–27, 528 A.2d 1123 (1987) (holding that plaintiff's equitable claim for relief was not barred by three-year statute of limitations in § 52-577), overruled in part on other grounds by *Santopietro v. New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996); see also *Government Employees Ins. Co. v. Barros*, 184 Conn. App. 395, 399, 401, 195 A.3d 431 (2018) (recognizing that “[s]tatutes of limitations do not apply in a strict fashion to causes of action arising in equity,” and when “the plaintiff's claim sounds only in equity, not in law or in both law and equity . . . the plaintiff's claim is not subject to any statute of limitations, let alone the same statutes of limitations applicable to the underlying claims” [footnote omitted]). In an action for equitable relief, a court is not “bound to apply the statute of limitations that governs the underlying cause of action. In fact, in an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute.” *Dunham v. Dunham*, supra, 326. “Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obliged to adhere to those time limitations.” *Id.*, 326–27; see *Certain Underwriters at Lloyd's, London v. Cooperman*, 289 Conn. 383, 411, 957 A.2d

614

AUGUST, 2019

332 Conn. 590

Reclaimant Corp. v. Deutsch

836 (2008) (concluding that plaintiffs' equitable claims were time-barred because its legal claims were time-barred under statute of limitations). As equitable claims for relief, the plaintiff's unjust enrichment claims are not barred by the three-year limitation period in § 52-577.

The defendants contend¹⁸ that, even under the doctrine of laches, the three-year limitation period in § 52-577 should apply to this action by analogy because the plaintiff “has no excuse whatsoever for waiting until 2013 to seek recovery of payments made in 2008,” and the defendants have suffered prejudice as a consequence of the plaintiff's delay because “SV Fund recouped the alleged loss, SV Fund no longer exists, and all of the other partners have received their distributions.” To prevail on the affirmative defense of laches, the defendants must establish, first, that there was an inexcusable delay and, second, that the delay “prejudiced the defendant[s]. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the defendant[s] A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law.” (Citations omitted; internal quotation marks omitted.) *Papcun v. Papcun*, 181 Conn. 618, 620–21, 436 A.2d 282 (1980). The trial court made no factual findings regarding the defendants' special defense of laches, and, in the absence of subordinate facts, we decline to address the issue. We therefore remand this case to the trial court for consideration of the defendants' seventh special defense of laches, as

¹⁸ The defendants also contend that the judgment of the trial court may be affirmed on the alternative ground that “[i]t is well settled in Connecticut that the equitable remedy of unjust enrichment is unavailable where there is a written contract between the parties on the subject.” We decline to address the defendants' alternative ground for affirmance in light of our conclusion in part II of this opinion that Delaware law, rather than Connecticut law, governs the substance of the plaintiff's unjust enrichment claims.

332 Conn. 615 AUGUST, 2019 615

Meletrich v. Commissioner of Correction

well as the remaining grounds for summary judgment raised in the defendants' August 12, 2016 motion for summary judgment.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

ANGEL MELETRICH v. COMMISSIONER
OF CORRECTION
(SC 20075)

McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted of certain crimes in connection with a robbery, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to present alibi testimony from the petitioner's aunt, G. The robbery occurred at a restaurant located less than one mile from the petitioner's house. The petitioner's cousin, B, who worked at the restaurant, informed the police that, before she went to work one day, the petitioner and another cousin had told her to leave a side door unlocked after closing so that they could rob the restaurant. B complied, and the restaurant was later robbed by three men wearing sweatshirts and ski masks. During the petitioner's criminal trial, the state introduced evidence that the police had searched the petitioner's home and seized, inter alia, sweatshirts and ski masks that purportedly had been used during the robbery and cash register drawers from the restaurant. In order to establish an alibi, trial counsel presented testimony from the petitioner's girlfriend, D, indicating that the two had spent the entire day and night in question together at the petitioner's house. The jury ultimately returned a verdict finding the petitioner guilty of first degree robbery and larceny, as well as conspiracy to commit first degree robbery and larceny, and the trial court rendered judgment in accordance with the verdict. During the habeas trial, G testified that she lived in the same house as the petitioner and that she had seen him there periodically throughout the day in question. The petitioner's trial counsel testified during the habeas trial that he had interviewed a number of relatives, including G, in preparing an alibi defense and that, in his judgment, D was the strongest witness because she could testify that she and the petitioner were together in bed when the robbery occurred. The habeas court rendered judgment denying the habeas petition and thereafter denied the petitioner's petition for

616

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

certification to appeal. The petitioner then appealed to the Appellate Court, which dismissed the petitioner's appeal. On the granting of certification, the petitioner appealed to this court. *Held* that the Appellate Court correctly concluded that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, this court having concluded that the petitioner's claim that trial counsel had rendered ineffective assistance by failing to call G as an alibi witness was not debatable among jurists of reason; trial counsel's strategic decision to present an alibi defense only through D's testimony, which was entitled to deference, did not constitute deficient performance because G would not have been able to account sufficiently for the petitioner's whereabouts for the entire day and evening in question, as G was able to provide only general testimony that the petitioner had been home at various points during the relevant time periods, and, given the close proximity of the restaurant, G may not have noticed the petitioner leaving the house to confront B about leaving a door unlocked or to participate in the robbery, whereas D's testimony, if credited, would have provided a complete alibi for the petitioner at the time of both of those events.

Argued February 20—officially released August 6, 2019

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, *Fuger, J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to the Appellate Court, *Lavine, Elgo and Beach, Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *Jo Anne Sulik*, supervisory assistant state's attorney, and *Lisa Maria Proscino*, former special deputy assistant state's attorney, for the appellee (respondent).

332 Conn. 615 AUGUST, 2019 617

Meletrich v. Commissioner of Correction

Opinion

MULLINS, J. The principal issue in this appeal is whether the petitioner, Angel Meletrich, has demonstrated that his criminal trial counsel rendered ineffective assistance by failing to present the testimony of a second alibi witness to support his defense. The petitioner appeals from the judgment of the Appellate Court dismissing his appeal from the judgment of the habeas court, which denied his amended petition for a writ of habeas corpus. The petitioner claims that the Appellate Court incorrectly concluded that the habeas court acted within its discretion in denying certification to appeal because he established that his counsel had performed deficiently by failing to call a second alibi witness and, further, that had that witness testified, there is a reasonable probability that the outcome of the petitioner's criminal trial would have been different. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's decision in *Meletrich v. Commissioner of Correction*, 178 Conn. App. 266, 174 A.3d 824 (2017), sets forth the relevant facts and procedural history of the petitioner's underlying criminal case. "[T]he petitioner was charged with one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, one count of larceny in the first degree in violation of [General Statutes (Rev. to 2007)] § 53a-122 (a) (2), and one count of conspiracy to commit larceny in the first degree in violation of . . . § 53a-48 and [General Statutes (Rev. to 2007)] § 53a-122]. The petitioner, represented by Attorney Claud Chong, proceeded to a jury trial. The jury returned [a verdict] of guilty on all counts, finding the petitioner guilty [on the counts alleging robbery in the first degree

618

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

and larceny in the first degree under a] theory of vicarious liability.” *Id.*, 268.

“On Wednesday, November 21, 2007, the day before Thanksgiving, the McDonald’s restaurant near the New Brite Plaza area of New Britain had been open for business. . . .

“Shortly before midnight, when both the inside of the restaurant and the drive-through window stopped transacting business, the employees then on site prepared to close the restaurant. Among those employees were Assistant Manager Angel Echevarria and Bethza Meletrich. Echevarria’s responsibilities at closing included collecting the eight cash register drawers in a safe located in a small office in the back of the restaurant. . . . The cash proceeds from sales [were] then secured inside the back office safe.

“Although it was normally Echevarria’s responsibility to lock the two outside doors, on the evening of November 21, 2007, he was training another manager to count the money in the registers and [Echevarria] asked Bethza Meletrich to lock the two outside doors. Although Bethza Meletrich initially locked both doors . . . she returned [and unlocked them]. One of the restaurant’s surveillance cameras shows Bethza Meletrich on her cell phone as she walked past the registers to the side door. Shortly thereafter, Bethza Meletrich walked past the registers again, and then three men, later described by Echevarria as being light skinned and of normal height and average size, who were dressed in dark hooded sweatshirts with the hoods pulled over their heads, and whose faces were concealed by dark ski masks, entered the McDonald’s restaurant through the side door and made their way to the back office.

“Two of the men brandished handguns, one chrome with a wooden handle and the other black. One of the men called Echevarria by his nickname, Sidio, a name

332 Conn. 615 AUGUST, 2019 619

Meletrich v. Commissioner of Correction

either uncommon or unique to Echevarria, but known to employees of the McDonald's, including Bethza Meletrich. After one of the men asked Echevarria where the money was located, he told them in the office safe. One of the robbers stacked either seven or eight of the register drawers and carried the stack . . . out of the restaurant. Echevarria called 911 after the three men exited the restaurant and then went to the side door and observed a car driving away. Three of the surveillance cameras in the restaurant captured footage of the robbery.

“The police responded to the restaurant and began their investigation, which included interviewing all employees. Although Bethza Meletrich initially denied any involvement, she later gave a statement to New Britain police officers admitting her involvement in the robbery. In her statement, dated November 26, 2007, Bethza Meletrich indicated that she met Adam [Marcano] and the petitioner,¹ whose nickname was Rome or Romeo, before she went to work.² They asked her to leave the door open at closing time so that they could rob the restaurant. According to Bethza Meletrich, she was first offered money for her cooperation, which she declined, and then her two cousins threatened her [and] her girlfriend. Bethza Meletrich informed the police that the petitioner was armed with a silver gun that had a brown handle, which he displayed to her while it was tucked into his waistband. The petitioner and Adam Marcano, accompanied by a third person unknown to Bethza Meletrich, entered the restaurant shortly before midnight through the side door she had left unlocked.

“Also on November 26, 2007, the police executed a search warrant for one of the apartments in, as well

¹ We note that Adam Marcano, Anthony Marcano, and Bethza Meletrich are the petitioner's cousins, and that each of them was named as a codefendant.

² At the petitioner's criminal trial, Bethza Meletrich testified that she left for work between 5 and 6 p.m. and that it took approximately ten minutes to walk to the McDonald's restaurant.

620

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

as the basement of, 20 Acorn Street, New Britain, a multifamily dwelling approximately six blocks, or less than one mile, from the [McDonald's] restaurant that was robbed. The petitioner was at the apartment when the police executed the search warrant. Although [Adam] Marcano [and his brother, Anthony Marcano] were not present at that time, the police found items belonging to both [of them] in the apartment. The police investigation determined that the petitioner and both Marcano brothers lived at 20 Acorn Street on the first floor.

“The police also found three black hooded sweat-shirts in the apartment. After gaining access to the basement from the apartment, the police searched the basement and found two money deposit bags, one of which contained several rolls of coins and loose quarters; a plastic bag containing three black ski masks, one pair of black fleece gloves and one pair of brown knit gloves; and three cash register drawers, one of which contained a McDonald's coupon. Subsequently, in January, 2008, the police received a phone call from the landlord of 20 Acorn Street apprising the police that other items had been found concealed under a subfloor of the basement. The police returned to 20 Acorn Street and seized five additional cash register drawers, one of which had a McDonald's sticker on it, that had been concealed under the subfloor.

“Forensic evidence recovered included [fingerprints] and palm prints from the plastic bag that contained the masks and gloves, as well as DNA from two of the ski masks. Three of the fingerprints—the right index, the right thumb, and the left thumb—were identified as belonging to Anthony [Marcano]. A DNA sample obtained from the petitioner allowed a comparison to [be] made with DNA from two of the masks. One mask interior had DNA from at least three individuals; the petitioner was determined to be a contributor to that

332 Conn. 615

AUGUST, 2019

621

Meletrich v. Commissioner of Correction

DNA profile. . . . A DNA sample from another mask's exterior had DNA from at least four individuals; the petitioner was determined to be a contributor to that DNA profile. . . .

“The state contended that the petitioner was guilty of the robbery and larceny in the first degree charges either as a principal offender or as an accessory to another participant in the crime. Additionally, the court instructed the jury on the robbery and larceny in the first degree charges as to the theory of vicarious liability. Thus, if the jury found beyond a reasonable doubt that the state had proven all elements of the conspiracy to commit robbery and larceny in the first degree charges, but that the state had not proven that the petitioner was a principal or accessory as [to] the robbery and larceny charges in counts one and three, then the jury could consider whether the petitioner was criminally liable for the criminal acts of the other [coconspirators] under vicarious liability. The jury was charged accordingly.

“The jury returned [a] guilty [verdict] on all counts. Specifically, the jury found the petitioner guilty of both the robbery and larceny in the first degree charges as a [coconspirator] under the theory of vicarious liability.” (Footnotes added; internal quotation marks omitted.) *Id.*, 268–72. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of twenty-three years of incarceration, followed by five years of special parole. As a self-represented party, the petitioner appealed from the judgment of the trial court to the Appellate Court, but subsequently withdrew that appeal following the appointment and advice of appellate counsel.

Thereafter, the petitioner, as a self-represented party, filed a six count petition for a writ of habeas corpus. After being assigned counsel, the petitioner filed an

622

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

amended seven count petition for a writ of habeas corpus claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to present the testimony of a second alibi witness, his aunt, Guillermina Meletrich.³ Following a three day trial, the habeas court denied his petition for a writ of habeas corpus. Thereafter, the habeas court denied the petitioner's request for certification to appeal. The petitioner then appealed from the habeas court's judgment to the Appellate Court.

In that appeal, the petitioner claimed that the habeas court had abused its discretion in denying his petition and improperly had concluded that Chong did not render ineffective assistance by failing to call Guillermina Meletrich as a second alibi witness. *Id.*, 268. The Appellate Court dismissed the petitioner's appeal, concluding that the petitioner had not established that Chong's decision not to call a second alibi witness amounted to deficient performance or that it prejudiced the petitioner. *Id.*, 287. The petitioner appealed to this court, and we granted his petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that (a) trial counsel's failure to call the petitioner's aunt as an alibi witness was reasonable trial strategy and therefore not ineffective assistance of counsel, and (b) such failure did not prejudice the petitioner?" *Meletrich v. Commissioner of Correction*, 328 Conn. 908, 178 A.3d 1041 (2018).

On appeal, the petitioner claims that the Appellate Court incorrectly determined that the habeas court acted within its discretion in denying the petitioner certification to appeal because it is debatable among jurists of reason whether Chong rendered ineffective assistance by failing to present the testimony of Guiller-

³ This is the only claim of ineffective assistance advanced by the petitioner in the present appeal.

332 Conn. 615

AUGUST, 2019

623

Meletrich v. Commissioner of Correction

mina Meletrich. The respondent counters that the Appellate Court properly dismissed the petitioner's appeal because Chong's decision not to call a second alibi witness was reasonable trial strategy.⁴

The following additional facts and procedural history are relevant to our resolution of this claim. At the petitioner's criminal trial, Chong pursued an alibi defense. In support of that defense, he presented the testimony of Christina Diaz, a woman with whom the petitioner had a romantic relationship and shared children.⁵ Diaz testified as follows.

On the day of the robbery, Diaz travelled from New York, where she was living, in order to spend Thanksgiving with the petitioner. She arrived at the petitioner's residence, 20 Acorn Street, when "[i]t was still daylight outside" and proceeded to spend "the entire day and night at [his] house." She testified that neither she nor the petitioner left the house at any time that evening and that they spent the entire evening together. Her testimony was that they were together "100 percent of the time."

At the petitioner's habeas trial, several witnesses, including the petitioner, testified with regard to the petitioner's claim of ineffective assistance of counsel for failure to present a second alibi witness. First, the petitioner testified that he discussed his alibi with Chong. He stated that he told Chong that he had several alibi witnesses, including Guillermina Meletrich, Diaz, and "Tasha."

Additionally, Guillermina Meletrich testified at the habeas trial about the petitioner's whereabouts on the

⁴ We note that the parties agree that this is not a claim of ineffectiveness of counsel for failure to investigate an alibi witness. Rather, the petitioner claims that Chong was ineffective for failing to present the testimony of a known second alibi witness.

⁵ At trial, Diaz stated that the petitioner was her "ex-husband." In his brief, the petitioner refers to Diaz as his "girlfriend."

624

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

night of the robbery as follows. At the time of the robbery, she was living at the same house as the petitioner with her sister, nieces, and nephews. On the night of the robbery, she arrived home from work around 4:30 p.m. and stayed there the rest of the night. She testified that the petitioner and Diaz were also there and that the petitioner did not leave the house that day. She stated that she knew that he didn't leave "[b]ecause every time [she] came in he was there and [they] were kidding around." When asked if she would have been willing and available to testify at the petitioner's criminal trial, she responded that "[t]hey had asked [her] once to testify if he was at my house that day . . . and [she] said he was, but they never called [her]." She further testified that she would have provided the same testimony at the criminal trial that she provided at the habeas trial "because it's the truth."

Chong also testified at the habeas trial about his decision to present only Diaz as an alibi witness. He testified that the theory of defense was that the petitioner did not take part in the robbery. In particular, it was their position that the petitioner was at home at the time of the robbery. He testified that, in preparation of the alibi defense, he had spoken with "a number of relatives." Among those he spoke with was an aunt who lived at the residence, but he could not recall specific names of individuals or the substance of specific conversations. He did recall, however, "that a girlfriend claimed that she was in bed with [the petitioner] at the time of the . . . robbery" and that "it was [his] judgment at the time that she would provide the best testimony with respect to his whereabouts at the time of the robbery." Chong acknowledged that Bethza Meletrich's testimony was a major piece of evidence for the state at the criminal trial and that impeaching her would have been helpful to the petitioner's defense.

332 Conn. 615

AUGUST, 2019

625

Meletrich v. Commissioner of Correction

With regard to Guillermina Meletrich, Chong testified at the habeas trial that he recalled speaking with an aunt who remembered being with the petitioner on the day of the robbery, but she couldn't "account for his whereabouts within the specific timeframe of the actual commission of the robbery."⁶ He explained that an important consideration was the close proximity of the petitioner's residence to the robbery because the two locations were within a five minute drive from each other. Ultimately, he testified that, "after interviewing a number of family members and friends who were at the residence, people were coming and going and family . . . members could not account for his presence every hour, every minute of the day and night. The only person who could testify in [his] judgment and provide the strongest testimony was the girlfriend who said . . . that she was in bed with him at the . . . specific time that the robbery occurred" When asked if calling an additional alibi witness would have been helpful, Chong testified that "you're assuming that other alibi witnesses were available, credible alibi witnesses," but declined to speculate any further.

We begin with the applicable law and standard of review. "[W]e are mindful that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Breton v. Commissioner of Correction*, 325 Conn. 640, 666–67, 159 A.3d 1112 (2017).

⁶ Although the record reveals that there were two aunts living at the petitioner's residence, the parties do not dispute, and there is support in the record, that Guillermina Meletrich is the aunt who spoke with Chong during his investigation of potential alibi witnesses and whose testimony is at issue in this appeal.

626

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

“Faced with the habeas court’s denial of certification to appeal, a petitioner’s first burden is to demonstrate that the habeas court’s ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits.” (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Crawford v. Commissioner of Correction*, 285 Conn. 585, 592, 940 A.2d 789 (2008). “In determining whether the habeas court abused its discretion in denying the petitioner’s request for certification, we necessarily must consider the merits of the petitioner’s underlying claims to determine whether the habeas court reasonably determined that the petitioner’s appeal was frivolous.” (Internal quotation marks omitted.) *Castonguay v. Commissioner of Correction*, 300 Conn. 649, 658, 16 A.3d 676 (2011).

The following principles guide our review of the petitioner’s claim of ineffective assistance of counsel. “To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant

332 Conn. 615

AUGUST, 2019

627

Meletrich v. Commissioner of Correction

must demonstrate that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground.” (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, 330 Conn. 520, 537–38, 198 A.3d 52 (2019).

We first address the performance prong of *Strickland*. In order for a petitioner to prevail on an claim of ineffective assistance on the basis of deficient attorney performance, “a defendant must show that, considering all of the circumstances, counsel’s representation fell below an objective standard of reasonableness as measured by prevailing professional norms.” *Skakel v. Commissioner of Correction*, 329 Conn. 1, 31, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019); see also *Strickland v. Washington*, supra, 466 U.S. 687–88.

“It is axiomatic that decisions of trial strategy and tactics rest with the attorney.” *Crespo v. Commissioner of Correction*, 292 Conn. 804, 815 n.7, 975 A.2d 42 (2009). Furthermore, our review of counsel’s performance is highly deferential. *Strickland v. Washington*, supra, 466 U.S. 689. Indeed, “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*,

628

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

supra, 330 Conn. 538–39. Our cases instruct that “[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable” (Internal quotation marks omitted.) *Michael T. v. Commissioner of Correction*, 319 Conn. 623, 632–33, 126 A.3d 558 (2015).

“[T]he decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel” (Citation omitted.) *Bryant v. Commissioner of Correction*, 290 Conn. 502, 521, 964 A.2d 1186, cert. denied sub nom. *Murphy v. Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). “[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel’s decision not to investigate or call certain witnesses or to investigate potential defenses, [including] . . . when . . . counsel learns of the substance of the witness’ testimony and determines that calling that witness is unnecessary or potentially harmful to the case” (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, supra, 330 Conn. 548.

In the present case, Chong testified that the theory of the case pursued by the defense at the petitioner’s criminal trial was that the petitioner did not participate in the robbery and, instead, that he was at home the entire evening. In light of this theory, Chong pursued an alibi defense by presenting the testimony of Diaz, a witness who could account for his whereabouts at every minute on the night of the robbery. Diaz testified that the petitioner never left the house on the evening of the robbery. She further testified that she knew this because she was with the petitioner “100 percent of the time.” Thus, Diaz’ testimony, if believed, offered an airtight alibi for the petitioner. Her testimony could establish that he neither was at McDonald’s during the robbery nor confronted Bethza Meletrich on her way to work.

332 Conn. 615

AUGUST, 2019

629

Meletrich v. Commissioner of Correction

The petitioner asserts, however, that Chong’s decision was not reasonable trial strategy because Guillermina Meletrich also could have provided a complete alibi for all of the offenses charged, and, thus, her testimony would have corroborated and bolstered that of Diaz. We disagree.

At the habeas trial, Guillermina Meletrich testified that she came home from work around 4:30 p.m. and remained at home the rest of the night. Regarding her specific knowledge of the petitioner’s whereabouts, she testified that she knew the petitioner never left the house because “every time [she] came in he was there” As the Appellate Court aptly pointed out, Guillermina Meletrich’s testimony implies that there were times when she was not with the petitioner. *Meletrich v. Commissioner of Correction*, supra, 178 Conn. App. 283. We agree with the Appellate Court that her testimony reveals that the petitioner was not always in her presence and that, therefore, she could not account for his whereabouts at every moment. This court has held that “[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. . . . When the failure to call a witness implicates an alibi defense, an alibi witness’ testimony has been found unhelpful and defense counsel’s actions have been found reasonable when the proffered witnesses would fail to account sufficiently for a defendant’s location during the time or period in question” (Citation omitted; internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, supra, 330 Conn. 548–49. In the present case, Guillermina Meletrich’s testimony would not have been able to account sufficiently for the petitioner’s whereabouts for the entire evening in question.

We find *Jackson v. Commissioner of Correction*, 149 Conn. App. 681, 697, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson v. Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016), instructive. In *Jackson*, the petitioner claimed that his trial counsel performed deficiently when he failed to call additional alibi witnesses at the petitioner's criminal trial. *Id.*, 697. The petitioner in that case had been convicted on various charges related to the late night robbery of a deli. *Id.*, 683–85 and n.2. At the petitioner's criminal trial, defense counsel presented the testimony of two alibi witnesses, one of whom testified that she was with the petitioner at her house at the time that the robbery occurred. *Id.*, 698–99. The other testified that she saw the petitioner at least an hour prior to the robbery. *Id.*, 699. The petitioner claimed, however, that his counsel performed deficiently by failing to call five additional alibi witnesses because the alibi witnesses that did testify were not credible and could not support a complete alibi defense, whereas the additional alibi witnesses could establish an uninterrupted timeline that accounted for his whereabouts during the time of the robbery. *Id.*, 697.

At the petitioner's habeas trial in *Jackson*, each of the five alibi witnesses testified that they saw the petitioner at various times during the night of the robbery. *Id.*, 699–701. None of them, however, could testify that they were with the petitioner during the exact time the crime occurred. *Id.*, 701. Both the habeas court and the Appellate Court in *Jackson* concluded that defense counsel's decision not to call the additional alibi witnesses did not constitute deficient performance because none of the witnesses could account for the petitioner's whereabouts "immediately before, during, and after the robbery." *Id.*

Similarly, in the present case, Guillermina Meletrich could not account for the petitioner's whereabouts dur-

332 Conn. 615 AUGUST, 2019 631

Meletrich v. Commissioner of Correction

ing the relevant time periods, namely, when the petitioner confronted Bethza Meletrich on her way to work and at the time of the actual robbery. Guillermina Meletrich would merely have provided general testimony that the petitioner was at her home at the times that she happened to look for him during the course of the evening.

Moreover, there was evidence in the record that the McDonald's restaurant was a close distance from the petitioner's house. Thus, we agree with the Appellate Court's reasoning that, even if the jury were to believe Guillermina Meletrich's testimony, it was possible for the petitioner to leave the house to confront Bethza Meletrich on her way to work and to participate in the robbery without Guillermina Meletrich noticing. See *Meletrich v. Commissioner of Correction*, supra, 178 Conn. App. 283. Therefore, under the circumstances, Guillermina Meletrich's testimony would not have been helpful because she could not sufficiently account for the petitioner specifically during the relevant time periods, which was critical considering the close proximity of the location of the robbery.

Conversely, Diaz, who testified that she was with the petitioner the entire night and that he never left the house, was able to account for the petitioner's whereabouts during both the robbery and the time that Bethza Meletrich claimed to have been confronted by the petitioner. On that basis, Chong made the strategic decision, to which we accord strong deference, to present the testimony of Diaz only.

Chong's decision finds support in our case law. Indeed, in *Johnson v. Commissioner of Correction*, supra, 330 Conn. 520, this court considered a similar set of facts. In that case, the petitioner claimed that his trial counsel performed deficiently by failing to present the testimony of two alibi witnesses at his criminal trial

632

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

for murder. *Id.*, 528. At the habeas trial, one of the witnesses testified that the petitioner was at home with her on the night of the murder but conceded that he was not always within her line of sight while she was watching television and tending to her child. *Id.*, 530. Evidence presented at the petitioner's criminal trial showed that the home was in close proximity to the crime scene. *Id.*, 552–53.

In explaining his decision not to call that witness, defense counsel testified that the witness' testimony would open for the jury the possibility that the petitioner could have left the house, committed the murder, and returned without the alibi witnesses noticing. *Id.*, 551. Instead, counsel relied on the weakness of the state's case. *Id.* Indulging the strong presumption that counsel's strategic decisions were reasonable, this court concluded that counsel's decision not to call the alibi witness was a reasonable strategic decision because that witness would have failed to account sufficiently for the petitioner's whereabouts at the time the crime occurred and would have placed the defendant in close proximity to the crime scene. *Id.*, 554.

Similarly, in *Spearman v. Commissioner of Correction*, 164 Conn. App. 530, 537, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016), the petitioner claimed that his trial counsel performed deficiently when he failed to call several alibi witnesses, all family members of the petitioner, at the petitioner's criminal trial for arson. He contended that testimony from the alibi witnesses would have contradicted testimony from the state's two primary witnesses, who testified that they saw him near the location of the fire at the time it started. *Id.*, 552–53. At the habeas trial, the alibi witnesses testified that they were at home with the petitioner, who lived across the street from the location of the fire, at the time the fire started. *Id.*, 548–51. Each of the witnesses testified that the petitioner had been

332 Conn. 615

AUGUST, 2019

633

Meletrich v. Commissioner of Correction

asleep in his room but that, upon awaking at the sound of the explosion, they saw the petitioner run outside to move his car. *Id.*

In *Spearman*, defense counsel testified that he chose not to call the alibi witnesses at trial because their testimony would place the petitioner in close proximity to the crime scene at the time of the fire, allowing for the possibility that the jury could determine that he left his house, started the fire, and returned before the alibi witnesses saw him. *Id.*, 562. On that basis, counsel decided instead to rely on the weakness of the state's case. *Id.*, 551. The Appellate Court concluded that counsel's decision not to call the witnesses did not amount to deficient performance given that none of the alibi witnesses was able to sufficiently establish the petitioner's whereabouts before the fire, the crime scene was in close proximity to the petitioner's house, and the alibi witnesses were all relatives of the petitioner. *Id.*, 562–63.

Like the alibi witnesses in *Johnson* and *Spearman*, Guillermina Meletrich was not able to account for the petitioner's whereabouts at the relevant times. She was able to provide only general testimony that the petitioner was at home whenever she saw him. That house was in close proximity to both the crime scene and the location where Bethza Meletrich testified that she was approached by the petitioner. Indulging a strong presumption, as we are required to do, that Chong's strategic decision not to call Guillermina Meletrich to testify was sound trial strategy, and in light of the substance of her testimony and the close proximity of the relevant locations, we conclude that Chong's conduct did not constitute deficient performance. Rather, Chong made a reasonable strategic decision to call only the witness who could testify to the petitioner's whereabouts at all of the relevant times.

The petitioner claims, however, that the testimony of Guillermina Meletrich was necessary to his defense

634

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

against the conspiracy charges, and, thus, Chong's decision not to call Guillermina Meletrich was not reasonable trial strategy. In support of his claim, he asserts that the state's witness, Bethza Meletrich, provided the only evidence of conspiracy when she testified that the petitioner approached her on her way to work and coerced her into participating in the robbery. In light of this, he argues that Diaz' contrary testimony that the petitioner was at home during that time was critical to his defense. He claims that the jury would have been more likely to accept Diaz' testimony if Guillermina Meletrich's testimony that he was at home also had been presented.⁷ For the same reasons discussed previously, we disagree that Guillermina Meletrich's testimony would have been helpful to the petitioner's defense against the conspiracy charges.

As stated previously, Guillermina Meletrich could testify only in general terms that the petitioner was home whenever she saw him. She could not, however, provide specific times during the afternoon and evening that could be used to support the assertion that he was home the entire time between 5 and 6 p.m. when Bethza Meletrich was approached on her way to work. Bethza Meletrich testified that the McDonald's restaurant was only a ten minute walk from the petitioner's home. Therefore, it would have been possible for the jury to conclude that the petitioner slipped out of his house, confronted Bethza Meletrich on her way to work, and returned home unnoticed by Guillermina Meletrich. Thus, contrary to the petitioner's claims, Guillermina Meletrich was not able to account for his whereabouts specifically during the time that Bethza Meletrich was approached on her way to work. We conclude that, with regard to being able to provide a complete alibi for all of the charges, the testimony of Guillermina

⁷ The petitioner does not claim on appeal that the evidence was insufficient to support his conviction on the conspiracy charges.

332 Conn. 615

AUGUST, 2019

635

Meletrich v. Commissioner of Correction

Meletrich was not necessary or helpful to the petitioner's defense.

The petitioner asserts, however, that the present situation is similar to the one in *Skakel*, in which we concluded that defense counsel was ineffective for failing to call an additional alibi witness when all of the other alibi witnesses were potentially biased as a result of being related to the defendant. See *Skakel v. Commissioner of Correction*, supra, 329 Conn. 54. Specifically, the petitioner asserts that, because Diaz was the petitioner's girlfriend, she was biased, and Guillermina Meletrich's testimony regarding the petitioner's alibi was therefore necessary to bolster Diaz. We disagree and conclude that *Skakel* is distinguishable from the present case.

In *Skakel*, we determined that the alibi witness that was not called to testify was completely neutral and disinterested by virtue of the fact that he was not related to the defendant and that he had not maintained contact with his only tie to the defendant's family in almost thirty years. *Id.*, 51. On that basis, we concluded that the witness "would have been an independent and unbiased witness with no motive to lie" and whose testimony could have established "the credibility of the alibi generally" and "the credibility of the petitioner's witnesses more specifically." *Id.* Accordingly, this court concluded that the testimony of the alibi witness who was not called to testify at trial was not cumulative but would have been corroborative of the other alibi witnesses. See *id.* ("[alibi witnesses'] testimony, while corroborative, certainly was not cumulative, because the petitioner's other alibi witnesses were either siblings or cousins of the petitioner").

The present case is unlike *Skakel* because Guillermina Meletrich was not a neutral witness. In fact, she was related to almost everyone involved in the crime. Not only was she the aunt of the petitioner, but she

636

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

also was the aunt of every one of the codefendants, including Bethza Meletrich.

We also will not assume, as the petitioner invites us to do, that her personal relationships with Bethza Meletrich and the petitioner cancel each other out and render her a neutral witness because it would require us to speculate as to the details of the nature of her relationship with each person. From the limited information before us, we cannot draw the same conclusion that we did in *Skakel* that Guillermina Meletrich had no biases or motives for testifying falsely. Therefore, we agree with the Appellate Court that “neither [Diaz nor Guillermina Meletrich] was entirely neutral and disinterested.” *Meletrich v. Commissioner of Correction*, supra, 178 Conn. App. 286. Thus, unlike the alibi witness in *Skakel*, Guillermina Meletrich was not a neutral witness, and, thus, we cannot conclude that her testimony would have been corroborative and not cumulative. See *Johnson v. Commissioner of Correction*, supra, 330 Conn. 550–52 (considering in analysis fact that potential alibi witness was family and, therefore, that counsel made reasonable strategic decision not to call witness).

Finally, the petitioner contends that Chong’s decision to call only Diaz as an alibi witness cannot be considered reasonable trial strategy because Chong could not articulate a reason for not presenting the testimony of Guillermina Meletrich. We disagree.

At the habeas trial, Chong testified that he didn’t “recall every detail of the trial or the investigation, but what [he did] recall [was] that, after interviewing a number of family members and friends who were at the residence, people were coming and going and family . . . members could not account for his presence every hour, every minute of the day and night. The only person who could testify in [his] judgment and provide the strongest testimony was the girlfriend who said . . . that she was in bed with him at the . . . specific time

332 Conn. 615

AUGUST, 2019

637

Meletrich v. Commissioner of Correction

that the robbery occurred” He testified that “it was [his] judgment at the time that she would provide the best testimony with respect to his whereabouts at the time of the robbery.” Thus, Chong did articulate a reason for presenting only Diaz’ testimony. See, e.g., *Morant v. Commissioner of Correction*, 117 Conn. App. 279, 303–304, 979 A.2d 507 (holding that defense counsel’s decision not to call alibi witness was reasonable trial strategy despite counsel’s inability to recall details of investigation of witness’ testimony because witness was not strong and other alibi witnesses were available), cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009); cf. *Gaines v. Commissioner of Correction*, 306 Conn. 664, 683, 51 A.3d 948 (2012) (considering in its analysis defense counsel’s complete inability to explain reason for not investigating potential alibi witness).

After investigating multiple alibi witnesses, which included Guillermina Meletrich, Chong, in his professional judgment, determined that Diaz was the strongest alibi witness because she could account for the petitioner’s whereabouts throughout the entire evening, including the relevant time periods, whereas Guillermina Meletrich could not. Indeed, we recognize that “[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did” (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, supra, 330 Conn. 539.

On the basis of the foregoing, we conclude that the petitioner has not met his burden of overcoming the strong presumption that Chong’s decision to present only the testimony of Diaz as an alibi witness was reasonable trial strategy. Thus, we further conclude that Chong’s decision was not deficient performance. In

638

AUGUST, 2019

332 Conn. 615

Meletrich v. Commissioner of Correction

light of our conclusion, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Chong's decision. See, e.g., *Michael T. v. Commissioner of Correction*, supra, 319 Conn. 639 (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently). Because the petitioner has not met his burden of showing that Chong performed deficiently, he cannot succeed on his claim of ineffective assistance of trial counsel. Therefore, we further conclude that it is not debatable among jurists of reason that Chong rendered ineffective assistance,⁸ and that, thus, the Appellate Court correctly concluded that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

⁸ The petitioner cites *Gaines v. Commissioner of Correction*, supra, 306 Conn. 664, and *Bryant v. Commissioner of Correction*, supra, 290 Conn. 502, as support for the contention that it is debatable among jurists of reason as to whether trial counsel's failure to investigate and present the testimony of an alibi witness is deficient performance. Those cases, however, are factually distinguishable from the present case. In *Gaines*, the petitioner's trial counsel failed to investigate potential alibi witnesses entirely and failed to present any alibi defense despite there having been witnesses who could testify to being with the defendant on the night of the murders. *Gaines v. Commissioner of Correction*, supra, 683–84. This court concluded that, because counsel failed to contact the potential alibi witnesses, he could not know the substance of their testimony, and, thus, his failure to investigate was not based on reasonable professional judgment. *Id.* In the present case, Chong investigated an alibi defense by speaking with several alibi witnesses, and, on the basis of information gained during his investigation, he determined that Diaz would provide the strongest testimony at trial.

In *Bryant*, the petitioner's trial counsel failed to present four witnesses whose testimony would have supported a third-party culpability defense despite being aware of the witnesses and knowing of their potential testimony. *Bryant v. Commissioner of Correction*, supra, 290 Conn. 519–20 and n.12. This court concluded that counsel's decision amounted to deficient performance that was prejudicial to the petitioner because the four witnesses were independent and credible, and their statements were made contemporaneously to the events in question. *Id.*, 521. As such, a reasonable doubt could have been raised in the minds of the jurors as to the petitioner's guilt. *Id.*, 520. In the present case, Chong presented an alibi defense with the witness that he believed to be the strongest. Moreover, as previously discussed, Guillermina Meletrich was not a neutral witness.

332 Conn. 639

AUGUST, 2019

639

State v. Dudley

STATE OF CONNECTICUT *v.* LIONEL G. DUDLEY
(SC 20177)Robinson, C. J., and Palmer, McDonald, D'Auria,
Mullins, Kahn and Ecker, Js.*Syllabus*

Pursuant to statute (§ 54-142d), whenever a person has been convicted of an offense in this state and such offense has been decriminalized subsequent to the date of conviction, such person may file a petition with the Superior Court for an order of erasure, “and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state’s or prosecuting attorney pertaining to such case to be physically destroyed.”

The defendant appealed from the trial court’s denial of his petition, filed pursuant to § 54-142d, to erase the records related to its finding that he had violated his probation. The defendant had been charged in 2010 with the possession and sale of a controlled substance and, in 2012, was convicted on a plea of guilty to possession of less than one-half ounce of marijuana. At the time of the defendant’s conduct that led to his 2012 conviction, the defendant was on probation as a result of a prior narcotics conviction, the terms of which required that the defendant not violate any federal or state criminal law. During the 2012 plea proceedings, the defendant admitted that he had violated his probation. Subsequently, the trial court granted the defendant’s petition to erase the records related to the 2012 conviction in light of the legislature’s enactment of a statute (§ 21a-279a) in 2011 that decriminalized the possession of less than one-half ounce of marijuana. The trial court concluded, with respect to the defendant’s separate petition to erase the records pertaining to his probation violation, that the defendant was not entitled to erasure of those records because a conviction was not necessary in order to find that he had violated his probation. On appeal from the trial court’s denial of that petition, the defendant claimed that he was entitled to erasure because, among other reasons, the probation violation was premised on his 2012 conviction for conduct that has since been decriminalized, and, therefore, it could no longer serve as a basis for the violation of probation finding. *Held* that the trial court correctly determined that the defendant was not entitled to erasure of the records pertaining to the violation of probation finding: § 54-142d applies only to records pertaining to a criminal case in which a defendant has been convicted of an offense that subsequently was decriminalized, and, because the defendant’s probation violation proceeding was not a criminal proceeding but constituted a separate civil proceeding, and thus a violation of probation cannot be “decriminalized,” as that term is used in § 54-142d, that statute did not apply to the records pertaining to the

640

AUGUST, 2019

332 Conn. 639

State v. Dudley

defendant's probation violation proceeding; moreover, the legislative history of the marijuana decriminalization statute, § 21a-279a, made clear that, although possession of a small amount of marijuana would be decriminalized, it would still remain illegal, and indicated that the legislature recognized that the state may retain public records of illegal conduct, even if there was no criminal record of such conduct; furthermore, the defendant could not prevail on his claim that § 54-142d clearly requires the erasure of any record containing a reference to his conviction for an offense that subsequently was decriminalized because, in the absence of such conviction, nothing in the record could support the probation violation finding, as the defendant's conduct of possessing marijuana, rather than his conviction based on that conduct, supported the probation violation finding, and, even without evidence of the defendant's conviction, his general admission during the plea proceedings that he had violated the terms of his probation was sufficient to support that finding.

Argued January 24—officially released August 6, 2019

Procedural History

Substitute information charging the defendant with the crime of possession of narcotics and with two counts of violation of probation, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, where the defendant was presented to the court, *Clifford, J.*, on a plea of guilty to the charge of possession of narcotics and on an admission of violation of probation; judgment of guilty in accordance with the plea and finding the defendant in violation of probation; thereafter, the court, *Newson, J.*, granted the defendant's petition for the destruction of certain records relating to the conviction of possession of narcotics and denied the defendant's petition for the destruction of certain records relating to the finding of violation of probation, and the defendant appealed. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

332 Conn. 639

AUGUST, 2019

641

State v. Dudley

Opinion

D'AURIA, J. In 2011, our General Assembly changed the penalty for possessing less than one-half ounce of marijuana from a potential term of imprisonment and/or a large fine to merely a fine. See Public Acts 2011, No. 11-71 (P.A. 11-71), codified at General Statutes § 21a-279a.¹ Subsequently, in *State v. Menditto*, 315 Conn. 861, 863, 110 A.3d 410 (2015), this court held that P.A. 11-71 “decriminalized” the possession of less than one-half ounce of marijuana for purposes of this state’s erasure statute, General Statutes § 54-142d.² In the present case, the defendant asks us to hold that § 54-142d also compels the erasure of a finding of a violation of probation that he claims was premised on the now decriminalized offense of possession of less than one-

¹ General Statutes § 21a-279a (a) provides in relevant part: “Any person who possesses or has under his control less than one-half ounce of a cannabis-type substance . . . shall (1) for a first offense, be fined one hundred fifty dollars, and (2) for a subsequent offense, be fined not less than two hundred dollars or more than five hundred dollars.”

As we recognized in *State v. Menditto*, 315 Conn. 861, 872–73, 110 A.3d 410 (2015), “[w]hen the legislature enacted P.A. 11-71 in 2011, it reduced the maximum penalty for a first offense of possession of less than one-half ounce of marijuana from a fine of up to \$1000 and/or imprisonment of up to one year to a fine of \$150, and reduced the penalty for subsequent offenses from a fine of up to \$3000 and/or imprisonment of up to five years to a fine of between \$200 and \$500. P.A. 11-71, § 1. It did so by limiting the scope of conduct that constituted criminal possession of marijuana under [General Statutes] § 21a-279 and enacting a new statute imposing fines for the conduct excluded from the scope of § 21a-279. See General Statutes § 21a-279a. The legislature then added that new statutory provision proscribing possession of less than one-half ounce of marijuana to the list of minor civil violations in [General Statutes] § 51-164n (b); P.A. 11-71, § 6; which are deemed not to be offenses pursuant to § 51-164n (e).”

² General Statutes § 54-142d provides in relevant part: “Whenever any person has been convicted of an offense in any court in this state and such offense has been decriminalized subsequent to the date of such conviction, such person may file a petition with the superior court at the location in which such conviction was effected, or with the superior court at the location having custody of the records of such conviction . . . for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state’s or prosecuting attorney pertaining to such case to be physically destroyed.”

642

AUGUST, 2019

332 Conn. 639

State v. Dudley

half ounce of marijuana. The trial court rejected the defendant's argument, and we affirm the trial court's decision.

The record reveals the following undisputed facts and procedural history, which are relevant to the resolution of this appeal. In 2007, the defendant pleaded guilty under the *Alford* doctrine³ to possession of narcotics in violation of General Statutes (Rev. to 2005) § 21a-279 (a). The trial court sentenced him to thirty months of imprisonment, execution suspended, and two years of probation. The terms of probation included that the defendant "not violate any criminal law of the United States, this state or any other state or territory." The court also ordered special conditions of probation, including substance abuse evaluation and twenty hours of community service.

In July, 2008, the defendant was arrested again, this time on a charge of selling narcotics. Pursuant to a September, 2009 plea agreement, he admitted to violating his probation, and the court extended his probation for another year. The court accepted a nolle prosequi from the state on the underlying narcotics charge.

With approximately eight days remaining on the defendant's extended probation, in July, 2010, the police found him in possession of less than one-half ounce of marijuana. Subsequently, an arrest warrant issued for the defendant, alleging that he had engaged in the sale of a controlled substance in violation of the conditions of his probation prohibiting the violation of any criminal law of the United States, this state or any other state. The arrest warrant also alleged that the defendant failed to provide verification that he had completed the twenty

³ Pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 1625 (1970), a defendant does not admit guilt but, rather, acknowledges that the state's case is so strong that he is willing to enter a plea of guilty.

332 Conn. 639

AUGUST, 2019

643

State v. Dudley

hours of community service. He was arrested and charged with possession and sale of a controlled substance, and with violating his probation. In July, 2012, he pleaded guilty under the *Alford* doctrine to the misdemeanor charge of possession of less than four ounces of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c).⁴ Also during the plea proceedings, the defendant admitted to the probation violation. The prosecutor stated on the record that the violation of probation charge was premised on both the defendant's arrest on the charge of sale of a controlled substance, as well as on the charge of possession of marijuana.⁵ The defendant was sentenced to one year of incarceration, execution suspended, and one year of probation, and was required to make a charitable contribution of \$250.⁶

In 2011, the legislature enacted P.A. 11-71, which changed the penalty for possessing less than one-half of an ounce of marijuana from a potential term of imprisonment and/or a fine to merely a fine of \$150 for a first offense and a fine of between \$200 and \$500 for subsequent offenses. See General Statutes § 21a-279a (a).⁷ In a decision officially released on March 24, 2015, this court held in *State v. Menditto*, supra, 315 Conn.

⁴ General Statutes (Rev. to 2009) § 21a-279 (c) provides: "Any person who possesses or has under his control any quantity of any controlled substance other than a narcotic substance, or a hallucinogenic substance other than marijuana or who possesses or has under his control less than four ounces of a cannabis-type substance, except as authorized in this chapter, for a first offense, may be fined not more than one thousand dollars or be imprisoned not more than one year, or be both fined and imprisoned; and for a subsequent offense, may be fined not more than three thousand dollars or be imprisoned not more than five years, or be both fined and imprisoned."

⁵ The state never argued that the violation of probation was premised on the defendant's conviction of possession of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c). Rather, the state relied more broadly on the fact that the defendant was found in possession of marijuana.

⁶ The trial court noted during the defendant's plea that the plea agreement was the result of some weaknesses in the state's case regarding the count for sale of a controlled substance.

⁷ See footnote 1 of this opinion.

644

AUGUST, 2019

332 Conn. 639

State v. Dudley

871, that P.A. 11-71 had the effect of “decriminalizing” the possession of less than one-half of an ounce of marijuana, thus permitting a defendant to take advantage of the state’s erasure statute, § 54-142d. As a result, an individual convicted of possessing less than one-half of an ounce of marijuana may petition the court to have the records “pertaining to such case” erased under § 54-142d. See *State v. Menditto*, supra, 876.

In September, 2015, in response both to the enactment of P.A. 11-71 and this court’s 2015 decision in *Menditto*, the defendant in the present case filed a petition seeking erasure of the records related to his 2012 marijuana conviction. Because the defendant’s July, 2012 conviction, which was based on his July, 2010 arrest, was for less than one-half of an ounce of marijuana, the trial court granted the defendant’s motion.

In April, 2016, the defendant filed another petition, this time seeking erasure of the 2012 finding that he had violated his probation. The defendant argued that, because his 2012 marijuana conviction had been erased from his record, no conviction any longer supported the violation of probation finding. The trial court denied the defendant’s motion, reasoning that “you don’t need any conviction to violate your probation. . . . [It] is a standard condition of probation that you not violate any laws of the United States or any other state, so the conviction, whether there is in fact a conviction or not, isn’t necessary.”

The defendant appealed from the trial court’s decision to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

In addressing the defendant’s sole claim on appeal, we begin with our well established standard of review and governing legal principles. The trial court’s ruling that § 54-142d does not apply to a violation of probation

332 Conn. 639

AUGUST, 2019

645

State v. Dudley

premised on subsequently decriminalized conduct is a question of law that we review de novo. See, e.g., *State v. Menditto*, supra, 315 Conn. 865. Because the issue “presents a question of statutory interpretation, our analysis is guided by General Statutes § 1-2z, the plain meaning rule. In seeking to determine the meaning of a statute, § 1-2z directs us first to consider the text of the statute itself and its relationship to the broader statutory scheme. ‘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.’ General Statutes § 1-2z. ‘The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation.’” *State v. Menditto*, supra, 865.

The erasure statute, § 54-142d, provides in relevant part: “Whenever any person has been *convicted of an offense* in any court in this state and *such offense* has been *decriminalized* subsequent to the date of *such conviction*, such person may file a petition with the superior court . . . for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state’s or prosecuting attorney *pertaining to such case* to be physically destroyed.” (Emphasis added.) As we recognized in *Menditto*, “the purpose of the statute is to allow people who have been convicted of a criminal offense to erase their criminal records in the event that the legislature later decriminalizes such conduct.” *State v. Menditto*, supra, 315 Conn. 866. The parties’ disagreement centers on the meaning of the phrase, “pertaining to such case.” To agree with the defendant and order the physical destruction of the record of the 2012 violation of probation finding, we must conclude that the record of that finding is a

646

AUGUST, 2019

332 Conn. 639

State v. Dudley

“[record] . . . pertaining to such case” General Statutes § 54-142d. We do not agree with the defendant and therefore reject his argument.⁸

Both parties argue that § 54-142d plainly and unambiguously supports their respective positions. Although whether a statute is ambiguous is a legal question; cf. *Enviro Express, Inc. v. AIU Ins. Co.*, 279 Conn. 194, 200, 901 A.2d 666 (2006); “our case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation.” (Internal quotation marks omitted.) *Lackman v. McNulty*, 324 Conn. 277, 286, 151 A.3d 1271 (2016). “Honest disagreement about the interpretation of a statutory provision does not, however, make the statute ambiguous or vague.” *State v. Mattioli*, 210 Conn. 573, 579, 556 A.2d 584 (1989).

The defendant first argues that the finding that he violated his probation is a “record” that qualifies for erasure under § 54-142d because his conviction of possession of less than one-half of an ounce of marijuana, on which the violation was premised, has since been decriminalized. Because his decriminalized conduct is now classified as a minor civil violation, and not as a misdemeanor, the defendant argues that it also can no longer serve as the basis for the violation of probation

⁸ The defendant was arrested on a charge of sale of a controlled substance in 2010. P.A. 11-71 became law on July 1, 2011. The defendant was convicted in July, 2012, after his arrest in connection with his July, 2010 conduct: possession of less than one-half of an ounce of marijuana. Thus, the legislature decriminalized possession of less than one-half of an ounce of marijuana *before*, not subsequent to, the defendant’s conviction, although it was not until we decided *Menditto* in 2015 that this became clear. Nonetheless, because the state does not argue that the defendant was not “convicted of an offense . . . and such offense has been decriminalized *subsequent* to the date of such conviction”; (emphasis added) General Statutes § 54-142d; but instead was convicted of an offense in 2012 that was decriminalized *before* the defendant’s conviction, we assume that the defendant fits this predicate.

332 Conn. 639

AUGUST, 2019

647

State v. Dudley

finding. Thus, according to the defendant, the violation of probation finding “pertains to” his conviction of possession of marijuana, and, therefore, the court must order erasure.

The state responds that the erasure statute applies only to records pertaining to the criminal case in which the defendant was convicted of an offense later decriminalized. The state contends that the violation of probation proceeding did not “pertain to” that criminal case but was, in fact, a separate civil proceeding. We agree with the state.

In determining what the legislature intended by the term “such case,” we must carefully examine the entire text of the statute. See, e.g., *Lackman v. McAnulty*, supra, 324 Conn. 287 (“[i]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation” [internal quotation marks omitted]). We first observe that the phrase “such case” undoubtedly refers to the phrases, “an offense,” and “such offense,” which appear earlier in the same sentence. Neither party contends otherwise. That is to say, “such case” can refer only to the case in which the “person has been convicted of *an offense* in any court in this state and *such offense* has been decriminalized subsequent to the date of such conviction” (Emphasis added.) General Statutes § 54-142d.

As applied to the defendant’s record in the present case, “such case” can refer only to his 2012 conviction under his *Alford* plea in connection with his July, 2010 conduct, which resulted in his arrest on the misdemeanor charge of possession of less than four ounces of marijuana.⁹ “Such case” cannot, as the defendant

⁹ The defendant does not argue that “such case” refers either to his 2007 conviction of possession of narcotics, as that offense has not been decriminalized, or to his 2008 probation violation.

648

AUGUST, 2019

332 Conn. 639

State v. Dudley

appears to initially contend, refer to his probation violation. This is because it is well established that a probation revocation proceeding is not a criminal proceeding but is instead more “akin to a civil proceeding.” *State v. Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994). The trial court may “find a violation of probation [if] it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence” and not beyond a reasonable doubt. *Id.*, 302. As such, a defendant is not “convicted” of a probation violation and, most relevant to our purposes, because a revocation of probation proceeding is not a criminal proceeding, it would be a misnomer to say that a finding of a violation of probation could be “decriminalized.” Therefore, the trial court’s finding that the defendant violated his probation does not constitute a “convict[ion] of an offense” or an “offense [that] has been decriminalized” General Statutes § 54-142d. In turn, it also does not fall within the term “such case,” compelling erasure pursuant to § 54-142d. The legislature could have chosen to craft our erasure statute to explicitly include probation violations but did not do so.

Alternatively, the defendant contends that even if the phrase, “such offense” or “such case,” refers only to his 2012 conviction of possession of less than four ounces of marijuana, which has been decriminalized, records of the finding that he violated his probation fall within the scope of those records that are “pertaining to” that offense or criminal case. Specifically, he argues that the legislature’s use of the phrase “pertaining to” manifests an intent to have the erasure statute extend beyond mere conviction information to encompass any records of any judicial proceeding that either reference the conviction or that rely on the underlying facts that supported the conviction. This includes, according to the defendant, records relating to the violation of probation proceeding, in which, he contends, the trial court

332 Conn. 639

AUGUST, 2019

649

State v. Dudley

relied on his conviction of possession of less than four ounces of marijuana to support the finding that he violated his probation.

For its part, the state agrees that the phrase “pertaining to” expands the reach of the statute beyond mere conviction information, but argues that it does so in a different way than the defendant contends. Namely, the state argues that the phrase encompasses all records specifically pertaining to the criminal case in which the defendant was convicted of the offense that later was decriminalized. This includes records from the police, the prosecutor, and the courts that supported the conviction, such as, for example, investigative records, trial transcripts, and case files.

We conclude that the state has the better textual argument. The erasure statute provides that, upon the decriminalization of an offense, and upon a person’s petition to the court for an order of erasure, “the Superior Court or records center of the Judicial Department shall direct” the physical destruction not of all records pertaining to such case, but of “all *police* and *court* records and records of the *state’s* or *prosecuting attorney*” pertaining to such case. (Emphasis added.) General Statutes § 54-142d. The emphasized terms manifest an intent to expand the locations and type of records related to the defendant’s conviction that are subject to destruction (e.g., police records, court records and prosecutor’s records), not the type of proceeding to which the erasure statute applies (e.g., criminal proceeding versus probation violation proceeding). This would not support a conclusion that a defendant’s probation violation finding must be erased when the conduct underlying that violation has been decriminalized. Essentially, a probation violation is simply a square peg the defendant seeks to fit in the round hole of the erasure statute.

650

AUGUST, 2019

332 Conn. 639

State v. Dudley

Even if we thought that both the defendant's and the state's interpretations were plausible, a look at the text of the marijuana decriminalization statute and its legislative history makes clear that the legislature did not intend the result the defendant suggests. See *Lackman v. McAnulty*, supra, 324 Conn. 286. First, the text of P.A. 11-71, decriminalizing possession of less than four ounces of marijuana effective July 1, 2011, makes no mention of the erasure statute whatsoever. Nor does it speak to whether records of any noncriminal violations for possessing that amount of marijuana after the effective date would be available to the public. That records of "convictions" of possession of less than four ounces may now be erased is not an issue addressed explicitly by the text of P.A. 11-71, but is a conclusion drawn from the erasure statute itself once we concluded that P.A. 11-71 "decriminalized" this conduct. See *State v. Menditto*, supra, 315 Conn. 866.

Further, the legislative history of the marijuana decriminalization statute makes clear that the legislature did not intend to legalize possession of less than one-half of an ounce of marijuana. Rather, one of the purposes of P.A. 11-71 was to prevent imprisonment for mere possession of a small amount of marijuana. *Id.*, 873. The legislature made clear that, although such possession would be decriminalized, it remained illegal and would result in a fine. See 54 S. Proc., Pt. 17, 2011 Sess., p. 5471, remarks of Senator Martin M. Looney ("decriminalization is not legalization . . . but we are trying to realign the punishment to something that is appropriate"); 54 H.R. Proc., Pt. 26, 2011 Sess., p. 8738, remarks of Representative Brendan J. Sharkey ("this policy of decriminalization—not making it legal, it's still illegal"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2011 Sess., p. 2435, remarks of Representative Lawrence F. Cafero, Jr. ("this bill doesn't seek to legalize marijuana").

332 Conn. 639

AUGUST, 2019

651

State v. Dudley

Because the legislature did not intend to legalize possession of less than one-half of an ounce of marijuana, it recognized that, although such conduct would not result in a criminal record, the state may retain public records regarding such a violation because the conduct remains illegal. See 54 H.R. Proc., Pt. 25, 2011 Sess., p. 8530, remarks of Representative Gerald M. Fox III (explaining that, although “[t]here would be no criminal record,” “[t]here would still be a record of the violation,” and state would retain records of such violations). Specifically, this issue arose during the legislature’s consideration of P.A. 11-71, in its discussion concerning arrests for violations of the new law going forward, which would not result in a criminal conviction but instead would result in a fine or, after more than two violations, an order requiring participation in a drug education program. See General Statutes § 21a-279a (c). Legislators were given no assurance that, upon completion of the program, the offender’s “record [would] then [be] expunged.” 54 H.R. Proc., Pt. 25, 2011 Sess., p. 8530, remarks of Representative Christopher G. Donovan. The proponent of the bill indicated: “I would say no [the records would not be expunged] because . . . it is a violation. There would be no criminal record. There would still be a record of the violation.” *Id.*, remarks of Representative Fox. Therefore, the proponent reasoned, such records might very well be available to the public, just as records of motor vehicle infractions and other violations would be available to the public. *Id.*, p. 8537; see also 54 H.R. Proc., Pt. 26, 2011 Sess., pp. 8551–52, 8595, remarks of Representative Fox.

As such, in decriminalizing the conduct at issue, the legislature intended only to provide offenders with the opportunity to erase any criminal record, thereby allowing them to answer that they had not been convicted of a crime when asked in an employment or other context; the legislature did not intend to prevent

652

AUGUST, 2019

332 Conn. 639

State v. Dudley

the creation of a record of the violation in general. See 54 H.R. Proc., Pt. 26, 2011 Sess., pp. 8551–52, 8595, remarks of Representative Fox (explaining that, although there may be record of violation, there would be no criminal record, and offenders may truthfully state on employment application that they have not been convicted of crime). Similarly, the purpose of the decriminalization provision of our erasure statute is not to remove from public view entirely all violations of law, including those that have been decriminalized but, rather, to allow those convicted of a criminal offense to have their criminal records erased upon subsequent decriminalization of the offense. *State v. Menditto*, supra, 315 Conn. 868–69 (purpose of decriminalization is to reduce penalties, not to legalize conduct).

As a result, the legislature's intent is not thwarted by an offender's violation of probation remaining publicly available and not being erased. The legislature never intended for there to be no record whatsoever of an offender's violation, only no *criminal* record. As previously discussed, violation of probation is not itself a crime and does not create a criminal record, but is more akin to a civil violation; *State v. Davis*, supra, 229 Conn. 295; not unlike violations that are not subject to erasure and remain publicly available. If, after 2011, an offender's violation for possessing less than one-half of an ounce of marijuana would not be erased, but would be publicly available, it stands to reason that a violation of probation for similar conduct would not need to be erased. In either instance, decriminalization has served its purpose in that the offender does not have a criminal record. We do not discern the legislature's intent as going any further than that.

The defendant counters that, to the extent that the erasure statute is ambiguous, the rule of lenity should apply, requiring this court to strictly construe the statute in his favor and against the state. See *State v. Cote*,

332 Conn. 639

AUGUST, 2019

653

State v. Dudley

286 Conn. 603, 615, 945 A.2d 412 (2008). This argument is unpersuasive in light of our determination that, to the extent that the erasure and decriminalization statutes are ambiguous, any ambiguity is clarified by the legislative history. See *American Promotional Events, Inc. v. Blumenthal*, 285 Conn. 192, 206, 937 A.2d 1184 (2008) (“courts do not apply the rule of lenity unless a reasonable doubt persists about the statute’s intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute” [emphasis omitted; internal quotation marks omitted]). Additionally, the erasure statute does not fall within the scope of the rule of lenity. The rule of lenity “is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be . . . [and] to protect the individual against arbitrary discretion by officials and judges.” (Citation omitted; internal quotation marks omitted.) *State v. Cote*, supra, 615. The erasure statute is not a criminal statute under the Penal Code; rather, it is a procedural statute that does not expose people to liability for any penalty. See also *Cisco v. Shelton*, 240 Conn. 590, 607, 692 A.2d 1255 (1997) (legislature provided defendants with “procedural protection” by requiring erasure of records of nolle case pursuant to General Statutes § 54-142a [c] [1]).

The defendant responds that, even if the erasure statute does not apply to a violation of probation finding, the erasure statute clearly requires the erasure of any reference to his conviction of possession of less than one-half of an ounce of marijuana and, in the absence of that conviction, nothing in the record supports the violation of probation finding. This argument fails. The arrest warrant specifically stated that the defendant

654

AUGUST, 2019

332 Conn. 639

State v. Dudley

was arrested for and charged with sale of a controlled substance, which, the state alleged, violated the conditions of his probation, specifically, the requirement that he “not violate any criminal law of the United States, this state or any other state or territory.” At the plea proceeding, the state specified on the record that the violation of probation charge was premised on both the fact that the defendant had been arrested and charged with sale of a controlled substance, and the fact that he had been in possession of marijuana. As alleged in the arrest warrant, such conduct at the time violated state law, which, in turn, violated the terms of his probation. Thus, although the defendant might very well be entitled to erasure of any reference to his *conviction*, including any reference in his probation violation file, even without reference to the conviction of the subsequently decriminalized conduct, the fact that the defendant was in possession of marijuana alone supported the finding of violation of probation because such conduct violated state criminal law when he was arrested in July, 2010. Moreover, the defendant advances no authority to now contest, or for a court to now review, whether there remains (as opposed to whether there *was*) a sufficient record to continue to support the probation violation that he admitted to having committed.

Additionally, in the arrest warrant and at the plea proceeding, the state relied on the fact that the defendant had been arrested and charged with sale of a controlled substance, which constituted a violation of the criminal laws of this state. The defendant contends, however, that he admitted only to the possession of marijuana charge under state law, not to the sale of a controlled substance charge or to having violated federal law. He argues that, without evidence of the conviction, there is insufficient evidence that he engaged in the sale of a controlled substance.

332 Conn. 639

AUGUST, 2019

655

State v. Dudley

Contrary to his assertions, when the defendant admitted to the violation of probation charge, he did not specify that his admission was limited to the ground of possessing marijuana in violation of state law. The defendant was convicted of possession of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c) pursuant to an *Alford* plea, whereby he did not admit guilt. Subsequently, however, the defendant admitted to having violated his probation. The state then clarified on the record the basis for the violation of probation charge, including the arrest on the charges of sale of a controlled substance and possession of marijuana. The defendant at no time objected to the state's recitation of the reasons supporting the violation of probation charge. Rather, the defendant generally admitted to the charge of violation of probation, which was premised on more than the conviction of possession of marijuana. As a result, the state did not need to put on evidence to establish that the defendant violated his probation by a preponderance of the evidence because he admitted to the violation. Thus, even without evidence of the conviction, the defendant's general admission that he violated his probation was sufficient to support the trial court's finding that he violated his probation in light of the fact that the state did not rely solely on the conviction of possession of marijuana.

For all of the foregoing reasons, we agree with the state that § 54-142d does not entitle the defendant to erasure of the records pertaining to the 2012 finding that he violated his probation.

The decision of the trial court is affirmed.

In this opinion the other justices concurred.
