CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

WILLIE A. SAUNDERS *v.* COMMISSIONER OF CORRECTION (SC 20430)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The petitioner, who had been convicted of the crimes of sexual assault and risk of injury to a child, sought a writ of habeas corpus, claiming that his rights to due process were violated because, at the time of his criminal trial, he suffered from severe intellectual disabilities and physiological and mental health afflictions that rendered him incompetent to stand trial. He further alleged that, during his criminal trial, neither his trial counsel, the state, nor the trial court sought a competency examination for him, in violation of statute (§ 54-56d). At his criminal trial and on direct appeal to the Appellate Court, which upheld his conviction, the petitioner did not raise any claim regarding his competency to stand trial. The respondent, the Commissioner of Correction, filed a return in response to the petitioner's habeas petition, asserting that the petitioner had procedurally defaulted because his due process claims were not raised during his criminal trial or on direct appeal and that he could not establish cause and prejudice to excuse the procedural defaults. The petitioner filed a reply, in which he asserted that the defense of procedural default did not apply to his due process claims, that he could not have raised those claims previously because of his developmental and intellectual disabilities, and, in the alternative, that he could establish cause and prejudice to overcome the procedural defaults. The respondent filed a motion to dismiss, and the habeas court granted that motion and rendered judgment dismissing the habeas petition. The habeas court determined that the petition and reply were

deficient because an allegation of incompetency was legally insufficient to establish cause and prejudice. Accordingly, the habeas court concluded that the petitioner's due process claims were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the defaults. On the granting of certification, the petitioner appealed to the Appellate Court, which upheld the habeas court's judgment. On the granting of certification, the petitioner appealed to this court, claiming, inter alia, that the Appellate Court incorrectly had concluded that the procedural default doctrine applies to competency claims. *Held*:

1. The Appellate Court correctly concluded that the petitioner's competency claim was subject to the procedural default doctrine, as the prudential interests in finality and uniformity underlying that doctrine militated against carving out an exception to it for competency claims: application of the procedural default doctrine to competency claims encourages the timely assertion of those claims when the trial court is in the best position to determine competency and to provide a timely remedy, and the passage of time could result in the potential for loss of evidence or the improvement or deterioration of the petitioner's condition, and could hinder a habeas court's ability to make a meaningful determination regarding a petitioner's competency at the time of his criminal trial; moreover, this court has emphasized the importance of applying the cause and prejudice standard consistently to all procedural defaults and has recognized only two exceptions to the application of the procedural default doctrine, including for claims of actual innocence, and the reasons that led this court to carve out those exceptions were not applicable in the context of competency claims; furthermore, this court declined to follow federal cases that have held, pursuant to the waiver rule of *Wainwright* v. *Sykes* (433 U.S. 72), that procedural default does not apply to substantive competency claims, as the great weight of federal and Connecticut habeas jurisprudence since *Wainwright* has transitioned from a waiver standard to a forfeiture standard for procedural default, and the procedural default standard in Connecticut is more akin to forfeiture, which addresses the petitioner's timing in raising a constitutional claim rather than the mental state driving the petitioner's decision to waive such a claim.

2. The Appellate Court incorrectly concluded that the petitioner had failed to allege sufficient cause and prejudice to overcome his procedural defaults:

   a. This court rejected the Appellate Court's conclusion that mental incompetency is internal, rather than external, to the petitioner and, thus, that a claim of incompetency is legally insufficient to satisfy the cause prong of the cause and prejudice standard: the term "internal" is defined as something fairly attributable to the petitioner, whether cause is internal presumes a level of participation by the petitioner in his defense, and the duty that § 54-56d (c) imposes on trial counsel, the state, and the

trial court to raise the issue of competency indicates that incompetency is external to the petitioner; moreover, there was a lack of precedential support for the respondent's claim that, on collateral review, procedurally defaulted due process competency claims must be brought with an accompanying ineffective assistance of counsel claim, as habeas petitioners are not precluded from raising freestanding competency claims, when, as in the present case, an objective factor is external to the defense yet still tangential to effective assistance of counsel.

b. The habeas court incorrectly determined that the petitioner had failed to allege sufficient prejudice to survive the respondent's motion to dismiss: the petitioner sufficiently alleged that, if the trial court had him evaluated, his several cognitive limitations and significant physiological and mental health afflictions would have established that he was incompetent to stand trial, was not restorable to competency and, therefore, would not have been tried and convicted; accordingly, the judgment was reversed and the case was remanded so that the petitioner could produce evidence to support his claim and to rebut the defense of procedural default.

Argued October 18, 2021—officially released April 19, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Kwak*, *J.*, granted the respondent's motion to dismiss and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to the Appellate Court, *Alvord*, *Prescott* and *Moll*, *Js.*, which affirmed the judgment of the habeas court, and the petitioner, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Vishal K. Garg, for the appellant (petitioner).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, *Bruce R. Lockwood*, supervisory assistant state's attorney, and *Eva B. Lenczewski*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

D'AURIA, J. In this certified appeal, we must determine whether the defense of procedural default, which prevents courts from reaching the merits of a constitutional claim raised for the first time in a habeas proceeding in the absence of a showing of cause and prejudice, applies to a due process claim that is based on incompetency to stand trial.

The petitioner, Willie A. Saunders, appeals from the judgment of the Appellate Court, which upheld the habeas court's dismissal of his petition for a writ of habeas corpus as barred by procedural default. The petitioner claims that the Appellate Court incorrectly concluded that (1) the defense of procedural default applies to competency claims, and (2) his pleadings failed to allege sufficient cause and prejudice to overcome the procedural default defense. We disagree with the petitioner that competency claims are categorically exempt from being procedurally defaulted because incompetency may satisfy the cause and prejudice standard to excuse a procedural default. In the petitioner's case, our review of the petition leads us to conclude that his pleadings met the standard necessary to survive a motion to dismiss. Accordingly, we reverse the Appellate Court's judgment and remand the case to that court with direction to remand it to the habeas court for an evidentiary hearing on the threshold question of whether the petitioner was incompetent at the time of his underlying criminal trial or his direct appeal and, if so, whether he suffered any resulting prejudice, thereby excusing his procedural default.

The Appellate Court's opinion contains the pertinent facts and procedural history; see *Saunders* v. *Commissioner of Correction*, 194 Conn. App. 473, 475–81, 221 A.3d 810 (2019); which we summarize in relevant part. A jury found the petitioner guilty of sexual assault in

the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (2). Id., 477. The trial court sentenced the petitioner to ten years of imprisonment followed by fifteen years of special parole. Id. The petitioner appealed to the Appellate Court, claiming that "the state adduced insufficient evidence to sustain his conviction . . . the trial court improperly allowed the state to comment on missing witnesses during final argument, and the . . . state engaged in prosecutorial impropriety during final argument and, therefore, deprived him of his due process right to a fair trial." (Internal quotation marks omitted.) Id., 477–78 n.3. The petitioner raised no claim regarding his competency to stand trial. See id. The Appellate Court upheld the petitioner's conviction on direct appeal; see *State* v. *Saunders*, 114 Conn. App. 493, 509, 969 A.2d 868, cert. denied, 292 Conn. 917, 973 A.2d 1277 (2009); and this court denied his petition for certification to appeal. *State* v. *Saunders*, 292 Conn. 917, 973 A.2d 1277 (2009).

The present case is the petitioner's second in which he seeks a writ of habeas corpus.[1] He raises claims of two "due process violations under the fifth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution on the grounds that [he] was incompetent to be prosecuted and to stand trial . . . ." *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 478. Count one of his habeas petition alleges that, at the time of trial, the petitioner suffered from severe intellectual disabilities, including "an inability to read or write, a

[1] In his first habeas petition, the petitioner alleged that his trial counsel rendered ineffective assistance by failing to call additional alibi witnesses. *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 478. The habeas court denied the petition and denied certification to appeal. Id. The petitioner appealed to the Appellate Court, which dismissed the appeal. See *Saunders* v. *Commissioner of Correction*, 143 Conn. App. 902, 67 A.3d 316, cert. denied, 310 Conn. 917, 76 A.3d 632 (2013).

diagnosis of 'mental retardation' at a young age, and brain functioning equivalent to that of a ten year old child." Id. Because of these deficiencies, the petitioner alleges, he "could not comprehend the nature of the criminal proceedings against him, other than the general nature of the charges and the fact that he was facing incarceration if convicted." Id. Count two of the petition alleges that, at the time of trial, the petitioner also suffered from "significant physiological and mental health afflictions," including "a long history of epileptic seizures, a visibly misshapen head, paranoia, schizophrenia, and depression, and that he had been hospitalized on numerous occasions in North Carolina prior to his arrest . . . ." Id., 479. Both counts allege that his trial counsel, the state, and the trial court failed to request a competency examination during the course of the proceedings, in violation of General Statutes § 54-56d. Id., 478–79.

The respondent, the Commissioner of Correction, filed a return denying the petitioner's material allegations and asserting several affirmative defenses, including procedural default as to both counts of the petition. Id., 479. The respondent argued that the petitioner did not raise his due process claims regarding competency to stand trial during his criminal trial or on direct appeal and, therefore, had procedurally defaulted. Id., 479–80. The respondent further contended that the petitioner could not establish sufficient cause and prejudice to excuse the defaults. Id., 480.[2] The petitioner, in his reply, argued

[2] The respondent also argued that, to the extent the petition raised an ineffective assistance of counsel claim, that claim had been raised and resolved in the prior habeas proceeding. *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 479 n.5. "The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . [T]he [petition] must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the [petition] is insufficient

that the defense of procedural default did not apply to his due process claims, that he could not have raised those claims previously because of his developmental and intellectual disabilities, and, in the alternative, that he could establish cause and prejudice to overcome the procedural defaults. Id.

The respondent moved to dismiss the second habeas petition on the ground that the petitioner's due process claims were procedurally defaulted. Id., 480–81. The habeas court granted the motion, "determin[ing] that the petitioner's due process claims were procedurally defaulted and that he had failed to allege legally cognizable cause and prejudice to overcome the procedural defaults." (Footnotes omitted.) Id., 481.

The habeas court granted the petitioner certification to appeal to the Appellate Court, which upheld the habeas court's judgment. See id., 481, 504. We granted the petitioner's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that the doctrine of procedural default applies to competency claims?" And (2) "[d]id the Appellate Court correctly conclude that the petitioner's pleadings

to allow recovery." (Footnote omitted; internal quotation marks omitted.) *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842, 878 A.2d 1088 (2005). Although the petition does allege that defense counsel failed to request a competency evaluation, the petitioner specifically disclaimed that he was raising an ineffective assistance of counsel claim. The habeas court agreed, concluding that a "fair and liberal reading of the . . . petition supports the conclusion that the petitioner is alleging only a due process violation, and that he is not alleging ineffective assistance of counsel in violation of the petitioner's rights under the sixth amendment [to] the United States constitution. Nor is the petitioner alleging ineffective assistance of appellate counsel on direct appeal [or] ineffective assistance by prior habeas counsel." The petitioner also disclaimed that he was raising an ineffective assistance of counsel claim on appeal to the Appellate Court; see *Saunders* v. *Commissioner of Correction*, supra, 483 n.12; and at oral argument before this court. The respondent does not press this issue before this court. Thus, consistent with these prior proceedings and the limited issues we have certified for appeal, we do not revisit this issue.

failed to allege sufficient cause and prejudice to overcome a procedural default?" *Saunders* v. *Commissioner of Correction*, 334 Conn. 917, 222 A.3d 103 (2020). We will discuss additional facts and procedural history as necessary to address the petitioner's claims.

I

The petitioner first claims that the Appellate Court incorrectly concluded that the procedural default defense applies to competency claims. He argues that, because an incompetent defendant cannot waive any rights,[3] including fundamental rights, any valid waiver of a fundamental right must be made on the record. Specifically, he argues that (1) this court should follow the guidance of federal courts that have declined to apply procedural default to competency claims because the harm of prosecuting an incompetent defendant outweighs the interests protected by the judge-made doctrine of procedural default, and (2) even if procedural default is a forfeiture rule, and not a waiver rule, this court should reject its applicability to competency claims. In response, the respondent argues that the Appellate Court correctly

[3] We express concern that, during the habeas proceedings, the petitioner's counsel indicated that the petitioner's mother was in the courtroom and represented that she is the petitioner's "legal protector . . . I should say, legal guardian. And she has signed, a while ago, a release to me that she wanted—she agreed that I should pursue his habeas [case], Your Honor." When the respondent's counsel expressed concern about whether there would be any effective waiver of attorney-client confidentiality because "I have trial counsel I would like to call as a witness, and there really is no ineffective assistance of counsel claim," the petitioner's counsel indicated that, if the respondent was considering calling the petitioner's criminal trial counsel as a witness, "*I* have no objection to Attorney [Alan D.] McWhirter testifying about the trial." (Emphasis added.) It is not clear from the record before us that habeas counsel could unilaterally waive the petitioner's attorney-client privilege if habeas counsel had determined it was necessary to have someone other than the petitioner approve the filing of the petition on his behalf due to the petitioner's alleged incompetency and inability to be restored to competence. Habeas counsel should consult rule 1.14 of the Rules of Professional Conduct on remand.

(1) applied Connecticut's habeas jurisprudence, and followed the majority of federal and other state courts, in holding that procedural default applies to competency claims, (2) declined to follow the decision of the United States Court of Appeals for the Second Circuit in *Silverstein* v. *Henderson*, 706 F.2d 361 (2d Cir.), cert. denied, 464 U.S. 864, 104 S. Ct. 195, 78 L. Ed. 2d 171 (1983), and other federal and state court decisions, because they improperly conflate waiver and procedural default, and (3) concluded that the interest in the finality of convictions outweighs the risk that a criminal defendant will be deprived of his right not to be prosecuted while incompetent. We agree with the respondent.

It is well established that, although federal postconviction jurisprudence does not bind us, this court has adopted the procedural default standard articulated in *Wainwright* v. *Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). See, e.g., *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 70–71, 136 A.3d 596 (2016). "Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition." (Internal quotation marks omitted.) Id., 71. The cause and prejudice standard "is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, [inadvertence] or ignorance . . . ." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 191, 982 A.2d 620 (2009). The procedural default doctrine is a prudential limitation on the right to raise constitutional claims in collateral proceedings that vindicates the interests of finality of judgments and uniformity. See, e.g., *Hinds* v. *Commissioner of Correction*, supra, 71–72; *Crawford* v. *Commissioner of Correction*, supra, 188–89.

Raising the defense of procedural default in Connecticut proceeds as follows: The petitioner files a petition for a writ of habeas corpus under oath, stating the specific acts on which each claim is based and the relief requested; whether he has, in prior petitions, challenged the same confinement; the dispositions taken in connection with those petitions; and whether "the legal grounds [on] which the petition is based were previously asserted at the criminal trial, on direct appeal or in any previous petition." Practice Book § 23-22 (3). The respondent is then required to file a return to the petition and, specifically, must "allege any facts in support of any claim of procedural default . . . ." Practice Book § 23-30 (b). The petitioner must then file a reply to "allege any facts and assert any cause and prejudice claimed to permit review of any issue despite any claimed procedural default. The reply shall not restate the claims of the petition." Practice Book § 23-31 (c). The habeas court, sua sponte or on a motion by the respondent, may dismiss the petition for "any other legally sufficient ground . . . ." Practice Book § 23-29 (5).[4] Alternatively, the habeas court may conduct a trial, an evidentiary hearing, or hear argument on a dispositive question of law. Practice Book § 23-40. The habeas court's conclusion that the petitioner procedurally defaulted his due process claims involves a question of law; our review is therefore plenary. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

Neither this court nor the United States Supreme Court has considered whether the defense of proce-

[4] Practice Book § 23-29 provides that a habeas court may dismiss a petition if it determines that "(1) the court lacks jurisdiction; (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted; (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition; (4) the claims asserted in the petition are moot or premature; (5) any other legally sufficient ground for dismissal of the petition exists."

dural default applies to due process competency claims. We note, however, that we do not write on a clean slate. Rather, the same interests in finality and uniformity that apply to other procedurally defaulted constitutional claims apply in the present case. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71–72; *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 188. We conclude that these interests militate against carving out an exception to the defense of procedural default for competency claims.

As to finality, procedural default encourages petitioners to undertake "the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal. . . . This type of rule promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 189. Procedural default also discourages petitioners from sitting on claims for tactical and strategic reasons, and ensures that evidence that is crucial to petitioners' claims is available for review. "Memories fade with the passage of time, exhibits are lost, and other evidence is less likely to be available." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 416, 589 A.2d 1214 (1991). The greater lapse in time that occurs between conviction and a habeas court's consideration of a petition, unlike the direct appellate process with its stricter time limits, has serious consequences on the availability of witnesses and evidence. Id. Compare Practice Book § 63-1 (a) (direct appeal must be filed within twenty days of judgment), with General Statutes § 52-470 (c) (rebuttable presumption that habeas peti-

tion was delayed without good cause if not filed within five years of conviction deemed to be final judgment after appellate review or expiration of time for seeking such review) and General Statutes § 52-470 (d) (rebuttable presumption that successive habeas petition was delayed without good cause if not filed within two years of final judgment on prior petition due to conclusion of appellate review or expiration of time for seeking such review).

The petitioner argues that, because the state does not need to retry him if he succeeds on his competency claim, the finality interest is diminished, thereby militating against the application of the procedural default rule in this context. We do not agree. In fact, if anything, the passage of time heightens the concern that constitutional claims regarding competency be made timely. Not only is there the potential for the loss of evidence concerning a petitioner's incompetency at the time of his trial—in this case, fifteen years after it concluded—but, potentially, the petitioner's condition might further deteriorate, improve, or otherwise materially change. Courts have commented on the difficulties posed by attempting "retrospectively [to] determin[e] an accused's competence to stand trial." *Pate* v. *Robinson*, 383 U.S. 375, 387, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966); see also *Gold* v. *Warden*, 222 Conn. 312, 317–18, 610 A.2d 1153 (1992). Although certain circumstances require a court to conduct nunc pro tunc, or retroactive, competency hearings, they are generally disfavored because of the "risk that the post hoc reconstruction of the defendant's mental state will be unduly speculative and inherently unreliable." *State* v. *Burgos*, 170 Conn. App. 501, 529, 155 A.3d 246, cert. denied, 325 Conn. 907, 156 A.3d 538 (2017). The passage of time hinders the ability of postconviction courts to make meaningful determinations regarding a petitioner's competency at the time of trial. See, e.g., *United States* v. *Arenburg*, 605 F.3d

164, 171–72 (2d Cir. 2010) (remanding for nunc pro tunc competency determination if trial court determines meaningful hearing can be held); *United States* v. *Auen*, 846 F.2d 872, 878 (2d Cir. 1988) (same). The trial court "is in a particularly advantageous position to observe a defendant's conduct during a trial and has a unique opportunity to assess a defendant's competency. A trial court's opinion, therefore, of the competency of a defendant is highly significant." (Internal quotation marks omitted.) *State* v. *Connor*, 292 Conn. 483, 523–24, 973 A.2d 627 (2009). A petitioner's failure to raise the issue of competency at trial or on direct appeal deprives the habeas court of the crucial perspective of the jurist presiding at the trial. Consistent with these policies, applying the procedural default defense to competency claims encourages the timely assertion of those claims when the trial court is in the best position to determine competency and to provide a timely remedy.

As to uniformity, we have emphasized the importance of applying the cause and prejudice standard consistently to all procedural defaults, whether the default occurred at trial or on direct appeal. See, e.g., *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 182 ("[i]n setting out [the cause and prejudice] standard, the [United States] Supreme Court emphasized the importance of the uniform application of procedural default standards, regardless of the specific nature of the procedural default"); see also *Coleman* v. *Thompson*, 501 U.S. 722, 747, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (explaining that United States Supreme Court cases since *Wainwright* "have been unanimous in applying the cause and prejudice standard"); *Newland* v. *Commissioner of Correction*, 331 Conn. 546, 561, 206 A.3d 176 (2019) (claim of complete denial of trial counsel was subject to procedural default, but prejudice is assumed); *Council* v. *Commissioner of Correction*, 286 Conn. 477, 489, 944 A.2d 340 (2008) (challenge

to validity of plea subject to procedural default when petitioner failed to file motion to withdraw guilty plea or to challenge validity of plea on direct appeal); *Correia* v. *Rowland*, 263 Conn. 453, 461–62, 820 A.2d 1009 (2003) (failure to raise issue of due process violation at trial or on direct appeal for state's failure to preserve evidence was procedurally defaulted); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 37–38, 779 A.2d 80 (2001) (failure to challenge allegedly illegal sentence at trial or on direct appeal was subject to procedural default); *Johnson* v. *Commissioner of Correction*, supra, 218 Conn. 409 (failure to challenge jury array or to raise ineffective assistance of counsel claim at trial or on direct appeal was subject to procedural default).

This court has recognized only two exceptions to the requirement that a petitioner's claims are subject to the defense of procedural default: (1) claims pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008),[5] and (2) like the United States Supreme Court, claims of actual innocence. We exempted *Salamon* claims from procedural default because we concluded that the finality interests[6] were "insufficiently weighty" in those cases and, further, that the state would "effectively be in the same position even if the petitioner had raised

[5] *Salamon* claims are habeas claims seeking to vacate a kidnapping conviction pursuant to this court's decision in *State* v. *Salamon*, supra, 287 Conn. 509, in which we overruled our long-standing interpretation of our kidnapping statutes. See id., 542; see also *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 68–69.

[6] These finality interests included "(1) the fact that law enforcement relied on the old interpretation of the kidnapping statutes while trying the petitioner; (2) the fact that the retroactive application of *Salamon* has no deterrent value or remedial purpose; (3) the fear that our courts will be flooded with habeas petitions from other inmates convicted under [General Statutes] § 53a-92 (a) (2) (A); (4) the difficulty of retrying such cases where significant time has elapsed since conviction; and [5] perhaps most [important] . . . the concern that victims will be retraumatized by again having to testify and endure another round of judicial proceedings." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 73.

a *Salamon* type challenge in his criminal proceedings." *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 76. Similarly, we have held that the "strong interest in the finality of judgments, and the state's interest in retrying a defendant with reasonably fresh evidence, does not require the continued imprisonment of one who is actually innocent" and, therefore, have allowed petitioners to raise a substantial claim of actual innocence for the first time on collateral review. *Summerville* v. *Warden*, 229 Conn. 397, 422, 641 A.2d 1356 (1994); see also *Murray* v. *Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). In acknowledging both exceptions, we have recognized that *Salamon* claims and claims of actual innocence are exceedingly rare. See, e.g., *Hinds* v. *Commissioner of Correction*, supra, 74–75 ("[o]f the 1.5 percent of [D]epartment of [C]orrection inmates incarcerated for kidnapping or unlawful restraint, one can reasonably assume that only a small subset will fall within the ambit of *Salamon*"); see also *Schlup* v. *Delo*, 513 U.S. 298, 321, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ("habeas . . . petitions that advance a substantial claim of actual innocence are extremely rare"). Thus, the finality interests and, as we explain next, the distinct and limited basis for actual innocence claims, which previously persuaded this court to carve out exceptions to the defense of procedural default, are not present for competency claims. We see no other prevailing reason to exempt competency claims from our uniform application of procedural default.

Citing *Wainwright* v. *Sykes*, supra, 433 U.S. 91, the petitioner also argues that procedural default should not apply to competency claims because the petitioner " 'will be the victim of a miscarriage of justice.' " Both the United States Supreme Court and this court, however, have limited this exception to claims of actual innocence. See *Schlup* v. *Delo*, supra, 513 U.S. 321; *Sum-*

merville v. *Warden*, supra, 229 Conn. 422. A petitioner's claim of incompetency at the time of trial is not the same as a claim of incompetency at the time of his crimes. The latter claim would address his culpability and, therefore, his "actual innocence." *Perkins* v. *Hall*, 288 Ga. 810, 826, 708 S.E.2d 335 (2011), overruled in part on other grounds by *State* v. *Lane*, 308 Ga. 10, 838 S.E.2d 808 (2020). Instead, the claim of incompetency at the time of trial is "a trial right—a [due process] based protection designed to ensure that he received a fair trial." (Emphasis omitted.) Id. The habeas petitioner "does not come before the [c]ourt as one who is innocent, but on the contrary as one who has been convicted by due process of law . . . ." (Internal quotation marks omitted.) *Summerville* v. *Warden*, supra, 423. Thus, the application of procedural default to claims addressing competency to stand trial would not result in the same "miscarriage of justice" that *Wainwright* contemplated.

Nonetheless, the petitioner argues that we should follow the decisions of several federal courts, including the Second Circuit, and hold that substantive competency claims[7] cannot be procedurally defaulted. In *Silverstein* v. *Henderson*, supra, 706 F.2d 361, the Second Circuit declined to hold that a petitioner's claim regarding competency to stand trial was subject to procedural default. See id., 366. The court in *Silverstein* applied the logic of *Pate* v. *Robinson*, supra, 383 U.S. 375, in which the United States Supreme Court held that a petitioner could not waive his right to a competency hearing at trial by failing to request one because "it is contradictory to argue that a defendant may be incom-

[7] "A procedural competency claim is based [on] a trial court's alleged failure to hold a competency hearing, or an adequate competency hearing, [whereas] a substantive competency claim is founded on the allegation that an individual was tried and convicted while, in fact, incompetent." (Internal quotation marks omitted.) *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 489 n.14, quoting *Lay* v. *Royal*, 860 F.3d 1307, 1314 (10th Cir. 2017), cert. denied, U.S. , 138 S. Ct. 1553, 200 L. Ed. 2d 752 (2018).

petent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Id., 384. The Second Circuit held that this rationale also applied to a petitioner's failure "to object or to take an appeal on the issue" on collateral review, resting its holding that procedural default does not apply to competency claims or *Wainwright*'s waiver rule. See *Silverstein* v. *Henderson*, supra, 367. Waiver, in this context, is "an intentional relinquishment or abandonment of a known right or privilege by the petitioner personally and depended on his considered choice." (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 131, 629 A.2d 413 (1993).

As the respondent and the Appellate Court aptly noted, however, in the nearly forty years since *Silverstein*, the great weight of federal and Connecticut habeas jurisprudence has transitioned from a waiver standard to a forfeiture standard for procedural default. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 488–93. We explained in *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 165, that our prior habeas jurisprudence, using the deliberate bypass standard for procedural defaults, "was predicated on an assumption about federal law that later was refuted by the federal adoption of cause and prejudice for all procedural defaults . . . ." Id., 188. We have defined forfeiture in the criminal context as "the failure to make the timely assertion of a right . . . ." (Internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71, 967 A.2d 41 (2009). Thus, our procedural default standard is more akin to forfeiture, which addresses the petitioner's timing in raising a constitutional claim and not the mental state driving his decision to waive a claim. Additionally, *Silverstein* does not discuss the finality or uniformity interests served by procedural default. We are persuaded that, given the

more recent move away from a waiver standard for procedural default, and the compelling finality and uniformity interests implicated, *Silverstein* is not helpful in resolving the contemporary question of whether to apply procedural default to competency claims.[8]

In concluding that the Appellate Court correctly held that the petitioner's claim is subject to procedural default, we recognize the predicament facing habeas petitioners who may have been incompetent at the time of trial and, because of that incompetency, failed to raise the issue at trial or on direct appeal. Because we conclude, however, that, if properly pleaded, incompetency is a legally cognizable "cause" that may survive a motion to dismiss; see part II A of this opinion; the potential harm of applying procedural default to competency claims is mitigated.

II

The petitioner next challenges the Appellate Court's conclusion that his pleadings failed to allege sufficient cause and prejudice to overcome a procedural default. As to the cause prong, he argues that incompetency can constitute cause.[9] As to the prejudice prong, he

[8] The petitioner also contends that our decision in *State* v. *Gore*, 288 Conn. 770, 777–78, 955 A.2d 1 (2008), should lead us to conclude that we have adopted a "nonforfeiture doctrine with respect to fundamental constitutional rights." We are not persuaded. *Gore* is a waiver case, and, therefore, the petitioner's argument falters on the same analytical defect in *Silverstein*. See *State* v. *Gore*, supra, 776–77 ("[o]ur task, therefore, is to determine whether the totality of the record furnishes sufficient assurance of a constitutionally valid waiver of the right to a jury trial"). We agree that an incompetent defendant cannot, at the time of trial, knowingly, intelligently, and voluntarily waive the right not to be tried while incompetent in violation of the wisdom of *Pate* v. *Robinson*, supra, 383 U.S. 384. However, our case law regarding procedural default is consistent with a forfeiture regime, not waiver. In fact, we previously have held that a petitioner *can* procedurally default the right to a jury trial, the constitutional claim advanced in *Gore*. See *Duperry* v. *Solnit*, 261 Conn. 309, 330–33, 803 A.2d 287 (2002).

[9] In particular, the petitioner argues that his allegation of incompetency sufficiently established cause because the trial court's failure to conduct a competency hearing during his underlying criminal trial was external to the

argues that prejudice must be presumed because incompetency to stand trial constitutes structural error. The respondent counters that the Appellate Court correctly held that the petitioner's reply was deficient pursuant to Practice Book § 23-31 (c).[10] As to cause, the respondent argues that the Appellate Court correctly held that the petitioner's mental impairment is not an external impediment to his defense and, thus, cannot suffice to overcome the procedural default. The respondent also posits that, on collateral review, due process claims of incompetence to stand trial must be brought with an accompanying ineffective assistance of counsel claim. The respondent does not address the sufficiency of the petitioner's allegation of prejudice. We address each prong in turn.

A

The United States Supreme Court has left open for resolution the precise definition of cause and prejudice for more than forty years; see *Wainwright* v. *Sykes*,

defense. Because we hold that the petitioner's claim of incompetency in general is external to him, we do not address this specific argument.

[10] The respondent argues that the petitioner's reply was deficient because he failed to plead a legally sufficient cause to rebut the defense of procedural default. The respondent relies on *Anderson* v. *Commissioner of Correction*, 114 Conn. App. 778, 788–89, 971 A.2d 766, cert. denied, 293 Conn. 915, 979 A.2d 488 (2009), in which the Appellate Court held that the habeas court properly dismissed in part a habeas petition because the petitioner's reply "fail[ed] to allege any facts or [to] assert any cause and resulting prejudice to permit review of his claims" to rebut the affirmative defense of procedural default. Id., 788. In the present case, the habeas court and the Appellate Court concluded that the petition and the reply were deficient because an allegation of incompetency was not legally sufficient to establish cause. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 498–99. Because we hold that incompetency may constitute legally sufficient cause, we find the respondent's argument unavailing. Both the petitioner's petition and his reply specifically allege that he suffers from "severe [i]ntellectual and [a]daptive disabilities" and "significant physiological and mental health afflictions" that prevented him from comprehending the nature of the legal proceedings against him and from assisting in his defense. Thus, the pleadings satisfy Practice Book § 23-31 (c).

supra, 433 U.S. 87; but has explained "that the existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor *external to the defense* impeded counsel's efforts to comply with the [s]tate's procedural rule." (Emphasis added.) *Murray* v. *Carrier*, supra, 477 U.S. 488; accord *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 568. "A factor is external to the defense if it 'cannot fairly be attributed to' the prisoner." *Davila* v. *Davis*, U.S. , 137 S. Ct. 2058, 2065, 198 L. Ed. 2d 603 (2017). Objective factors external to the defense include, but are not limited to, "a showing that the factual or legal basis for a claim was not reasonably available to counsel," outside interference by officials that made compliance impracticable, and ineffective assistance of counsel that violates the sixth amendment. *Murray* v. *Carrier*, supra, 488.

Cause and prejudice replaced the "deliberate bypass" standard in federal and state habeas jurisprudence as the standard courts apply in response to a procedural default. The deliberate bypass standard had assessed "whether the record affirmatively disclose[d] that the petitioner's decision to waive his right to appeal was made voluntarily, knowingly and intelligently." *Valeriano* v. *Bronson*, 209 Conn. 75, 79, 546 A.2d 1380 (1988). The cause and prejudice standard, instead, "rests not only on the need to deter intentional defaults" but also on the judgment that the costs of habeas review are high when a trial default has occurred. *Murray* v. *Carrier*, supra, 477 U.S. 487. A trial default "deprives the trial court of an opportunity to correct any error without retrial, detracts from the importance of the trial itself, gives state appellate courts no chance to review trial errors, and exacts an extra charge by undercutting the [s]tate's ability to enforce its procedural rules." (Internal quotation marks omitted.) Id. The United States Supreme Court has explained that these costs "do not

disappear when the default stems from counsel's ignorance or inadvertence rather than from a deliberate decision, for whatever reason, to withhold a claim." Id.; see also *Wainwright* v. *Sykes*, supra, 433 U.S. 87–88 (noting that cause and prejudice standard is narrower than deliberate bypass standard).

The cause and prejudice standard, therefore, is designed to default inadvertent forfeitures of constitutional claims, as well as intentional waivers. The cause and prejudice standard is also designed to excuse procedural defaults beyond a petitioner's control. For a cause to be "internal," the law presumes some level of participation by the petitioner in his defense so that we hold him answerable for failing to raise a claim at trial or on direct appeal, whether it is active participation, such as intentional waivers, or passive participation, such as inadvertent forfeitures. Incompetency, on the other hand, has the effect of the petitioner's being unable to participate in his defense. See General Statutes § 54-56d (a). The due process protection against trying an incompetent defendant finds support in the common-law ban on "trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." (Internal quotation marks omitted). *Drope* v. *Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). Indeed, we measure incompetence to stand trial by whether the defendant "is unable to understand the proceedings against him or her or to assist in his or her own defense." General Statutes § 54-56d (a).

Determining whether a cause is internal or external based on a petitioner's ability to participate in his defense is similar to drawing the distinction between the kinds of attorney error that we do or do not impute to petitioners for purposes of satisfying the cause prong of the cause and prejudice standard. On the one hand, a petitioner is bound by counsel's tactical decisions, whether

counsel is flouting procedural rules or hedging against strategic risks. See *Reed* v. *Ross*, 468 U.S. 1, 13–14, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984). In those situations, excusing the procedural default "would be contrary to [well settled] principles of agency law." *Coleman* v. *Thompson*, supra, 501 U.S. 754, citing 1 Restatement (Second), Agency § 242, p. 534 (1958) (master is subject to liability for harm caused by negligent conduct of servant within scope of employment). On the other hand, "if the procedural default is the result of ineffective assistance of counsel, the [s]ixth [a]mendment itself requires that responsibility for the default be imputed to the [s]tate. . . . In other words, it is not the gravity of the attorney's error that matters, but that it constitutes a violation of [the] petitioner's right to counsel, so that the error must be seen as an external factor, i.e., imputed to the [s]tate." (Citation omitted; internal quotation marks omitted.) *Coleman* v. *Thompson*, supra, 754.

We decline to follow the Appellate Court's analysis, and that of several federal courts of appeals, holding that mental incompetency is "internal" to the petitioner and therefore not recognizing incompetency as legally sufficient to satisfy the cause prong of the cause and prejudice standard. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 503–504. Four circuits have concluded that incompetency is internal because "[s]omething that comes from a source within the petitioner is unlikely to qualify as an external impediment." *Harris* v. *McAdory*, 334 F.3d 665, 669 (7th Cir. 2003), cert. denied, 541 U.S. 992, 124 S. Ct. 2022, 158 L. Ed. 2d 499 (2004); see also *Gonzales* v. *Davis*, 924 F.3d 236, 242–44 and 244 n.4 (5th Cir. 2019), cert. denied, U.S. , 140 S. Ct. 1143, 206 L. Ed. 2d 199 (2020); *Johnson* v. *Wilson*, 187 Fed. Appx. 455, 458 (6th Cir. 2006), cert. denied, 549 U.S. 1218, 127 S. Ct. 1273, 167 L. Ed. 2d 96 (2007); *Hull* v. *Freeman*, 991 F.2d 86, 91

(3d Cir. 1993). We find the analysis of these courts flawed and, therefore, reject this conclusion. Specifically, we do not read the case law to consider pertinent to a determination of external versus internal cause whether that cause comes from "within the petitioner" (e.g., within his mind or body). Rather, "internal" is defined as "something fairly attributable to the petitioner," and, as we have explained, whether cause is internal presumes a level of participation by the petitioner in his defense.[11] The fact that our statutes impose a duty on defense counsel, the state, and the trial court—but not the defendant himself—to raise the issue of competency also informs us that incompetency is external to the petitioner. See General Statutes § 54-56d (c). And, unlike other causes of procedural default that courts have held are internal to a petitioner, such as illiteracy or limited education; see, e.g., *Harris* v. *McAdory*, supra, 669; only competence to stand trial is a constitutionally protected due process right.

We instead agree with the United States Court of Appeals for the Eighth Circuit, which has recognized incompetency as legally sufficient to satisfy the cause prong of the cause and prejudice standard and to excuse

[11] We also are unpersuaded that the same alleged incompetency that would have exempted the petitioner from standing trial in 2006 is also "fairly attributable" to the petitioner so that, if proven as alleged, it would not serve as cause to excuse procedural default. Such circuitous logic defies common sense and our constitutional, statutory, and jurisprudential protections against convicting an incompetent defendant. See *State* v. *Johnson*, 253 Conn. 1, 20, 751 A.2d 298 (2000) ("Connecticut jealously guards" right of accused persons who are not legally competent to stand trial to not be convicted); see also General Statutes § 54-56d (a) (providing that "[a] defendant shall not be tried, convicted or sentenced while the defendant is not competent"); *Drope* v. *Missouri*, supra, 420 U.S. 171–72 ("it suffices to note that the prohibition [on trying a mentally incompetent defendant] is fundamental to an adversary system of justice"). To keep a petitioner incarcerated because of a procedural bar, if the claim that the petitioner was incompetent to have stood trial is correct, would be repugnant to these ideals.

procedural default. In doing so, the Eighth Circuit held that "there must be a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and [to] make rational decisions regarding his or her case at the time during which he or she should have pursued . . . relief." *Holt* v. *Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999); see also *Schneider* v. *McDaniel*, 674 F.3d 1144, 1154 (9th Cir.) (explaining that Ninth Circuit precedent does "not necessarily foreclose the possibility that a pro se petitioner might demonstrate cause in a situation where a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance"), cert. denied, 568 U.S. 1001, 133 S. Ct. 579, 184 L. Ed. 2d 380 (2012); *Farabee* v. *Johnson*, 129 Fed. Appx. 799, 802 (4th Cir. 2005) (assuming, without deciding, "that profound mental illness may constitute cause to excuse a procedural default in certain circumstances" but determining that petitioner did not demonstrate that any mental illness actually caused his procedural defaults). Consistent with the standard the Eighth Circuit has articulated, if a petition has been sufficiently pleaded to survive a motion to dismiss, habeas courts must assess whether a petitioner's incompetency satisfies the cause prong of the cause and prejudice standard.

In the present case, the Appellate Court was "persuaded that the risk of a truly incompetent person being convicted and sentenced without any requested examination of, or other challenge to, his or her competency during the criminal trial proceedings or on direct appeal is so minimal that the systemic interests of finality, accuracy of judicial decisions, and conservation of judicial resources vastly outweighed such risk." *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 493. This assumption is premised on attorneys—those appearing on behalf of the petitioner and the state, as well as the court itself—being duty bound to raise the

issue if it appears that the defendant is not competent to stand trial. See General Statutes § 54-56d (c); see also *Pate* v. *Robinson*, supra, 383 U.S. 385 (court must conduct competency hearing when evidence "raises a 'bona fide doubt' " as to defendant's competence to stand trial); *State* v. *Skok*, 318 Conn. 699, 722, 122 A.3d 608 (2015) ("[a] trial court has an independent obligation to inquire, sua sponte, into a defendant's competency when there is sufficient evidence before the court to raise a reasonable doubt as to whether the defendant can understand the proceedings or assist in her defense"). There is also the presumption that a defendant is competent to stand trial. See General Statutes § 54-56d (b). Given this presumption, and our confidence in our state bar to raise issues of competency, we agree with the Appellate Court that the risk of a truly incompetent person being convicted and sentenced without challenge is minimal—but not zero.[12] The cause and prejudice standard is meant to balance the need for keeping habeas relief available to those petitioners who warrant it against the societal costs of habeas relief, and is not meant to thwart the interest in preventing a miscarriage of justice. See *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 559–60.

We disagree with the respondent that due process competency claims must therefore be brought with an accompanying ineffective assistance of counsel claim. "In habeas corpus proceedings, courts often describe constitutional claims that are not tethered to a petition-

[12] We emphasize that we hold only that the petitioner's allegations of incompetency suffice to survive a motion to dismiss. On remand, to excuse his procedural default, the petitioner must still satisfy (1) the cause requirement of the cause and prejudice standard by establishing that he was incompetent at the time of his underlying criminal trial or direct appeal, *and* that his incompetency interfered with his ability to appreciate his position and make rational decisions regarding his case at the time during which he should have pursued relief, *and* (2) the prejudice requirement by showing that there is a reasonable probability that, had the issue been raised, the trial court would have found him incompetent and not restorable to competency.

er's sixth amendment right to counsel as 'freestanding.' " *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 810 n.8, 218 A.3d 638 (2019). Although ineffective assistance of counsel in violation of the sixth amendment is the most commonly asserted basis for cause to excuse procedural default; 7 W. LaFave et al., Criminal Procedure (3d Ed. 2007) § 28.4 (d), p. 202; it is not the exclusive basis. In holding that a novel constitutional claim could give rise to cause and excuse a procedural default, the United States Supreme Court has explained that there is a "broad range of potential reasons for an attorney's failure to comply with a procedural rule, and [a] virtually limitless array of contexts in which a procedural default can occur . . . ." *Reed* v. *Ross*, supra, 468 U.S. 13. "[T]he failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." Id., 14. The United States Supreme Court, therefore, has recognized as sufficient to establish cause a scenario in which, as in the present case, an objective factor is external to the defense yet still tangential to the effective assistance of counsel. Given the lack of precedential support for the proposition that procedurally defaulted competency claims *must* be brought with an ineffective assistance of counsel claim, we do not preclude the petitioner from raising a freestanding competency claim.[13]

[13] Indeed, there is the risk that the petitioner's incompetency prevented him from relating his incompetency to his attorneys. Incompetence, in that instance, may have impeded "[defense] counsel's efforts to comply with the [s]tate's procedural rule" requiring that counsel request a competency examination and, therefore, constitutes an external cause to excuse procedural default. *Murray* v. *Carrier*, supra, 477 U.S. 488. A defendant representing himself at trial may also have no avenue to vindicate his due process rights against being tried while incompetent if his incompetency caused his procedural default. These examples highlight why an ineffective assistance of counsel claim does not necessarily need to accompany a due process competency claim. See *McCarthy* v. *Commissioner of Correction*, supra, 192 Conn. App. 811 (determining that petitioner's due process claim that his guilty plea was involuntary because of his misunderstanding of state's evidence, while related to petitioner's claim of ineffective assistance of

B

Although the petitioner alleged prejudice in his reply, stemming from his conviction, incarceration, and special parole, the habeas court concluded that his allegation did not suffice. On appeal, the petitioner argues only that he was not required to allege or prove prejudice because prejudice is presumed for competency claims. See *Newland* v. *Commissioner of Correction*, supra, 331 Conn. 548 (concluding that, "for purposes of procedural default, after the petitioner has established good cause for failing to raise his claim that he was completely deprived of his right to counsel [at his criminal trial], prejudice is presumed"). The petitioner provides no further support as to this issue. The respondent argues that the petitioner's reply was deficient because he failed to plead a legally sufficient cause to rebut the defense of procedural default.

The habeas court concluded that the petition and reply were deficient because an allegation of incompetency is legally insufficient to establish cause and prejudice. The Appellate Court agreed with the habeas court to the extent that an allegation of incompetency is not legally sufficient to establish cause but did not address the petitioner's argument regarding prejudice. See *Saunders* v. *Commissioner of Correction*, supra, 194 Conn. App. 499, 503 n.20.

With respect to the prejudice prong, a habeas petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." (Emphasis in original.) *United States* v. *Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); accord *Hinds* v. *Commissioner of Correction*, supra, 321 Conn.

counsel, is "a separate, freestanding due process claim subject to procedural default").

84. "In applying that standard, the [United States Supreme Court] indicated that the petitioner would have to demonstrate that, with the proper instruction, there was a 'substantial likelihood' that the jury would not have found the petitioner guilty of the crime of which he was convicted. . . . Substantial likelihood or reasonable probability does not require the petitioner to demonstrate that the jury more likely than not would have acquitted him had it properly been instructed. . . . 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (Citations omitted.) *Hinds* v. *Commissioner of Correction*, supra, 84–85; 7 W. LaFave, supra, § 28.4 (d), p. 207 (explaining that United States Supreme Court has clarified that, "in order to establish prejudice under [*Wainwright*], a petitioner must demonstrate that had the constitutional claim been raised in accordance with state rules, there is a 'reasonable probability that the result of the trial would have been different' "). The prejudice inquiry often overlaps or merges with the showing of harm required to prevail on the underlying constitutional claim of error. See *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 570–71 (showing of prejudice necessary to succeed on ineffective assistance of counsel claim necessarily satisfies prejudice prong of procedural default); see also *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 600 n.6, 119 A.3d 1153 (2015) ("[i]n the context of a guilty plea . . . to succeed on the prejudice prong the petitioner must demonstrate that, but for counsel's alleged ineffective performance, the petitioner would not have pleaded guilty and would have proceeded to trial" (internal quotation marks omitted)).[14] In the context of a claimed due process violation

[14] Other courts have held, in the context of counsel's failure to raise the issue of competency, that a petitioner must show that "there is a reasonable probability that the trial court would have found [the petitioner] incompetent had the issue been raised." *Blakeney* v. *United States*, 77 A.3d 328, 348 (D.C. 2013), cert. denied, 574 U.S. 1013, 135 S. Ct. 689, 190 L. Ed. 2d 392 (2014); see id., 348 n.65 (citing cases). Similarly, our Appellate Court has concluded

for being tried and convicted while incompetent, to prove prejudice, the petitioner therefore must show that there is a reasonable probability that, had the issue been raised, the trial court would have found him incompetent and not restorable to competency.[15]

We disagree with the habeas court that the petitioner failed to allege sufficient prejudice to survive a motion to dismiss. Because the habeas court dismissed the petition on a motion by the respondent, the petitioner was not allowed to make a conclusive showing that, had the trial court ordered a competency evaluation, he would have been found incompetent to stand trial and not restorable to competency. The petitioner's reply to the respondent's return states that he "is prejudiced because he stands convicted of sexual assault in the first degree and is currently serving [ten] years of special parole." The petition further alleges that the petitioner "was not competent to be prosecuted and to stand trial" and that, due to his severe cognitive limitations and significant physiological and mental health afflictions, it was impossible for him to (1) "have any legally competent understanding of the criminal justice court system at the time of his arrest and subsequent trial," (2) "under-

that a petitioner failed to show prejudice to excuse procedural default for counsel's failure to request additional competency evaluations because the petitioner failed to present credible evidence that he was not competent throughout his criminal trial. See *Andrades* v. *Commissioner of Correction*, 108 Conn. App. 509, 520, 948 A.2d 365, cert. denied, 289 Conn. 906, 957 A.2d 868 (2008).

[15] To excuse a defendant from standing trial, the trial court is required to find both that the defendant is incompetent and not restorable to competency. See General Statutes § 54-56d (f) ("[i]f the court finds that the defendant is not competent, the court shall also find whether there is a substantial probability that the defendant, if provided with a course of treatment, will regain competency within the maximum period of any placement order permitted under this section"). Because the prejudice prong of the cause and prejudice standard requires the petitioner to show that the trial court would have found him incompetent had the issue been raised at trial or on direct appeal, this inquiry must necessarily include the additional showing that the petitioner was not restorable to competency at the time of trial.

stand the criminal justice legal proceedings engendered by and encompassed by his arrest and subsequent trial," and (3) "appreciate and to understand in a legally competent manner his pending prosecution and criminal trial, such that he could not effectively assist in his defense." Reading the pleadings "broadly and realistically, rather than narrowly and technically"; (internal quotation marks omitted) *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 842, 878 A.2d 1088 (2005); we are satisfied that the petitioner has sufficiently alleged that, had the trial court had him evaluated, his severe cognitive limitations and significant physiological and mental health afflictions would have established that he was incompetent to stand trial, was not restorable to competency and, therefore, would not have been tried and convicted. Thus, we conclude that the pleadings satisfy Practice Book § 23-31 (c). See footnote 10 of this opinion. On remand, the petitioner must produce evidence to support this claim and thereby successfully rebut the defense of procedural default.

Accordingly, the case must be remanded to the habeas court to address whether the petitioner was incompetent at the time of his criminal trial or direct appeal, thereby satisfying the cause and prejudice exception to the doctrine of procedural default.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the habeas court's judgment and to remand the case to the habeas court for further proceedings in accordance with this opinion.

In this opinion the other justices concurred.

CARMEN LOPEZ *v.* WILLIAM RAVEIS REAL ESTATE, INC., ET AL.
(SC 20574)

Robinson, C. J., and D'Auria, Mullins, Ecker and Keller, Js.

Syllabus

Pursuant to statute (§ 46a-64c (a) (1)), it is a discriminatory practice "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . lawful source of income . . . ."

Pursuant further to statute (§ 46a-64c (a) (3)), it is a discriminatory practice "[t]o make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . lawful source of income . . . or an intention to make any such preference, limitation or discrimination."

The plaintiff sought to recover damages for alleged housing discrimination in connection with certain statements that the defendant H, a real estate salesperson, made regarding the plaintiff's participation in the Section 8 Housing Choice Voucher Program. H served as an independent contractor for the named defendant, R Co., a real estate broker. R Co., through H, entered into a listing contract with the defendant V for the exclusive right to lease an apartment owned by V and his wife. Thereafter, the plaintiff, through her real estate agent, B, submitted an application and offer to lease the apartment. After receiving the documents and speaking with V, who wanted the apartment rented by April 1, 2017, H notified B that they were "all set" for a lease commencing on that date. B then sent H blank section 8 paperwork to accompany the plaintiff's application. H and B then proceeded to exchange e-mails and text messages, in which H repeatedly indicated that she was not aware that the plaintiff would be using a section 8 voucher, that she would have to speak to V, that the decision was up to V, and that she was not sure if V would want to wait for the section 8 approval process. H eventually texted B that V had received a competing offer for the apartment, and, several hours later, H texted B that V had accepted the competing offer. The plaintiff alleged that H violated § 46a-64c (a) (1) and (3) by denying her the opportunity to rent the apartment on the basis of her lawful source of income and by making statements that indicated any preference, limitation, or discrimination on the basis of lawful source of income, and, in addition, that R Co., V, and V's wife were vicariously liable for H's statements. After a trial to the court, the trial court rendered judgment for the defendants, concluding that the plaintiff had failed to prove unlawful discrimination. Specifically, with respect to the plaintiff's

claim under § 46a-64c (a) (3), the court determined that H's statements would not convey to an ordinary listener a rejection of or otherwise disfavor a section 8 tenancy. On the plaintiff's appeal from the trial court's judgment, *held*:

1. The trial court incorrectly concluded that H's statements did not indicate any preference, limitation, or discrimination based on lawful source of income, in violation of § 46a-64c (a) (3):

a. Contrary to the plaintiff's claim, the trial court properly applied the ordinary listener standard in determining whether H's statements conveyed an impermissibly discriminatory preference: this court considered the statute's legislative history, as well as cases interpreting federal fair housing laws and the federal counterpart to § 46a-64c (a) (3), in particular, and concluded that, when a notice, statement, or advertisement that allegedly violates § 46a-64c (a) (3) is plainly discriminatory on its face, courts need not examine the surrounding context or the speaker's intent to determine whether the statement indicates any impermissible preference, limitation, or discrimination to the ordinary listener, but, when such a notice, statement, or advertisement is not discriminatory on its face, courts may consider context and the intent of the speaker to aid in determining the way an ordinary listener would have interpreted it; in the present case, the trial court apparently concluded that H's statements were not facially discriminatory, and, because this court agreed with that determination, it was not improper for the trial court to consider the context of H's statements in determining whether they indicated any preference, limitation, or discrimination based on lawful source of income.

b. The trial court's conclusion that H's statements would not have conveyed to an ordinary listener an impermissible preference with respect to lawful source of income was clearly erroneous: there was overwhelming evidence in the trial court's factual findings that supported the plaintiff's housing discrimination claim, as, after indicating that the plaintiff was "all set," H stated four separate times that she was not aware that the plaintiff intended to use a section 8 voucher to pay rent and that she was not sure whether V would want to wait, H had already made two of those statements before receiving the competing offer, meaning that she could not reasonably rely on the competing offer to explain her earlier statements, and, in context, H's statements could not reasonably be understood to mean anything other than that the plaintiff's intention to use her section 8 voucher to pay rent would be an obstacle to her lease application; moreover, the trial court's conclusion in favor of H undercut the broad protections afforded by § 46a-64c (a) (3), which is intended to protect against the psychic injury caused by discriminatory statements, especially in light of this state's public policy that landlords may not discriminate against housing applicants who use section 8 assistance and the legislature's manifest intent to afford low income families access to the rental housing market; in the present case, the plaintiff

indicated that she was able to satisfy V's interest in an April 1, 2017 tenancy, any preference to avoid the administrative process the section 8 program involved was an impermissible consideration under both subdivisions (1) and (3) of § 46a-64c (a), and this court was left with the definite and firm conviction that the trial court's conclusion that H's statements did not express a preference with respect to, or discriminate on the basis of, the plaintiff's lawful source of income was not simply an alternative yet permissible view of the evidence.

2. Although the trial court did not address the issue of vicarious liability, this court determined, as a matter of law, that R Co. was vicariously liable for H's statements but that V and his wife were not, and, accordingly, this court reversed the judgment of the trial court and remanded the case with direction to render judgment for the plaintiff as to liability against H and R Co. under § 46a-64c (a) (3) and for further proceedings to determine, inter alia, the damages to which the plaintiff was entitled: the parties stipulated, and the trial court found, that R Co. is a real estate broker and that H is R Co.'s independent contractor, and, because H acted on behalf of R Co. when she executed the listing contract with V and her statements were made in furtherance of that contract, R Co. was liable to the same extent as if H were its employee pursuant to the statute (§ 20-312a) governing the vicarious liability of real estate brokers; moreover, although V and his wife had an independent contractor relationship with H, there was no evidence that the listing contract gave V any control over H, and, in the absence of any exception to the general rule that employers are not liable for the torts of their independent contractors, V and his wife were not vicariously liable for any of H's statements.

Argued October 14, 2021—officially released April 19, 2022

Procedural History

Action to recover damages for alleged housing discrimination, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the case was tried to the court, *Kowalski*, *J.*; judgment for the defendants, from which the plaintiff appealed. *Reversed in part*; *further proceedings*.

Jeffrey Gentes, for the appellant (plaintiff).

Tracey Lane Russo, for the appellees (named defendant et al.).

Joseph P. Sargent, for the appellees (defendant Anthony Vaccaro et al.).

Opinion

ROBINSON, C. J. In this appeal, we consider the standard for determining whether a statement made in connection with the sale or rental of a dwelling violates General Statutes § 46a-64c (a) (3)[1] by indicating a "preference, limitation, or discrimination," or an "intention to make any such preference, limitation or discrimination," on the basis of an individual's "lawful source of income . . . ." The plaintiff, Carmen Lopez, appeals[2] from the judgment of the trial court rendered in favor of the defendants, William Raveis Real Estate, Inc. (Raveis), Sarah Henry, a licensed real estate salesperson, and Anthony Vaccaro and Eve Vaccaro,[3] in this action alleging housing discrimination in violation of § 46a-64c (a). On appeal, the plaintiff claims that the trial court, in considering whether Henry violated § 46a-64c (a) (3) by making certain statements in the course of renting an apartment owned by the Vaccaros, improp-

[1] General Statutes § 46a-64c (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section:

"(1) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, familial status or status as a veteran.

* * *

"(3) To make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, creed, color, national origin, ancestry, sex, gender identity or expression, marital status, age, lawful source of income, familial status, learning disability, physical or mental disability or status as a veteran, or an intention to make any such preference, limitation or discrimination. . . ."

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we subsequently granted the plaintiff's motion to transfer this appeal from the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

[3] For purposes of convenience, we refer to the defendants individually as appropriate. Consistent with the trial court's memorandum of decision, we refer to Anthony Vaccaro individually as "Vaccaro" and to Eve Vaccaro by her full name.

erly considered whether Henry had the subjective intent to discriminate on the basis of lawful source of income when she made those statements. The plaintiff specifically contends that she is entitled to judgment in her favor because (1) Henry's statements were facially discriminatory, rendering her subjective intent irrelevant as a matter of law, and (2) even if we were to conclude that Henry's statements were not facially discriminatory, the trial court nevertheless incorrectly determined that the statements, considered in context, did not convey an impermissible preference. We conclude that, although the trial court applied the proper legal standard in considering the plaintiff's claims under § 46a-64c (a) (3), its ultimate conclusion as to liability on the facts of this case was clearly erroneous with respect to Henry. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following relevant facts, as found by the trial court, and procedural history. At all relevant times, the Vaccaros owned a two family home located at 5 Prince Street in Danbury. On January 28, 2017, Vaccaro entered into an exclusive right to lease listing contract with Raveis, through its authorized representative, Henry, to lease a rental apartment located in the two family home (rental apartment). Henry is a real estate salesperson who is affiliated with Raveis, a real estate broker, pursuant to an independent contractor agreement. Vaccaro informed Henry that he wanted to ensure a new tenancy was in place for the rental apartment by April 1, 2017. Henry listed the rental apartment on the multiple listing service database, and, on March 9, the plaintiff, through her real estate agent, Sarah Becker, submitted to Henry an application and offer to lease the rental apartment. Henry received the documents on March 11, and, despite the plaintiff's having left blank portions of the offer to lease,[4] Henry

[4] The trial court found the following facts with respect to the plaintiff's offer to lease: "The offer to lease identified [the plaintiff] as the tenant,

forwarded the offer to Vaccaro on March 12. The next day, March 13, following a phone call with Vaccaro, Henry e-mailed Becker: "[A]ll set for April 1st. I will get the lease over to you. [It's] one month rent and one month security."

Later on March 13, Becker sent Henry blank paperwork for the Section 8 Housing Choice Voucher Program (section 8) to accompany the plaintiff's application to lease the rental apartment. After Henry received the section 8 documents on March 15, the following conversation occurred:

At 8:29 a.m., Henry e-mailed Becker: "*I wasn't aware that this was a* [*s*]*ection 8 tenant.* I have to speak with [Vaccaro] today. [He] is looking for a security deposit for this rental . . . . I will give you a call later today."

At 9:46 a.m., Becker e-mailed Henry: "To whom should [the] check be made out . . . . I can be there for [the] housing inspection if you like, but [I] will need access to [the] basement. It's oddly one of the best parts of [my] working with housing—free inspections. I had a state paid tenant in one of my buildings for [more than eight] years (not [section] 8 but similar), the direct deposit payments and yearly inspections were great really—that agency monitored the condition of the apartment, and they kept a paper trail and photos. No disagreements over who did what to a place, plus I

Prince Street as the premises, a lease term starting on April 1, 2017, ending '[one] year, may renew,' and a lease price of $1500 per month, but left a blank where it would have been indicated that an initial deposit was tendered with the offer. There were other blanks that were not filled in on the offer to lease, including two consecutive lines that were left blank, as follows:

"Security Deposit: Payable to Landlord or Landlord's Agent upon Signing of Lease: $ _____

"Additional Rent: Payable to Landlord or Landlord's Agent upon Signing of Lease: $ _____

"Although these lines were left blank, the words 'AS REQUESTED' were handwritten next to the additional rent line. . . . The offer to lease further provided that it would expire at midnight 'ASAP' if not accepted by all parties and identified as a contingency 'kitchen sink faucet leaking, needs repair.' "

knew I'd get paid [which made it] easier to sleep at night. Plus to get a voucher the state has already checked out the tenant financially and their background, so that is a huge benefit to a landlord as well. Win-win. [Vaccaro] hasn't had anyone with voucher assistance before? You can let him know that most of the rent will come from the tenant, and a part from the state via direct deposit, and other than that it's pretty normal. Let me know how I can help. . . . Will need to get paperwork in ASAP so [we] can have [the] place inspected fast to meet [the] April 1 start date. Usually a place may fail the first time on a stuck/broken window or no [ground fault circuit interrupter (GFCI)] outlets, basic safety issues that should be in place for any tenant, and then passes on [the] second trip. If [the] windows function OK and [there are GFCI] outlets by [the] sinks, [it] should be in good shape, place looks nice."

At 10:41 a.m., Henry texted Becker: "Good morning *I was not aware of the* [*s*]*ection 8 when I spoke with you I'm not sure* [*Vaccaro*] *would want to wait. I know it takes a couple of weeks for the process and he wants to* [*rent*] *it by April 1st* I will speak with him today and let you know thanks." (Emphasis added.)

At 12:31 p.m., Henry texted Becker: "I will speak with [Vaccaro] later today to make a decision about the rental."

At 1:36 p.m., Henry texted Becker: "*You did not inform me of section 8 when I spoke with you about the offer. I have to present that to* [*Vaccaro*]. [*I'm*] *not sure if* [*he*] *wants to* [*wait*] *through the process.* It is up to my client. We do not have a signed offer yet." (Emphasis added.)

At 1:50 p.m., Henry texted Becker: "[Vaccaro] has another offer he's also looking at we do not have an offer without a signed lease. *You were not upfront with me with* [*s*]*ection 8 and I didn't* [*present it*] *to* [*Vaccaro*]

that way as well. It's up to [*Vaccaro*] *what he would like to do with the offers as well as the waiting.* I will get back to you tonight thank you." (Emphasis added.)

At 1:52 p.m., Becker texted Henry: "It is not necessary to identify [my] client as having a voucher to all places she applies to, I respect her privacy, only that income is sufficient."

At 2:23 p.m., Henry texted Becker: "Yes, it is necessary by law. *It needs to be on the offer if paying from a* [*third*] *party.* [Vaccaro] will let me know tonight either way thanks." (Emphasis added.)

At 7:09 p.m., Henry texted Becker: "Hi, [Vaccaro] has decided to go with the other offer, [s]orry."

As reflected in the conversation, Henry received a second offer to lease on behalf of Everton Thompson and Saudia Dyer (Thompson and Dyer offer) on March 15, 2107, at 11:37 a.m. The Thompson and Dyer offer was accompanied by a completed rental application. It also proposed a lease term beginning on March 15, 2017, and ending on February 28, 2018, a lease price of $1500 per month, and a security deposit of $3000, and identified no contingencies. Vaccaro instructed Henry to accept the Thompson and Dyer offer and had a fully executed lease for the rental apartment by March 18.

The plaintiff subsequently brought this action for, inter alia, compensatory damages, punitive damages, and declaratory and injunctive relief, claiming that the defendants violated § 46a-64c (a) by (1) denying her the opportunity to rent property on the basis of her lawful source of income,[5] in violation of subdivision (1) of

[5] By way of background, General Statutes § 46a-63 (3) defines "lawful source of income" as "income derived from Social Security, supplemental security income, *housing assistance*, child support, alimony or public or state-administered general assistance." (Emphasis added.) "[T]he lawful sources of income protected from discrimination by § 46a-64c include 'section 8 rental subsidies as a form of housing assistance.' " *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250 Conn. 763, 775, 739 A.2d 238 (1999).

§ 46a-64c (a), and (2) making a statement with respect to the rental of a dwelling that indicated a preference, limitation, or discrimination on the basis of lawful source of income, in violation of subdivision (3) of § 46a-64c (a). The case was tried to the court over four days. The trial court issued a memorandum of decision and rendered judgment in favor of the defendants, concluding that the plaintiff failed to prove that the defendants had discriminated against her on the basis of her lawful source of income in light of Henry's statements. Given its conclusion as to Henry's liability, the trial court also declined to reach the plaintiff's derivative claims against Raveis and the Vaccaros.

Subsequently, the plaintiff filed a motion for reargument and reconsideration on the grounds that the trial court either failed to analyze her § 46a-64c (a) (3) claims or improperly analyzed those claims under the mixed motive analysis applicable to § 46a-64c (a) (1) claims. The trial court granted the plaintiff's motion and issued an addendum to its memorandum of decision, further explaining its judgment in favor of the defendants on the plaintiff's § 46a-64c (a) (3) claims. Specifically, the trial court stated in that addendum that it "must determine whether Henry's statements convey a preference against Lopez to an ordinary listener, hearing the statements in context." Applying that standard, the trial court ultimately concluded that Henry's statements did "not convey a rejection [of] or disfavor[ing] . . . a section 8 tenancy" and, therefore, did not violate § 46a-64c (a) (3).[6] This appeal followed.

[6] In reaching this conclusion, the trial court focused extensively on Becker and her communications with the plaintiff. The trial court stated: "[F]rom Becker's messages and conduct on March 15, it appears that Becker immediately jumped to the conclusion that [the plaintiff's] section 8 participation was a problem. . . .

"Then, in an exchange of messages between Becker and [the plaintiff] beginning at 10:59 a.m., Becker asked [the plaintiff] if she could call her housing contact because 'the landlord is a flight risk' and is 'trying to back off which is illegal and I will report them.' . . . By 1:35 p.m., Becker messaged [the plaintiff] that '[she] called the president of the real estate board.

On appeal, the plaintiff asks us to direct judgment in her favor, claiming that Henry's statements were facially discriminatory on the basis of her lawful source of income, in violation of § 46a-64c (a) (3), rendering it unnecessary to consider the context of those statements. The plaintiff further claims that the record supports a conclusion as a matter of law that the other defendants, Raveis and the Vaccaros, are vicariously liable for Henry's statements. We address each claim in turn.

I

We begin with the plaintiff's claims with respect to whether the trial court correctly determined that Henry's statements did not violate § 46a-64c (a) (3). Specifically, the plaintiff argues that (1) the trial court applied an improper legal standard in considering this claim, and (2) the trial court's finding that Henry's statements did not convey a discriminatory message to an ordinary listener was clearly erroneous.

A

We first address the plaintiff's claim that the trial court improperly applied the ordinary listener standard articulated by the United States Court of Appeals for the Second Circuit in *Soules* v. *United States Dept. of Housing & Urban Development*, 967 F.2d 817 (2d Cir. 1992), when it considered the context surrounding Henry's statements in determining whether they stated a preference or discriminated on the basis of lawful source of income, in violation of § 46a-64c (a) (3). Relying on the Second Circuit's subsequent decision in

If they do continue with the other offer (that suddenly exists) you have [a] legal case against [the] landlord [and] his agent. Minimum fine is around [$5000] to them.' By 9:05 p.m., Becker told [the plaintiff] that she had a 'perfect paper trail on this discrimination case and [was] reporting [it] to [the relevant state authorities]' and had identified counsel who was willing to help her pursue a discrimination claim."

Rodriguez v. *Village Green Realty, Inc.*, 788 F.3d 31 (2d Cir. 2015), the plaintiff argues that, under *Soules*, the proper analysis of facially discriminatory statements like those made by Henry is limited to whether an ordinary listener would infer that the speaker had stated a preference against a member of the protected class, and does not take into account whether the speaker had the subjective intent to discriminate. To this end, the plaintiff also argues that the trial court improperly failed to decide at the outset whether Henry's statements were facially discriminatory in determining whether it was appropriate to consider their context, instead concluding that it is *always* appropriate to consider context in determining whether a statement violates § 46a-64c (a) (3).

In response, Raveis and Henry argue that the plaintiff misreads *Soules* and that, under that case, the trial court properly considered context in determining whether Henry's statements violated § 46a-64c (a) (3). The Vaccaros, relying on several federal district court decisions following *Soules*, namely, *Thurmond* v. *Bowman*, 211 F. Supp. 3d 554, 566 (W.D.N.Y. 2016), appeal dismissed, Docket No. 16-3545, 2016 WL 10100759 (2d Cir. November 1, 2016), *Short* v. *Manhattan Apartments, Inc.*, 916 F. Supp. 2d 375, 394 (S.D.N.Y. 2012), and *Mancuso* v. *Douglas Elliman LLC*, 808 F. Supp. 2d 606, 625 (S.D.N.Y. 2011), argue that the trial court properly applied the ordinary listener test, as utilized in the Second Circuit, because the ordinary listener always considers statements in their context. We agree with the plaintiff's argument that the ordinary listener considers context only when necessary to analyze a notice, statement, or advertisement that is not clearly discriminatory on its face, but, applying that standard, we conclude that the trial court properly considered context in the present case.

Whether the trial court applied the proper standard for analyzing the statements under § 46a-64c (a) (3)

presents an issue of statutory construction that raises a question of law, over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). "It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing statutes to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Ledyard* v. *WMS Gaming, Inc.*, 338 Conn. 687, 696, 258 A.3d 1268 (2021).

As required by § 1-2z, we begin with the text of the statute, which provides in relevant part that it is "a discriminatory practice" to "make, print or publish, or cause to be made, printed or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . lawful source of income . . . or an intention to make any such preference, limitation or discrimination." General Statutes § 46a-64c (a) (3); see footnote 1 of this opinion (complete text of § 46a-64c (a) (1) and (3)).

Section 46a-64c (a) (3) is silent as to the proper standard by which to analyze statements alleged to violate the statute, leaving the statute susceptible to multiple, plausible interpretations as to the proper standard. See *Thomas* v. *Dept. of Developmental Services*, 297 Conn. 391, 400, 999 A.2d 682 (2010) (silence as to scope of provision rendered statute ambiguous with respect to its scope because there was more than one plausible interpretation). When silence renders a statutory provision ambiguous "with respect to [the issue at hand], our analysis is not limited by . . . § 1-2z . . . . In addition to the words of the statute itself, we look to . . . the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter." (Citation omitted; internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 407, 944 A.2d 925 (2008).

Turning to the legislative history, we note that then state Senator Richard Blumenthal described the bill that was enacted in 1990 as the Connecticut Discriminatory Housing Practices Act as having "all the standards and assurances that exist under federal law" and "incorporat[ing] the federal [Fair Housing Act, 42 U.S.C. 3601 et seq. (federal act)] into our state statute . . . ." 33 S. Proc., Pt. 2, 1990 Sess., p. 3494. With no on point discussion in the legislative history of the provision enacted as § 46a-64c (a) (3), we are left to consider how the state fair housing act relates to common-law principles and federal fair housing laws. In interpreting our state fair housing laws, "we are guided by the cases interpreting federal fair housing laws . . . despite differences between the state and federal statutes." (Citation omitted.) *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 202, 596 A.2d 396 (1991); see, e.g., *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 407 ("this court previously has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws"). We find particularly instructive the constructions of the federal act by the United States Court of Appeals for the Second Circuit in the absence of a United States Supreme Court decision on point. See *Feehan* v. *Marcone*, 331 Conn. 436, 478, 204 A.3d 666 ("[i]n considering claims of federal law, it is well settled that, when the United States Supreme Court has not spoken, we find decisions of the Second Circuit particularly persuasive"), cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019). Accordingly, we will look to cases interpreting 42 U.S.C. § 3604 (c),[7] which is the

[7] Section 3604 (c) of title 42 of the 2018 edition of the United States Code provides that it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination."

federal counterpart to § 46a-64c (a) (3), even though the state statute is unique insofar as it includes lawful source of income as a protected class.

Our analysis begins with the Second Circuit's decision in *Ragin* v. *New York Times Co.*, 923 F.2d 995 (2d Cir.), cert. denied, 502 U.S. 821, 112 S. Ct. 91, 116 L. Ed. 2d 54 (1991), in which that court analyzed the statutory language of 42 U.S.C. § 3604 (c) in upholding the denial of a motion to dismiss an action claiming that a newspaper had violated the federal act by publishing real estate advertisements that featured virtually no black models, thus indicating a preference for white purchasers. See id., 998–1000. "Beginning [its] analysis with the statutory language, [the Second Circuit noted that] the first critical word is the verb 'indicates.' Giving that word its common meaning, [the court] read the statute to be violated if an ad for housing suggests to an ordinary reader that a particular race is preferred or dispreferred for the housing in question." Id., 999.

"[The court] read the word 'preference' to describe any ad that would discourage an ordinary reader of a particular race from answering it." Id., 999–1000. "Moreover, the statute prohibits *all* ads that indicate a racial preference to an ordinary reader *whatever the advertiser's intent*. To be sure, the intent of the creator of an ad *may* be relevant to a factual determination of the message conveyed . . . but *the touchstone is nevertheless the message*. If, for example, an advertiser seeking to reach a group of largely white consumers were to create advertisements that discouraged potential black consumers from responding, the statute would bar the ads, [regardless of] whether the creator of the ad had a subjective racial intent."[8] (Citation omitted; emphasis

[8] In responding to the plaintiff's reliance on *Ragin* v. *New York Times Co.*, supra, 923 F.2d 995, Raveis and Henry set forth this quoted language without analysis or context. Having considered it, we understand the Second Circuit to mean that the analysis must begin with the message itself, with the speaker's subjective intent only relevant when a court must look beyond

added.) Id., 1000. The court also noted that the "ordinary reader is neither the most suspicious nor the most insensitive of our citizenry." Id., 1002. Considering the advertisement at issue in the context of twenty years of advertisements, the Second Circuit determined that it presented a viable claim of a violation of 42 U.S.C. § 3604 (c) by stating racial preferences in the context of the sale of real estate, emphasizing "a long-standing pattern of publishing real estate ads in which models of potential consumers are always white while black models largely portray service employees, except for the exclusive use of black models for housing in predominantly black neighborhoods." Id., 1001.

Subsequently, the Second Circuit more clearly delineated when and why the ordinary listener considers evidence beyond the statement itself in *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 817. In *Soules*, the court considered whether a real estate agent violated the federal act by asking a prospective tenant how old her child was because "an elderly person lived in the first floor unit, and . . . she did not want an upstairs resident who would make too much noise." Id., 820. The court stated that, "[i]n cases [in which statements] are clearly discriminatory, a court may look at [the statement] and determine whether it indicates an impermissible preference to an ordinary reader, and inquiry into the author's professed intent is largely unnecessary." Id., 824. The court also stated that, because written content does not communicate the inflection of the speaker, "courts must turn to other evidence in determining whether a violation of the [federal act] occurred." Id., 825. "[Fact finders] may examine intent . . . because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it." Id. Deeming the real estate agent's statement not facially discriminatory, the

the plain language of the statement at issue to determine whether it conveys an impermissible preference.

court stated that the context and intent of the speaker could either expose an impermissible preference or simply explain why the statement was made, and upheld the administrative law judge's conclusion that the statements at issue were made to determine whether the prospective tenants were noisy.[9] Id., 825–26; see also *Jancik* v. *Dept. of Housing & Urban Development*, 44 F.3d 553, 554–55 (7th Cir. 1995) (considering context, including two statements that indicated express preference against children and teenagers, to determine that " 'mature person preferred' " advertisement expressed impermissible preference).

Significantly, the Second Circuit also suggested in *Soules* that context is particularly helpful when there may be a legitimate reason for inquiring into one's status as a protected class, observing that, "whereas [t]here is simply no legitimate reason for considering an applicant's race . . . there are situations in which it is legitimate to inquire about the number of individuals interested in occupying an apartment and their ages." (Internal quotation marks omitted.) *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 824. "In [*Soules*], for example, [the real estate agent] asked [the perspective tenant] whether her child was noisy and later stated that an elderly tenant 'would probably not be able to take a noisy child running around.' Depending on the context and intent of the speaker, the latter question either could intimate an impermissible preference or simply might explain—to a desired tenant—why the first question had been asked. It also might send a message that a tenant with a noisy child will

[9] The Vaccaros argue that the court in *Soules* stated the proper inquiry was whether the ordinary listener, in light of all the circumstances, would have interpreted the statement to indicate an impermissible preference. It is true that the court stated such, but it did so in a portion of the decision immediately *preceding* this section, which distinguished the statements in question from those that are facially discriminatory and discussed the distinct analysis that facially discriminatory statements warrant. See *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 824.

probably be confronted with regular complaints from the elderly tenant making the apartment less attractive to the prospective tenant." Id., 825.

Finally, in *Rodriguez* v. *Village Green Realty, Inc.*, supra, 788 F.3d 36–39, the Second Circuit considered whether there was sufficient evidence to raise a genuine issue of material fact as to whether a real estate agent had violated 42 U.S.C. § 3604 (c) by making certain comments with respect to the tenants' disabled child. Concluding that 42 U.S.C. § 3604 (c) could be violated even if the person who was the subject of the statements did not actually qualify as disabled under the federal act; id., 41; the court explained that it would contradict the language of 42 U.S.C. § 3604 (c) to hold that the inquiry depended on the speaker's subjective state of mind. See id., 53. Rather, the inquiry under 42 U.S.C. § 3604 (c) depends on whether the challenged statement conveyed a prohibited preference to the ordinary listener, with the " 'touchstone' " of the inquiry being the message itself.[10] Id. Section 3604 (c) prohibits all ads that indicate an impermissible preference to an ordinary reader, regardless of intent. See id. However, when the message does not convey an impermissible preference on its face, courts may turn to evidence beyond the message to determine whether the ordinary reader would, in fact, interpret the message to violate the statute. See id.

Guided by this Second Circuit case law, we conclude that, when a notice, statement, or advertisement that allegedly violates § 46a-64c (a) (3) is plainly discriminatory on its face, courts need not examine the surround-

[10] The defendants argue that the court in *Rodriguez* did not articulate a standard for facially discriminatory statements. However, the court expressly stated that, "[u]nder [42 U.S.C. §] 3604 (c), the speaker's subjective belief is not determinative. What matters is whether the challenged statements convey a prohibited preference or discrimination to the ordinary listener." (Emphasis omitted.) *Rodriguez* v. *Village Green Realty, Inc.*, supra, 788 F.3d 53.

ing context or the speaker's intent to determine whether the statement indicates any impermissible preference, limitation, or discrimination to the ordinary listener. When, however, such a notice, statement, or advertisement is not facially discriminatory, courts may consider the context and intent of the speaker to aid in determining the way an ordinary listener would have interpreted it.[11] In the present case, the trial court did not expressly conclude whether the statements were facially discriminatory, stating only that "Henry made no statement that conveys the message that she was disinclined to proceed with a prospective . . . tenancy [by the plaintiff] because of section 8 program participation." We understand that statement to mean that the court concluded that the statements were not facially discriminatory—a conclusion with which we agree. Thus, it was not improper for the trial court to consider the context of the statements in determining whether they stated a preference with respect to lawful source of income, in violation of § 46a-64c (a) (3).[12]

[11] The three federal District Court cases cited by the Vaccaros do not support their argument that the ordinary listener always considers context in evaluating an allegedly discriminatory statement. In *Mancuso*, the court proceeded to a consideration of context only following its initial assessment that the statement in question did "not clearly convey an impermissible preference to an ordinary person." *Mancuso* v. *Douglas Elliman, LLC*, supra, 808 F. Supp. 2d 626; see *Short* v. *Manhattan Apartments, Inc.*, supra, 916 F. Supp. 2d 394 (reciting standard from *Mancuso*, in which statements in question were not clearly discriminatory and, thus, warranted consideration of context). Further, although the court in *Thurmond* stated that the "ordinary listener hears the statement in context," it proceeded to forgo a consideration of the context as the statements at issue therein were "plainly" in violation of the federal act. *Thurmond* v. *Bowman*, supra, 211 F. Supp. 3d 566; see id., 567 ("[the] statements, in and of themselves, are enough to trigger liability under [42 U.S.C.] § 3604 (c), because the intent of the speaker is not determinative of liability").

[12] We note that the plaintiff claims that the trial court's finding that Henry did not subjectively intend to discriminate was clearly erroneous. We need not consider this claim because, although it would have been proper for the trial court to consider Henry's subjective intent insofar as the statements were not facially discriminatory, we nevertheless agree with Raveis and Henry that the trial court did not do so in its § 46a-64c (a) (3) analysis.

B

We now turn to the plaintiff's contention that the trial court incorrectly concluded that Henry's statements, even when considered in context, would not have conveyed an impermissible preference to an ordinary listener. Under Second Circuit case law, the ordinary listener inquiry is one of fact. See, e.g., *Ragin* v. *Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) ("[T]he inquiry directed by *Ragin* [v. *New York Times Co.*, supra, 923 F.2d 995] is whether a *hypothetical ordinary reader* would find that a defendant's ads expressed an impermissible racial preference. Like the inquiry in negligence cases concerning whether a defendant's conduct conformed with that of the reasonable person, this question is one that the [fact finder] can answer by viewing the ads and the defendants' conduct and then applying common sense." (Emphasis in original.)); *Soules* v. *United States Dept. of Housing & Urban Development*, supra, 967 F.2d 825 ("[i]t is for this reason that [fact finders] may examine intent, not because a lack of design constitutes an affirmative defense to [a] . . . violation [of the federal act], but because it helps determine the manner in which a statement was made and the way an ordinary listener would have interpreted it"); *Ragin* v. *New York Times Co.*, supra, 1000 ("the intent of the creator of an ad may be relevant to a *factual determination* of the message conveyed" (emphasis added)); *Gilead Community Services, Inc.* v. *Cromwell*, 432 F. Supp. 3d 46, 68 (D. Conn. 2019) ("whether the various statements . . . '*convey* a prohibited pref-

Indeed, in its memorandum of decision, the trial court focused on the plaintiff's § 46a-64c (a) (1) claim, including in its findings. It does not address whether the trial court found that Henry intended to indicate a preference in her statements to Becker. The trial court's addendum, which specifically addresses the § 46a-64c (a) (3) claim, similarly lacks a finding as to whether Henry intended her statements to Becker to be discriminatory. The addendum relies on context only to determine how the ordinary listener would have interpreted the nonfacially discriminatory statements.

erence or discrimination to the ordinary listener' . . . should be determined by the jury" (citation omitted; emphasis in original)).

"A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when *although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" (Emphasis added; internal quotation marks omitted.) *McKay* v. *Longman*, 332 Conn. 394, 417, 211 A.3d 20 (2019). Further, "[b]ecause it is the trial court's function to weigh the evidence and [to] determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Proctor*, 324 Conn. 245, 259, 152 A.3d 470 (2016).

We begin with the facts that the trial court included in its addendum discussing the plaintiff's § 46a-64c (a) (3) claim. As support for its conclusion that Henry's statements did not violate § 46a-64c (a) (3), the trial court cited the fact that Henry forwarded a *sample* lease to the plaintiff after finding out about her section 8 status. We fail to see the significance of this fact in light of the overwhelming evidence in the trial court's findings that support the plaintiff's § 46a-64c (a) (3) claim.[13] Immediately prior to learning about the plaintiff's section 8 status, Henry had communicated that the deal was "all set for April 1st." After Henry learned

[13] The trial court also spent a significant portion of its discussion on text messages exchanged between Becker and the plaintiff subsequent to Becker's receipt of the text messages from Henry. See footnote 6 of this opinion. We disagree with the trial court's extensive reliance on these statements because Becker's subjective reaction to Henry's statements hardly informs how an ordinary listener would understand Henry's statements.

of the plaintiff's section 8 status, she abruptly shifted gears to inform Becker that (1) they did "not have an offer without a signed lease," (2) Henry was "not sure [Vacarro] would want to wait," as she knew it took "a couple of weeks for the process," and (3) according to Henry, Vaccaro had to decide "whether he would want to wait for the section 8 program process to run its course given his expressed desire to have the [rental apartment] rented by April 1, 2017," as the trial court stated. In the hours following her receipt of the plaintiff's section 8 forms, Henry stated four separate times that she was not previously aware of the plaintiff's intention to use a section 8 voucher to pay the rent.

The Vaccaros argued that the fact that the plaintiff's initial paperwork was incomplete was also relevant to place Henry's statements in context, as was the existence of the competing offer from Thompson and Dyer. The facts, however, undermine the strength of this argument. After the plaintiff's initial submission of incomplete paperwork, Henry had stated that the deal was still "all set for April 1st." In regard to the competing offer, the trial court found that it was e-mailed to Henry at 11:37 a.m. on March 15, 2017. By that time, Henry had already made two of the four statements at issue and had stated that she was not sure Vaccaro would want to wait. The chronology of events does not reasonably permit her to rely on the competing offer to explain the statements that she made earlier that morning.

Thus, the trial court's ultimate finding that the ordinary listener would not have inferred that Henry's statements indicated any preference, limitation or discrimination was inconsistent with all but one of the subordinate facts it found. Put differently, Henry's statements could not reasonably be understood in context to mean anything other than that the plaintiff's intention to use her section 8 voucher to pay the rent would be a stumbling block to completing the transaction.

Beyond being inconsistent with the other facts it found, the trial court's conclusion undercuts the broad protections provided by § 46a-64c (a) (3). As the plaintiff argues, the purpose of 42 U.S.C. § 3604 (c), the federal provision on which § 46a-64c (a) (3) is modeled, "is to protect against the 'psychic injury' caused by discriminatory statements made in relation [to] the housing market."[14] See R. Schwemm, "Discriminatory Housing Statements and § 3604 (c): A New Look at the Fair Housing Act's Most Intriguing Provision," 29 Fordham Urb. L.J. 187, 249–50 (2001); see also *United States* v. *Space Hunters, Inc.*, 429 F.3d 416, 424–25 (2d Cir. 2005) ("[T]he [D]istrict [C]ourt's view that [the provision's] purpose is to 'prevent expressions that result in the denial of housing' is too narrow. The statute also 'protect[s] against [the] psychic injury' caused by discriminatory statements made in connection with the housing market. . . . If that were not so, Congress likely would not have made [the provision] applicable to dwellings that are otherwise exempt from [the act's] prohibition on discrimination." (Citations omitted.)). Our statute mirrors the broad language of the federal provision and differs only in its inclusion of additional protected classes, such as lawful source of income. See footnotes 1 and 7 of this opinion.

The protections against psychic injury provided by § 46a-64c (a) (3) are particularly significant with respect

[14] We note that 42 U.S.C. § 3604 (c) is itself broader than the other federal antidiscrimination laws on which it is modeled, namely, Title VII of the Civil Rights Act, which provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to print or publish or cause to be printed or published any notice or advertisement relating to employment . . . indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-3 (b) (2018). Section 3604 (c) expanded those protections into the fair housing context by adding "statement[s]" to the practices banned by the provision and by adding language that brought even stated intentions under the protection of fair housing laws. 42 U.S.C. § 3604 (c) (2018). That expansion was consistent with an overarching goal of the federal act, which is to promote "truly integrated and balanced living patterns." 114 Cong. Rec. 3422 (1968), remarks of Senator Walter F. Mondale.

to lawful source of income. "Unlike the federal provisions governing section 8, the provisions of § 46a-64c, which require landlords to accept otherwise qualified tenants whose lawful source of income may include section 8 housing assistance, are *mandatory*. Pursuant to this statute, it is a part of the public policy of this state that landlords may not discriminate against housing applicants because such applicants, otherwise qualified as potential tenants, look to section 8 assistance for payment of the stipulated rent."[15] (Emphasis added.) *Commission on Human Rights & Opportunities* v. *Sullivan Associates*, 250 Conn. 763, 774, 739 A.2d 238 (1999). The statute reflects "the legislature's manifest intent to afford low income families access to the rental housing market." Id., 782. Given the mandatory nature of the section 8 program in Connecticut, landlords may not justify disfavoring housing vouchers, which are a lawful source of income, by claiming reluctance to undertake the various administrative burdens that attend participation, such as undergoing rental unit inspections.[16]

[15] In contrast, in states with voluntary section 8 programs, statutes banning lawful source of income discrimination often have been read to allow landlords to refuse a section 8 tenant for legitimate business reasons related to compliance with that program's requirements. See, e.g., *Dussault* v. *RRE Coach Lantern Holdings, LLC*, 86 A.3d 52, 60 (Me. 2014) ("We recognize the . . . purpose [of the Maine Human Rights Act] to protect public assistance recipients' rights to secure decent housing. We will not, however, read into [that act] a mandate that landlords accept terms of tenancy that are otherwise required only if the landlord chooses to participate in a voluntary federal program."); *Edwards* v. *Hopkins Plaza Ltd. Partnership*, 783 N.W.2d 171, 177 (Minn. App. 2010) ("Minnesota law does not require property owners in Minnesota to participate in [s]ection 8 programs. . . . And we conclude that refusal to participate in a voluntary program for a legitimate business reason does not constitute discrimination under the [Minnesota Human Rights Act]." (Citations omitted.)).

[16] However, "nothing in the statutes forbidding discrimination against tenants receiving section 8 rental subsidies requires landlords to accept tenants who may be unqualified to rent for nondiscriminatory reasons such as, for example, a poor rental history, poor references, or poor credit. The target of the statutes is, instead, the unspoken presumption that section 8 assistance recipients, by virtue only of their source of income, are undesirable tenants for a landlord's rental properties." (Footnote omitted.) *Commission on*

See id., 778–82 (rejecting claim that exception existed under antidiscrimination provision allowing landlords not to participate in section 8 program by refusing use of statutorily mandated lease); see also *DiLiddo* v. *Oxford Street Realty, Inc.*, 450 Mass. 66, 77, 876 N.E.2d 421 (2007) (declining to carve out exception to mandatory section 8 program in Massachusetts for landlords facing substantial economic harm from compliance with its requirements).

Thus, given that the plaintiff indicated that she would have been able to meet Vaccaro's desired occupancy date of April 1, 2017, particularly with Becker's demonstrated desire to expedite the transaction, any preference to avoid the administrative process of the section 8 program in this transaction could not have been a determinative consideration in Vaccaro's rental decision under § 46a-64c (a) (1), which, ipso facto, renders it impermissible under § 46a-64c (a) (3) for Henry to express that Vaccaro planned to consider the length of the section 8 process in his rental decision.[17] Henry stated that she was "not sure if [Vaccaro] wants to [wait] through the process" and that it was up to him. By expressing that Vaccaro may not want to participate

Human Rights & Opportunities v. *Sullivan Associates*, supra, 250 Conn. 776.

[17] This is not to say that the plaintiff's status as a section 8 voucher holder automatically required the Vaccaros to rent the apartment to her, or otherwise privilege her application over other applications. Indeed, the trial court found credible Vaccaro's testimony that Thompson and Dyer presented a better offer. This illustrates the distinction between the protections offered by subdivisions (1) and (3) of § 46a-64c (a). Subdivision (3) prohibits all statements that express even an intention to indicate a preference or limitation based on any of the protected classes. As a result, there can be a violation of § 46a-64c (a) (3) even in the absence of a violation of § 46a-64c (a) (1). Put differently, the defendants did not violate the housing discrimination statute by the act of communicating and taking a better offer. Rather, Henry violated the statute by making a statement that an ordinary listener surely would understand to mean that the section 8 approval process could be a determinative consideration in the rental decision, when, as previously discussed, it cannot be.

in the section 8 approval process, and that the transaction may not proceed after Becker had surprised her with the plaintiff's section 8 status, Henry indicated that the administrative process would be a significant consideration in Vaccaro's rental decision, which is a clear indication of an intention to make a preference based on lawful source of income.

The trial court ultimately concluded that Henry's statements "would not have been understood as discriminatory by an ordinary listener . . . ." However, a violation of § 46a-64c (a) (3) does not require discriminatory animus. Nor does it require a rejection of or disfavoring a lawful source of income. Section 46a-64c (a) (3) bars statements that a reasonable listener would understand to *convey* an intention to make any such "preference, limitation, or discrimination . . . ." In light of the broad language of § 46a-64c (a) (3) and the abundance of facts supporting an inference that the ordinary listener would have understood Henry's statements to fall within the reach of the statute, we are left with a definite and firm conviction that the trial court's conclusion was not simply an alternative yet permissible view of the evidence. See, e.g., *American Diamond Exchange, Inc.* v. *Alpert*, 101 Conn. App. 83, 96, 920 A.2d 357 ("whe[n] there are two permissible views of the evidence, the [fact finder's] choice between them cannot be clearly erroneous" (internal quotation marks omitted)), cert. denied, 284 Conn. 901, 931 A.2d 261 (2007). It was clear error for the trial court to find that Henry's statements did not indicate even so much as an intention to make an impermissible consideration of section 8 in the rental decision. Accordingly, we conclude that the plaintiff is entitled to judgment as a matter of law as to liability on her § 46a-64c (a) (3) claim against Henry,[18] with remand to the trial court

[18] Although there are instances in which a reversal by this court based on a holding of clear error required a new trial as an appellate remedy; see, e.g. *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015) (determining

necessary for consideration of the plaintiff's claims for damages, attorney's fees, and declaratory and injunctive relief. See, e.g., *Channing Real Estate, LLC* v. *Gates*, 326 Conn. 123, 132–33, 161 A.3d 1227 (2017).

II

Because the trial court rendered judgment in favor of the defendants on the basis of its conclusion as to Henry's statements, it did not reach the plaintiff's derivative liability claims. The plaintiff argues that there is sufficient evidence in the record to conclude as a matter of law that, pursuant to General Statutes § 20-312a,[19] Raveis is vicariously liable for Henry's conduct. The plaintiff also asserts that, by virtue of authorizing Raveis and Henry to list a unit that he and his wife owned, Vaccaro created an agency relationship with

that requirement of different legal standard generally entitles parties to new trial); *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 225, 990 A. 2d 326 (2010) (trial court's damages award was clearly erroneous and case was remanded for new trial limited to determining adequate damages); a review of our case law does not require a new trial as to liability in the present case. We find persuasive our recent decision in *Bilbao* v. *Goodwin*, 333 Conn. 599, 217 A.3d 977 (2019). In that case, we reviewed the trial court's factual determination that an agreement was not supported by consideration. See id., 617. In determining that the trial court's finding was clearly erroneous and that the agreement was supported by consideration, this court cited inconsistent facts and facts supporting the contrary conclusion, as well as the trial court's improper reliance on certain case law. See id., 617–20. Rather than remanding the case for a new trial, this court remanded with direction to render the judgment the trial court would have rendered in the absence of its clearly erroneous factual finding. See id., 623; see also *Wesley* v. *Schaller Subaru, Inc.*, 277 Conn. 526, 556–57, 893 A.2d 389 (2006) (concluding that trial court's agency determination was clearly erroneous and directing judgment consistent with lack of agency relationship); *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 419–20, 880 A.2d 882 (2005) (concluding that trial court's finding of actual notice was clearly erroneous and directing judgment consistent with lack of notice).

[19] General Statutes § 20-312a provides: "In any action brought by a third party against a real estate salesperson affiliated with a real estate broker as an independent contractor, such broker shall be liable to the same extent as if such affiliate had been employed as a real estate salesperson by such broker."

the Vaccaros as the principals and Raveis and Henry as their agents, and, thus, the Vaccaros are vicariously liable for the tortious acts of Raveis and Henry. In response, the defendants claim that agency law requires a fact intensive inquiry, and, because the trial court did not adjudicate the vicarious liability claims against them, there is no record for this court to consider. We agree with the plaintiff that Raveis is vicariously liable for Henry's statements as a matter of law but disagree with respect to the Vaccaros.

This court need not remand the case for the trial court's decision on the issue of vicarious liability if it can be determined as a matter of law on the record before us. See *Hudson Wire Co.* v. *Winsted Brass Workers Union*, 150 Conn. 546, 552, 191 A.2d 557 (1963). In other words, if the evidence necessary for resolution is undisputed, then this court can decide the issue as a matter of law without need for a remand for factual findings. See, e.g., *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 309–310, 788 A.2d 1199 (2002); see also *Allstate Ins. Co.* v. *Palumbo*, 296 Conn. 253, 267–68, 994 A.2d 174 (2010) (citing cases).

Again, turning to cases interpreting the federal act, we note that the United States Supreme Court has stated that the federal statute incorporates "ordinary [tort related] vicarious liability rules . . . ." *Meyer* v. *Holley*, 537 U.S. 280, 285, 123 S. Ct. 824, 154 L. Ed. 2d 753 (2003). As applied in the state law context, under this court's well established vicarious liability jurisprudence, an employer is liable for the negligent and wilful torts of an employee that occurred within the scope of employment and were done in furtherance of the employer's business. E.g., *A-G Foods, Inc.* v. *Pepperidge Farm, Inc.*, 216 Conn. 200, 208, 579 A.2d 69 (1990); see *Matthiessen* v. *Vanech*, 266 Conn. 822, 840 n.16, 836 A.2d 394 (2003) ("an employer generally is liable for intentional torts committed by his employees to the

same extent that he is liable for damages arising out of the negligent or reckless conduct of those employees").

In Connecticut, the vicarious liability of a real estate broker is governed by § 20-312a, which provides: "In any action brought by a third party against a real estate salesperson affiliated with a real estate broker as an independent contractor, such broker shall be liable to the same extent as if such affiliate had been employed as a real estate salesperson by such broker." The parties stipulated to the fact that Raveis is a broker and that Henry is a real estate salesperson associated with Raveis by an independent contractor agreement. The trial court also made these findings in its memorandum of decision. Thus, under § 20-312a, Raveis is liable to the same extent as if Henry were its employee.

The trial court found that Henry acted on behalf of Raveis when she executed the exclusive right to lease listing contract with Vaccaro in relation to the rental apartment. It cannot reasonably be contended that statements made about the plaintiff's prospective tenancy in the Vaccaros' rental apartment were not in furtherance of the listing contract, and there is no evidence to suggest that Henry's conversations with Becker in regard to the rental apartment were outside the scope of that engagement. Therefore, we conclude as a matter of law that Raveis is vicariously liable for Henry's statements in violation of § 46a-64c (a) (3).

The plaintiff also asserts that, having authorized Raveis and Henry to list a unit that he and his wife owned, Vaccaro created an agency relationship with the Vaccaros as the principal and Raveis and Henry as their agents, and, thus, the Vaccaros are vicariously liable for the wrongful acts of those agents. At oral argument before this court, counsel for the Vaccaros argued that Vaccaro hired Henry as an independent contractor and provided no training, tools, equipment or instructions, other than the desired amount of rent,

and, thus, cannot be held liable for her wrongful acts. We agree with the Vaccaros and conclude that Henry had an independent contractor relationship with them for purposes of their vicarious liability.

A principal is generally liable for the authorized acts of their agent. E.g., *Rich-Taubman Associates* v. *Commissioner of Revenue Services*, 236 Conn. 613, 619, 674 A.2d 805 (1996). Agency is "the fiduciary relationship [resulting] from [the] manifestation of consent by one person to another that the other shall act on his [or her] behalf and subject to his [or her] control, and consent by the other so to act . . . ." (Internal quotation marks omitted.) *Fiano* v. *Old Saybrook Fire Co. No. 1, Inc.*, 332 Conn. 93, 102, 209 A.3d 629 (2019). "The test of the [agency] relationship is the right to control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent." (Internal quotation marks omitted.) *Tianti* v. *William Raveis Real Estate, Inc.*, 231 Conn. 690, 697, 651 A.2d 1286 (1995). Further, "[a]n independent contractor has been defined as one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer, except as to the result of his work." (Internal quotation marks omitted.) Id.

Turning to the record, we observe that the listing contract Henry executed between Raveis and Vaccaro stated that "[Raveis] will use reasonable efforts to lease the [rental apartment]." This provision does not state or imply that the Vaccaros had the right to intervene as to the means or methods by which to lease the listed property. Outside of the limited terms of the listing contract, there is no evidence to suggest that Vaccaro had the right to control anything other than the result, namely, the terms of the lease and which offer he

accepted.[20] Accordingly, we conclude that Vaccaro and Henry had an independent contractor relationship as a matter of law.

Generally, an employer is not liable for the torts of its independent contractors. E.g., *Gazo* v. *Stamford*, 255 Conn. 245, 257, 765 A.2d 505 (2001). "The explanation for [this rule] most commonly given is that, [because] the employer has no power of control over the manner in which the work is to be done by the contractor, it is to be regarded as the contractor's own enterprise, and [the contractor], rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and bearing and distributing it." (Internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 517–18, 825 A.2d 72 (2003).

The plaintiff raised an exception to this general principle in its brief to this court, at least as to Eve Vaccaro. Relying on *Alexander* v. *Riga*, 208 F.3d 419, 432–33 (3d Cir. 2000), cert. denied, 531 U.S. 1069, 121 S. Ct. 757, 148 L. Ed. 2d 660 (2001), the plaintiff argues that the duty not to discriminate is nondelegable in nature. This court has previously stated that "[t]he nondelegable duty doctrine is . . . an exception to the rule that an employer may not be held liable for the torts of its independent contractors." *Gazo* v. *Stamford*, supra, 255

[20] The plaintiff also did not provide any support for holding an owner liable for the wrongful acts of a real estate salesperson. The case cited by the plaintiff purporting to do so in its posttrial memorandum actually involved vicarious liability for the actions of an agent acting as a property manager. Although it is well established that, under the federal act, "owners of real estate may be held vicariously liable for discriminatory acts by their agents and employees"; (internal quotation marks omitted) *United States* v. *Hylton*, 944 F. Supp. 2d 176, 190 (D. Conn. 2013), aff'd, 590 Fed. Appx. 13 (2d Cir. 2014); the plaintiff does not provide any authority for the proposition that real estate salespersons who are hired as independent contractors under circumstances similar to those in the present case are deemed to be agents for purposes of tort liability, and our independent research does not reveal any.

Conn. 257. The United States Supreme Court, however, has held that the duty not to discriminate under the federal act is not nondelegable in nature because a conclusion to the contrary would extend vicarious liability beyond the ordinary tort principles imposed by the federal act. See *Meyer* v. *Holley*, supra, 537 U.S. 286; see also id., 290. Having concluded that Henry was an independent contractor, and, in the absence of an exception to the general rule that employers are not liable for the torts of their independent contractors, we conclude that the Vaccaros are not vicariously liable for any of Henry's statements that constitute a violation of § 46a-64c (a) (3).[21]

The judgment is reversed in part and the case is remanded with direction to render judgment for the plaintiff as to liability against the defendants Sarah Henry and William Raveis Real Estate, Inc., in connection with the plaintiff's claim under § 46a-64c (a) (3) and for further proceedings in accordance with this opinion; the judgment is affirmed with respect to the trial court's determination that the defendants Anthony Vaccaro and Eve Vaccaro were not liable to the plaintiff.

In this opinion the other justices concurred.

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[21] Because we conclude that Vaccaro, the contracting owner involved in the transaction, is not vicariously liable, we can assume without deciding that Eve Vaccaro, a noncontracting owner of the rental apartment, is similarly not subject to vicarious liability.