DEREK MAIA *v.* COMMISSIONER OF CORRECTION (SC 20786)

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

Syllabus

The petitioner, who had been convicted of murder and sentenced to sixty years of incarceration, the maximum sentence for that crime, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, M, had rendered ineffective assistance of counsel by failing to advise the petitioner to accept the trial court's plea offer of forty-five years of incarceration in exchange for his guilty plea. At the petitioner's habeas trial, M testified that he believed that he had advised the petitioner, in light of the plea offer, about the strength of the state's case, the weaknesses of his defenses, statements from witnesses on which the state was going to rely at trial, the elements of the charged crime, the petitioner's chances of succeeding at trial and his sentencing exposure if he were to proceed to trial. M also testified that he would have told the petitioner that his chances of succeeding at trial were not good given M's evaluation of the evidence. In addition, M testified that he never advised clients to accept or reject a plea offer but allowed them to decide for themselves. On the other hand, the petitioner testified at the habeas trial that M had informed him of the forty-five year offer but never advised him that it was in his best interest to accept the offer. The petitioner claimed that he would have accepted the offer had M advised him to do so. The habeas court granted the habeas petition, concluding that, although M had adequately advised the petitioner about the strength of the state's

case, the weaknesses of his case, his chances of succeeding at trial, and his sentencing exposure, M's performance was deficient and the petitioner was prejudiced thereby because M had failed to advise the petitioner to accept the court's plea offer and, if he had done so, the petitioner would have accepted the offer. The court reasoned that it was very unlikely that the petitioner would have prevailed at trial and that the forty-five year offer was the only meaningful opportunity for him to receive a sentence that was less than the maximum of sixty years. The habeas court thereafter denied the petition of the respondent, the Commissioner of Correction, for certification to appeal, and the respondent appealed.

Held that the habeas court abused its discretion in denying the respondent's petition for certification to appeal, the habeas court having incorrectly concluded that M had rendered deficient performance by failing to advise the petitioner to accept the forty-five year plea offer:

This court concluded that there is no per se requirement that defense counsel recommend whether a defendant should accept a plea offer, and the need to provide a specific recommendation in any particular case depends on a number of factors, including the defendant's chances of prevailing at trial, the disparity between the sentence proposed in the plea offer and the likely sentence that would be imposed if the defendant were found guilty after a trial, whether the defendant has maintained his innocence, and the defendant's comprehension of the various considerations that will inform his plea decision.

Moreover, prior Appellate Court cases led this court to conclude that defense counsel not only must explain to the defendant the strengths and weaknesses of the state's case, the charges he is facing, and the maximum sentence to which he would be exposed if he were unsuccessful at trial, but also advise on how those strengths and weaknesses relate to the state's likelihood of prevailing at trial and on the challenges the defendant would face in putting on his own defense.

The range of circumstances a particular defendant might face, including, for example, a defendant's health, the effects of incarceration or a trial on family members, or the defendant's assertion of his innocence, also informs defense counsel's decision whether to recommend that a defendant accept a plea offer.

In the present case, the habeas court found that M had effectively communicated to the petitioner the strengths and weaknesses of the state's case, the evidence on which the state was going to rely, the elements of the charged crime, the petitioner's chances of succeeding at trial, and his sentencing exposure, and this guidance provided the petitioner with sufficient information to make a reasonably informed decision about whether to accept the plea offer.

Furthermore, the habeas court erred when it relied solely on the fact that the forty-five year plea offer was the only meaningful opportunity for the petitioner to receive a sentence less than the maximum sentence in concluding that M's representation was ineffective.

In addition, consideration of the factors for determining whether defense counsel should recommend that the defendant accept a plea offer led this court to conclude that it would not have been unreasonable for M not to have provided the petitioner with a specific recommendation and, accordingly, M's representation of the petitioner was not deficient.

This court overruled the Appellate Court's decision in *Sanders* v. *Commissioner of Correction* (169 Conn. App. 813) to the extent that the Appellate Court determined in that case that trial counsel's performance was deficient because, among other things, counsel failed to provide the petitioner with an opinion as to what plea to enter.

Argued March 23—officially released August 8, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Parkinson*, *J.*; judgment granting the petition; thereafter, the court denied the petition for certification to appeal, and the respondent appealed. *Reversed*; *judgment directed.*

James A. Killen, senior assistant state's attorney, with whom, on the brief, was *Marc Ramia*, senior assistant state's attorney, for the appellant (respondent).

Kayla R. Stephen, with whom was *Alice Osedach Powers*, for the appellee (petitioner).

Opinion

D'AURIA, J. In this certified appeal, we consider whether trial counsel for the petitioner, Derek Maia, rendered ineffective assistance when he failed to recommend that the petitioner accept the court's pretrial plea offer of a forty-five year sentence of incarceration, considering that the court sentenced him to sixty years after trial. We disagree with the habeas court's determination that counsel's lack of a specific recommendation

amounted to deficient performance pursuant to *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). As a result, we reverse the habeas court's judgment and remand the case to that court with direction to deny the petitioner's petition for a writ of habeas corpus.

As reported in the Appellate Court's opinion in *State* v. *Maia*, 48 Conn. App. 677, 678–80, 712 A.2d 956, cert. denied, 245 Conn. 918, 717 A.2d 236 (1998), affirming the trial court's judgment of conviction, the jury in the petitioner's underlying criminal case reasonably could have found the following facts. In October, 1993, "a community newspaper association known as Da Ghetto held a [fundraising] Halloween party at the Casa Mia restaurant in Waterbury." Id., 678. Guests paid an admission price to attend the party. Id. "The [petitioner] arrived [at the event] between 11 and 11:30 p.m. Upon his arrival, the [petitioner] complained about having to wait outside for a long time before he was admitted inside. The party had been planned to continue until 2 a.m. . . . At some point, however, Mark Yates, the senior editor of Da Ghetto, announced that the party was ending early because of 'inappropriate conduct.' . . .

"The [petitioner] angrily confronted Yates about ending the party early and demanded his money back. . . . The [petitioner] then had an altercation with Leroy Flint, an employee of Casa Mia and the boyfriend of the restaurant owner, Delores Trudeau, and had further altercations with his brother and his cousin when they tried to calm him, and with Yates' brother. The [petitioner], who was described as acting 'like a typhoon,' pushed and shoved anyone who was in his path. Trudeau overheard the [petitioner] state that 'someone was going to stop breathing.' The [petitioner] eventually left Casa Mia with his friend, Brian Brown. The [petitioner] and Brown drove to the house where Brown's girlfriend

lived. Once there, Brown went inside and the [petitioner] waited in the car. After about five minutes, Brown returned and gave the [petitioner] a bag containing a gun. The [petitioner] and Brown then proceeded back to Casa Mia.

"At approximately 1 a.m. . . . Martin Hayre, Michael Millhouse and the victim, Christopher Love, were leaving Casa Mia together. Hayre and the victim walked out of Casa Mia and waited on the curb for Millhouse to come with his car. When Millhouse pulled his car up, the victim opened the front passenger door and Hayre opened the right rear door. As they were getting into the car, the [petitioner] approached, said something to the victim and then shot the victim in the face. The victim died of a gunshot wound to the head.

"At trial, the [petitioner] admitted that he was responsible for the victim's death. He testified, however, that he did not intend to take the victim's life. The [petitioner] testified that he had been drinking and had smoked marijuana that night. He testified that he did not leave the gun in the car when he and Brown returned to Casa Mia because he had been in previous arguments at the bar and had been jumped by several people. He testified that he approached the victim and wanted to talk to him about the way the party was ended. At that time, the gun was in the [petitioner's] shirt pocket, with the handle hanging out. The [petitioner] testified that he heard footsteps behind him and that as he was going to turn around, he was 'yanked from the back by [the] hood.' His arm then went up and the gun went off. The [petitioner] was convicted of murder and sentenced to a term of sixty years [of] imprisonment." (Footnotes omitted.) Id., 678–80. The petitioner appealed to the Appellate Court, which upheld the trial court's judgment of conviction. See id., 690.

The petitioner later filed this habeas action and, in his second amended petition, alleged that his trial counsel,

Attorney Alan McWhirter, had rendered ineffective assistance by "fail[ing] to adequately advise the petitioner of the strength of the state's case and the weakness of the petitioner's possible defenses" and "fail[ing] to adequately advise the petitioner to accept a plea offer."[1] The petitioner argued that McWhirter provided ineffective assistance because, when he presented the court's plea offer of forty-five years to the petitioner, McWhirter did not advise him to accept this offer, notwithstanding that the petitioner faced the possibility of sixty years in prison.

Despite concluding that McWhirter had adequately advised the petitioner of the strengths and weaknesses of the state's case, the habeas court ruled in the petitioner's favor, finding that "McWhirter rendered deficient performance by not recommending to [the petitioner] that he accept the court indicated offer of forty-five years." The habeas court further concluded that the petitioner was prejudiced because it was reasonably probable that, without McWhirter's deficient performance, the petitioner would have accepted the plea offer and that the trial judge would have accepted the plea agreement.

The habeas court found the following additional facts that are relevant to this appeal. McWhirter had been a public defender for eighteen years prior to the petitioner's jury trial. He had been trial counsel in many criminal cases, including one dozen or more murder trials. McWhirter began representing the petitioner the night that the petitioner turned himself in to the police. He began preparing for trial the moment representation started.

[1] The petition also alleged that McWhirter had rendered ineffective assistance by failing to "conduct an adequate factual investigation into the facts of the case"; "adequately research the legal issues"; "adequately engage in plea negotiations"; and "adequately pursue a plea offer . . . ." Because the petitioner presented no evidence regarding these claims, the habeas court considered them abandoned, and none is at issue in this appeal.

This preparation included using the petitioner's probable cause hearing to discover relevant information and to question witnesses in advance of trial, using investigators to produce evidence to counter the state's evidence and support his client's defenses, and receiving and reviewing all discovery from the state. McWhirter also explored the possibility of resolving the case via plea discussions.

In McWhirter's opinion, the state's case against the petitioner was very strong and would be very difficult to defend. He testified that the state was very forthcoming in the discovery process, which he took as a sign that the state was confident in its case. McWhirter's defense strategy was to negate the intent element of murder, resulting in a conviction of the lesser included offense of manslaughter in the first degree. McWhirter intended to show that the petitioner accidentally shot the victim after someone jumped on his back. Other than the petitioner's own testimony, the only evidence to support this theory was the statement of Clyde Wilkins. Wilkins told the petitioner's private investigator that the petitioner had shot the victim after he was accosted from behind by Hayre. Critically, Wilkins' statement contradicted Hayre's statement. Hayre told the police that the petitioner had walked up to the victim, took out a gun, put it to the victim's head and fired one gunshot at close range. Hayre stated that the "scuffle" between himself and the petitioner occurred after the petitioner shot the victim. McWhirter testified that a potential weakness in the state's case was that the eyewitnesses testifying against the petitioner, including Hayre, were the victim's friends, which the defense could use to show bias. According to McWhirter, the petitioner did not disagree with the defense strategy. McWhirter anticipated that the state would argue that, because the petitioner had left Casa Mia and returned with a gun, he intended to shoot and kill the victim.

He did not expect the jury to consider the petitioner's leaving and returning with a gun in a good light.

About two months after the petitioner's arrest, the state offered him a sentence of sixty years of incarceration in exchange for a guilty plea to the charge of murder. McWhirter communicated this offer to the petitioner and discussed it with him. As this offer presented no tangible benefit—it was the maximum charge and maximum sentence—the petitioner did not accept it. After the initial offer, McWhirter discussed the possibility of a plea agreement with the state, but the state made no further offer.

Almost two years after the initial plea offer, during a judicial pretrial, the court presented a plea agreement offering a sentence of forty-five years in exchange for a guilty plea to the charge of murder. McWhirter communicated the court's offer to the petitioner but could not recall their specific discussion about it. McWhirter testified, however, that his normal practice was to explain to clients that, if they did not accept a plea offer, the court would withdraw it and not make it available again. According to McWhirter, he never advised clients to accept or not to accept a plea offer. It was his practice to allow his clients to come to that decision independently without a specific recommendation. He testified that, in his opinion, only a client can make the decision about whether to accept a plea offer. McWhirter could not recall if the petitioner ever advised him that he did not want to proceed to trial. Importantly, McWhirter testified that he believed that, as was his normal practice, he had advised the petitioner on the strength of the state's case, the weaknesses of his defenses, the witness statements the state relied on, the elements of the charges, the petitioner's chances at trial, and his sentencing exposure going to trial. He also testified that he would have told the petitioner that the chance he would prevail at trial was not good given McWhirter's

evaluation of the evidence and what evidence he anticipated the state would present at trial.

In contrast, the petitioner testified that McWhirter informed him of the court's offer but did not advise him about the strengths of the state's case or the weaknesses of his potential defenses.[2] The petitioner testified that he was uncertain whether McWhirter was going to argue at trial that he acted in self-defense or that the shooting was unintentional. The petitioner maintained that, if McWhirter had advised him that claiming self-defense was untenable, he would have accepted the plea offer and pleaded guilty. The petitioner also testified that, during jury selection, he asked McWhirter if he could personally speak with the state's attorney to negotiate a plea deal, but McWhirter said it was too late. The petitioner denied that McWhirter informed him that the court's offer would be withdrawn if he did not accept it and that it was unlikely that he would receive another offer.[3] The petitioner indicated that McWhirter never advised him that it was in his best interest to accept a plea offer, but that, if he had, he would have accepted the court's offer.

The habeas court did not find the petitioner's testimony regarding McWhirter's alleged failures as defense

[2] The petitioner testified that McWhirter did not advise him as to why self-defense was a weak claim given the facts of the case. The petitioner also testified that McWhirter never advised him about the number of witness statements supporting the state's position, that Wilkins' statement was the only evidence supporting the petitioner's rendition of the events or that the jury might view his leaving the restaurant to obtain a weapon and then returning in an unfavorable light.

[3] The petitioner's uncle was an inspector in the Waterbury state's attorney's office, which the petitioner thought would result in a favorable plea deal. The habeas court concluded that "[t]he connection between [the petitioner] and his uncle, although it led to him turning himself in on the warrant, also embodied the potential of the state's having an inflexible approach to ward off claims of favoritism toward [the petitioner]." The habeas court made no finding that McWhirter was aware of the petitioner's hope that he would receive a favorable outcome because of his uncle's position in the prosecutor's office.

counsel credible, instead crediting McWhirter's testimony. In particular, the habeas court concluded that McWhirter did not fail to adequately advise the petitioner about the strengths of the state's case, the weaknesses of his defense, the petitioner's chances at trial and sentencing exposure going to trial. However, the habeas court concluded that McWhirter's failure to advise the petitioner to accept the court's plea offer constituted deficient performance. The court noted that the petitioner's chances of prevailing at trial were very unlikely and that the court's offer of forty-five years was the "only meaningful opportunity for [the petitioner] to receive a sentence less than the maximum sentence [of sixty years] for murder." The court reasoned that these considerations, coupled with the court's finding that the petitioner never maintained his innocence but claimed only that he lacked the requisite intent to commit murder, supported the conclusion that McWhirter's failure to advise the petitioner to accept the court's offer amounted to deficient performance. The habeas court concluded that this deficient performance prejudiced the petitioner because the court credited the petitioner's testimony that he would have accepted the trial court's offer had McWhirter recommended it.

The respondent, the Commissioner of Correction, then petitioned for certification to appeal to the Appellate Court, which the habeas court denied. The respondent then appealed to the Appellate Court, and we transferred the appeal to this court. See General Statutes § 51-199 (c); Practice Book § 65-2.

"Faced with the habeas court's denial of [a petition for] certification to appeal, [an appellant's] first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . If the [appellant] succeeds in surmounting that hurdle, the [appellant] must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted.)

Simms v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). To show that a court abused its discretion in denying certification to appeal, an appellant must "demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Emphasis omitted; internal quotation marks omitted.) *Castonguay* v. *Commissioner of Correction*, 300 Conn. 649, 657, 16 A.3d 676 (2011).

Necessarily, therefore, the respondent first claims that the habeas court abused its discretion in denying his petition for certification to appeal because the issue of whether and when counsel must provide a specific recommendation as to a plea offer is not settled law. The respondent argues that the habeas court's resolution of the petitioner's claim of ineffectiveness based on trial counsel's failure to advise him to accept the court's plea deal is debatable among reasonable jurists. The petitioner counters that the issue of when counsel is obligated to recommend that a client accept a plea offer is settled law in Connecticut. In particular, the petitioner argues, and the respondent agrees, that each case requires a fact specific analysis, as there is no "bright-line" rule that counsel must make a recommendation in every case. According to the petitioner, because the habeas court properly analyzed the facts, the issue in this case is not debatable among jurists of reason.

"In determining whether the habeas court abused its discretion in denying the petitioner's petition for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 626, 212 A.3d 678 (2019). We therefore turn to the merits of the respondent's claim, which is gov-

erned by our well established jurisprudence regarding ineffective assistance of counsel: The sixth and fourteenth amendments to the United States constitution guarantee criminal defendants the right to the effective assistance of counsel for their defense in state prosecutions. *Strickland* v. *Washington*, supra, 466 U.S. 685–86; *Helmedach* v. *Commissioner of Correction*, 329 Conn. 726, 732–33, 189 A.3d 1173 (2018). A defendant seeking habeas relief for ineffective representation must prove two elements. "First, the defendant must show that counsel's performance was deficient. This requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the [s]ixth [a]mendment. Second, the defendant must show that the deficient performance prejudiced the defense."[4] (Internal quotation marks omitted.) *Williams* v. *Taylor*, 529 U.S. 362, 390, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), quoting *Strickland* v. *Washington*, supra, 687.

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

[4] To satisfy the prejudice prong of the *Strickland* test when counsel's advice has led to the rejection of a plea offer, the petitioner must establish that "(1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). Because we conclude that trial counsel's performance was not deficient, we do not address *Strickland*'s prejudice prong.

The respondent claims that the habeas court improperly found McWhirter's representation deficient solely because he did not specifically recommend to the petitioner that he should accept the court's plea offer.[5] The respondent first argues that binding case law did not require McWhirter to directly advise the petitioner to accept the court's plea offer. Rather, he asserts that prior case law supports a conclusion that McWhirter's performance was not deficient in the present case. Second, the respondent argues that the habeas court's holding is out of line with federal precedent regarding whether trial counsel is required to provide a specific recommendation as to whether to accept a plea deal. Finally, the respondent argues that whether to recommend that a client accept a plea offer should be left to counsel's " 'wide discretion . . . .' " He specifically contends that trial counsel should be hesitant to make recommendations because only a criminal defendant can measure and account for certain factors that might necessarily impact his decision of whether to accept a plea offer, including health and family concerns, his relationships with others, and his prior experiences with prison life, including his belief in his ability to adapt to it. Additionally, the respondent asserts that trial counsel is in a "far better position than a reviewing court, twenty-five years later, to gauge firsthand exactly the type of advice that [the] client was seeking and otherwise needed" when advising a client on a plea offer.

The petitioner responds that the habeas court correctly concluded that he was denied the effective assis-

[5] The respondent also claims on appeal that the habeas court "erred in concluding that plea counsel, when advising a client in 1993, was constitutionally required to expressly advise his client whether to accept or reject a plea offer" because it was not settled law at the time—or now—that counsel had to provide a particular recommendation to function as sixth amendment "counsel" during plea negotiations. (Internal quotation marks omitted.) Because we reverse the habeas court's judgment on the respondent's first claim, we do not address the merits of this second claim.

tance of counsel because his attorney did not specifically recommend whether he should accept the court's offer of forty-five years. He argues that Appellate Court case law indicates that professional advice and assistance concerning a plea offer, *as well as* trial counsel's evaluation of the plea, are necessary to render competent performance. He argues that McWhirter should have "given the petitioner his advice as to the best course of action since the petitioner was not likely to prevail at trial . . . there was a likelihood of disparity in sentencing after a full trial compared to the offer, the petitioner did not maintain his innocence and the petitioner's level of comprehension of pertinent factors." We agree with the respondent that McWhirter's performance was not deficient in the present case.

A defendant's right to effective representation applies to all " 'critical stages' " of a criminal prosecution, including any plea negotiations. *Helmedach* v. *Commissioner of Correction*, supra, 329 Conn. 733, quoting *Missouri* v. *Frye*, 566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). "In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 338 Conn. 330, 340, 258 A.3d 40 (2021). "Precisely defining counsel's duties during plea negotiations is, however, a difficult task"; *Helmedach* v. *Commissioner of Correction*, supra, 734; because "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland* v. *Washington*, supra, 466 U.S. 688. Counsel performs effectively and reasonably when he provides a client with adequate information and advice on which the client can make an informed decision as to whether to accept the state's plea offer. See *Melendez* v. *Commissioner of Correction*, 151

Conn. App. 351, 359, 95 A.3d 551, cert. denied, 314 Conn. 914, 100 A.3d 405 (2014).

There is no per se requirement that defense counsel must recommend whether a client should accept a plea offer. See *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 341 n.6 (clarifying that appellate case law "require[s] counsel to provide advice on plea offers, but [does] not mandate that counsel make specific recommendations in all circumstances"). This is because providing a specific recommendation implicates two critical and sometimes conflicting rights: "On the one hand, defense counsel must give the client the benefit of counsel's professional advice on this crucial decision of whether to plead guilty. . . . As part of this advice, counsel must communicate to the defendant the terms of the plea offer . . . and should usually inform the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed . . . . On the other hand, the ultimate decision whether to plead guilty must be made by the defendant. . . . And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer." (Citations omitted; internal quotation marks omitted.) *Purdy* v. *United States*, 208 F.3d 41, 44 (2d Cir. 2000). The need to provide a specific recommendation in any particular case depends on a number of factors, including "the defendant's chances of prevailing at trial, the likely disparity in sentencing after a full trial as compared to a guilty plea . . . whether the defendant has maintained his innocence, and the defendant's comprehension of the various factors that will inform his plea decision." Id., 45; see also *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 343 (adopting factors set forth in *Purdy*). Thus, "whether an attorney's performance fell below an objective standard of reasonableness" by failing to provide a specific recommendation requires a

case-by-case, fact specific analysis. (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 341–42. Although this court has not yet considered whether trial counsel performs deficiently by failing to recommend that a client accept a plea offer, the Appellate Court has addressed this issue several times. A review of this case law, and a resolution of its inconsistencies, is beneficial for our analysis in the present case.

In *Vazquez* v. *Commissioner of Correction*, 123 Conn. App. 424, 1 A.3d 1242 (2010), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011), after a jury found the petitioner guilty of assault in the first degree, the trial court sentenced him to a term of sixteen years of incarceration, execution suspended after eight years. Id., 427. The petitioner filed a habeas action on the ground that his trial counsel had provided ineffective assistance by failing to adequately counsel him regarding the advisability of accepting the state's plea offer of ten years of incarceration, execution suspended after four years. Id., 425–26. The habeas court denied the petitioner's habeas petition. Id., 427. On appeal, the Appellate Court held that trial counsel's failure to recommend that the petitioner accept the plea offer did not constitute deficient performance under *Strickland*. See id., 439–40. Specifically, the Appellate Court upheld the habeas court's finding that counsel had "fully advised the petitioner concerning the state's plea offer . . . ." Id., 439. The court noted that, although counsel believed that the petitioner had a viable self-defense claim, which they communicated to the petitioner, and that defense proved unsuccessful, counsel performed adequately by fully informing the petitioner of the risks associated with trial, "the charges against him . . . the merits of the state's case and the petitioner's claim of self-defense, including the fact that the jury had to believe that the petitioner's use of force was not excessive and

was reasonable under the circumstances." Id., 436. The court also emphasized that the petitioner consistently had maintained his innocence and was adamant that he wanted to go to trial because he believed that had a viable self-defense claim. Id., 439. Under these circumstances, the court in *Vazquez* determined that the lack of a specific recommendation to take the plea offer was not constitutionally ineffective assistance of counsel. Id.

In *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 93 A.3d 165 (2014), the Appellate Court again addressed whether trial counsel rendered constitutionally deficient performance by failing to "give the petitioner her professional advice and assistance concerning, and her evaluation of, the court's [pretrial] plea offer." Id., 802. Counsel testified that it was her practice to refrain from giving advice on plea offers to protect herself from habeas and grievance actions in which clients could claim that they were coerced into pleading guilty. Id., 788. The habeas court found that trial counsel had informed the petitioner about the offer but had not given him any advice on the offer. Id., 795–96. The habeas court went on to conclude that counsel had not rendered constitutionally deficient performance, however, as she had "fully apprised the petitioner as to the terms of the plea offer . . . the strengths and weaknesses of the prosecution and defense cases, and the possible outcomes after trial." (Internal quotation marks omitted.) Id., 795. The habeas court also noted that conviction in that case was not a foregone conclusion because the petitioner's guilt hinged on the believability of coconspirator and circumstantial evidence. Id. As a result, the habeas court concluded that defense counsel had not performed deficiently by not recommending that the petitioner accept the plea offer. See id.

On appeal, the Appellate Court in *Barlow* agreed with the habeas court that, under the circumstances of that

case, counsel had no obligation to recommend that the petitioner accept the court's plea offer. Id., 796. However, the court held that counsel had "an obligation to provide advice and assistance to the petitioner regarding that plea offer, [which she] admittedly failed to do." Id., 796–97. The court noted that the petitioner's trial counsel had testified that she refrained from giving the petitioner *any advice* as to the plea offer but that she "merely gave [the petitioner] the facts of the offer," which the Appellate Court interpreted to mean that she provided "no assistance or advice as [the petitioner] weighed his options." Id., 801.[6] Because of this, the Appellate Court concluded that trial counsel's performance was deficient. See id., 796–97. The court emphasized that, although the decision to accept or reject a plea offer must ultimately be made by the defendant, this decision "should be made . . . with the adequate professional assistance, advice, and input of his . . . counsel." (Emphasis omitted.) Id., 800.[7]

The year after deciding *Barlow*, the Appellate Court decided *Andrews* v. *Commissioner of Correction*, 155 Conn. App. 548, 110 A.3d 489, cert. denied, 316 Conn. 911, 112 A.3d 174 (2015). After rejecting a plea offer of twenty years of incarceration, execution suspended

[6] The Appellate Court pointed to a line of questioning during which trial counsel testified that she had advised the petitioner about the specifics of the plea offer—fifteen years, execution suspended after nine years—but did not encourage him to accept the plea offer. *See Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 801 n.13. The Appellate Court interpreted this as counsel's not having provided "the petitioner [with any] professional assessment of the court's [pretrial] offer of nine years to serve in the context of the facts underlying the charges against him and his potential total sentence exposure." Id., 802.

[7] This court recently upheld the Appellate Court's holding that the petitioner in *Barlow* was prejudiced by his counsel's ineffective assistance, thus satisfying the second prong of *Strickland*. See *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 360, 273 A.3d 680 (2022). We did not address whether the Appellate Court correctly determined that counsel was ineffective, as that issue was not raised on appeal to this court. Id., 361–62.

after twelve years, the petitioner in *Andrews* was convicted of assault of a peace officer, attempt to commit assault in the first degree, attempt to commit assault of a peace officer, and possession of a sawed-off shotgun. Id., 550. The court sentenced him to a total effective term of forty years of imprisonment. Id. Upholding the habeas court's denial of the petitioner's petition for a writ of habeas corpus, the Appellate Court distinguished the facts of *Barlow*, explaining that, "[u]nlike trial counsel in *Barlow*, *who provided no advice or assistance to her client on the plea offer*, trial counsel in [*Andrews*] explained to the petitioner the strengths and weaknesses of the state's case, the charges he was facing, and the maximum sentence he would be exposed to if he was unsuccessful at trial. Trial counsel explained that the petitioner would likely receive a significantly higher sentence than twelve years if he was convicted at trial, that he believed that the state had a strong case against the petitioner, and that it would be a difficult case to win because most of the witnesses were police officers . . . one [of whom] had sustained permanent serious injury. Although trial counsel left the ultimate decision of whether to accept or to reject the offer to the petitioner, he provided the petitioner with adequate professional advice on [his] options and the best course of action . . . *given the facts of the case and the petitioner's potential total sentence exposure*." (Emphasis added.) Id., 554–55. The court held that counsel's assistance was not ineffective despite counsel's failure to specifically recommend that the petitioner accept the plea offer. Id.

The facts in *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017), differed only somewhat from those in *Andrews*, but, in *Sanders*, the differences compelled the opposite conclusion. The petitioner in *Sanders* was charged with two counts of assault in

the first degree and with being a persistent dangerous felony offender. Id., 815. The charges stemmed from an incident in which the petitioner had shot the victim multiple times in the presence of the victim's girlfriend. Id. Both the victim and his girlfriend identified the petitioner as the shooter. Id., 815–16. The state offered the petitioner eight years of incarceration in exchange for a guilty plea, which he declined. Id., 816. Like McWhirter in the present case, and trial counsel in *Barlow*, trial counsel in *Sanders* testified that his general practice was to "[present] his clients with the positive [and] the negatives of going to trial—the risks of trial [and] the maximum exposure," but that he does not specifically recommend that a client accept or reject a plea offer. (Internal quotation marks omitted.) Id., 817. The petitioner was convicted on all charges, and the court imposed a sentence of forty years of imprisonment. Id., 816. The habeas court found that counsel "did in fact adequately explain the pretrial offer, discuss the case, discuss the maximum punishments, discuss the pros and cons of pleading guilty or not guilty, but left, as he should have, the final decision as to whether to accept or reject such offer to [the petitioner]." (Internal quotation marks omitted.) Id., 819. Despite these findings, the Appellate Court held that "advising the petitioner on the strengths and weaknesses of his case, alerting him to his potential exposure and explaining to him the terms of the plea offer is insufficient . . . ." Id., 831. The court distinguished its holding in *Andrews*, reasoning that, unlike counsel in *Andrews*, counsel in *Sanders* had not provided the petitioner with his opinion as to whether the state would prevail at trial; id., 833; or his "professional advice as to the best course of action . . . ." Id., 831. Although the court concluded that trial counsel's performance was deficient, it ultimately ruled against the petitioner, as he had failed to prove that he was prejudiced by counsel's deficient performance. Id., 838.

Fulfilling counsel's constitutional duty to provide sufficient advice while not overstepping and potentially coercing a client can be a fine line to walk. Ultimately, we conclude that the Appellate Court's conclusion in *Sanders* concerning the effectiveness of counsel's assistance falls on the wrong side of the line, and we must overrule it. Although the court recognized that there is no per se rule obligating counsel to provide *recommendations* regarding plea offers, it interpreted *Barlow* to establish "an obligation for defense counsel to provide professional advice, assistance *and an 'informed opinion as to what pleas* [*to*] *enter'* and to make 'an informed evaluation of the options and *determine which alternative will offer the* [*petitioner*] *the most favorable outcome.*' " (Emphasis added.) Id., 832, quoting *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 798. In our view, requiring that counsel provide an "opinion" as to what plea to enter cannot be distinguished from requiring counsel to provide a specific recommendation to either accept or reject a particular plea offer. Neither is required in every case for counsel to have rendered constitutionally effective assistance, as "[t]here is no per se rule requiring specific conduct of defense attorneys during plea negotiations." *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 341. The approach taken by the court in *Sanders* is not consistent with the approach *Strickland* and the cases that have followed it have directed, which is to consider counsel's performance "in light of all the circumstances"; *Strickland* v. *Washington*, supra, 466 U.S. 690; see also *Jordan* v. *Commissioner of Correction*, 341 Conn. 279, 287, 267 A.3d 120 (2021); and is at odds with the fundamental governing principles that this court has established, namely, that "[t]he parameters of appropriate advice required during plea negotiations are determined by a fact specific inquiry in which we consider whether an attorney's performance fell below 'an objective stan-

dard of reasonableness.' " *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 341–42.

Most recently, in *Carrasquillo* v. *Commissioner of Correction*, 206 Conn. App. 195, 259 A.3d 1182, cert. denied, 339 Conn. 907, 260 A.3d 1227 (2021), the Appellate Court reiterated that "there is no requirement that counsel specifically recommend that [a defendant] accept a plea offer." Id., 209, citing *Barlow* v. *Commissioner of Correction*, supra, 150 Conn. App. 794–95. After rejecting a plea offer of twenty-five years of incarceration—the mandatory minimum sentence for the crime of murder—the petitioner in *Carrasquillo* was found guilty of murder and carrying a pistol without a permit and sentenced to thirty-five years of incarceration. *Carrasquillo* v. *Commissioner of Correction*, supra, 196–97. The petitioner filed a petition for a writ of habeas corpus, claiming in relevant part that trial counsel had failed to "explain the strength of the state's case against him, advise him of the maximum possible sentence for murder, or make a recommendation as to whether he should accept the proposed plea bargain." Id., 208. The habeas court disagreed with the petitioner, concluding that trial counsel had not rendered deficient performance after the court found that she "had extensive discussions with the petitioner about the strengths and weaknesses of the case, expressed her belief as to the likelihood of success after trial and told him that, in the end, it was his choice to make." (Internal quotation marks omitted.) Id., 202, 209. The court also found that there was evidence to suggest that counsel had, in fact, recommended that the petitioner plead guilty. Id. The Appellate Court upheld the habeas court's judgment, holding that "counsel's duty is to provide an informed opinion regarding the plea offer under the circumstances of the case," which does not always require a recommendation to accept a plea offer. Id., 209. Because the petitioner had failed to demonstrate that counsel's

advice fell below an objective standard of reasonableness, her performance was not deficient. Id., 207–208.

This case law informs our conclusion that counsel must not only explain to the defendant the strengths and weaknesses of the state's case, the charges he is facing, and the maximum sentence he would be exposed to if he were unsuccessful at trial, he also must advise his client on how those strengths and weaknesses relate to the state's likelihood of prevailing at trial and on the challenges a defendant would face in putting on his own defense. See *Andrews* v. *Commissioner of Correction*, supra, 155 Conn. App. 554–55. This is because "[a] defendant relies heavily [on] counsel's independent evaluation of the charges and defenses, applicable law, the evidence and the risks and probable outcome of a trial." (Emphasis omitted; internal quotation marks omitted.) *Ebron* v. *Commissioner of Correction*, 120 Conn. App. 560, 572, 992 A.2d 1200 (2010), rev'd in part on other grounds, 307 Conn. 342, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). "Instead of failing to meet a prescribed, mechanical standard, counsel's performance has been held to be constitutionally deficient when counsel failed to provide his client with sufficient information about the client's sentencing exposure to allow the client to make a reasonably informed decision [regarding] whether to accept a plea offer." (Internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 343. Although trial counsel must leave the ultimate decision of whether to accept or to reject a plea offer to a defendant—and must avoid coercing the defendant into taking a particular plea—he must also provide the petitioner with adequate professional advice on his options.

This standard is consistent with the standard federal courts apply. Under federal precedent, an attorney's

performance is deficient if the attorney communicates a plea offer to a client but fails to render " 'professional advice' " or guidance. *Purdy* v. *United States*, supra, 208 F.3d 44, 47. This advice includes "communicat[ing] to the defendant the terms of the plea offer . . . and . . . usually inform[ing] the defendant of the strengths and weaknesses of the case against him, as well as the alternative sentences to which he will most likely be exposed . . . ." (Citations omitted.) Id., 45; see *Barnes* v. *United States*, Docket Nos. 13 Civ. 1226 (SAS) and 09 CR 1053 (SAS) 2013 WL 3357925, *7 (S.D.N.Y. July 2, 2013) (counsel provided effective assistance by explaining risks of trial and benefits of plea and by advising petitioner of potential sentencing exposure).

Federal courts also have found an attorney's performance constitutionally deficient when the attorney communicates a plea offer to a client, discusses the strengths and weaknesses of the state's case and the defense but fails to recommend whether to accept the offer when the state has a virtually unassailable case and the offer is for significantly less prison time than the maximum possible sentence. See, e.g., *Boria* v. *Keane*, 99 F.3d 492, 494, 497 (2d Cir. 1996) (attorney rendered constitutionally deficient performance by failing to recommend that petitioner accept proffered plea bargain of one to three years, when attorney felt it would be "suicidal" to go to trial, and court ultimately sentenced petitioner to twenty years to life), cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997); *Carrion* v. *Smith*, 644 F. Supp. 2d 452, 455, 469 (S.D.N.Y. 2009) (counsel provided ineffective assistance when he conceded that acquittal would be "virtually impossible" on charge that carried a mandatory minimum sentence of fifteen years to life, and state offered plea of ten years to life, when defendant was ultimately sentenced to 125 years to life), aff'd, 365 Fed. Appx. 278 (2d Cir. 2010). It would be unreasonable for

counsel to fail to recommend that a client accept a plea offer if, after considering the circumstances of the case, he believes that a conviction is virtually inevitable and the attendant sentence will likely substantially exceed the pending offer. However, in most cases, the difference between a plea offer and a defendant's sentencing exposure is only one factor that trial counsel should consider when evaluating whether to advise a client to accept a plea offer.

The range of circumstances a particular defendant might face also informs defense counsel's representation, as "[d]efense counsel is in a much better position [than a trial judge] to ascertain the personal circumstances of his client so as to determine what indirect consequences the guilty plea may trigger." *Michel* v. *United States*, 507 F.2d 461, 466 (2d Cir. 1974); see also *McCoy* v. *Louisiana*, U.S. , 138 S. Ct. 1500, 1508, 200 L. Ed. 2d 821 (2018) (counsel and client "may not share" same objectives: counsel may consider avoiding harshest sentence paramount whereas client may "wish to avoid, above all else, the opprobrium that comes with admitting" guilt). For example, when deciding whether to recommend that a defendant accept a plea offer, defense counsel might have to consider whether the defendant's health affects his desire to accept an offer. See, e.g., *Moore* v. *Commissioner of Correction*, 186 Conn. App. 254, 267 n.8, 199 A.3d 594 (2018) (petitioner believed offered plea was "too high given his poor health, especially 'for someone who might not make it' "), aff'd, 338 Conn. 330, 258 A.3d 40 (2021). The effects of incarceration or trial on family members might also impact whether defense counsel should advise a defendant to accept a plea offer. See, e.g., *Foster* v. *Commissioner of Correction*, 217 Conn. App. 658, 670, 289 A.3d 1206 (2023) (petitioner pleaded guilty in part because he "did not want to put his family through a trial"), petition for cert. filed (Conn. March

3, 2023) (No. 220295). Additionally, whether a defendant maintains his innocence will also affect whether counsel should recommend that he accept a plea offer. *Purdy* v. *United States*, supra, 208 F.3d 45; *Vazquez* v. *Commissioner of Correction*, supra, 123 Conn. App. 439. In addition to all of these considerations, it is of paramount importance that defense counsel does not coerce a client into accepting a plea offer the client would otherwise not have accepted. *Purdy* v. *United States*, supra, 45.

Applying this standard to the present case, we first observe that the habeas court found that McWhirter had effectively communicated to the petitioner the strengths and weaknesses of the state's case, the witness statements the state relied on, the elements of the charges, the petitioner's chances at trial, and his sentencing exposure going to trial. This guidance provided the petitioner with sufficient information to make a reasonably informed decision about whether to accept the court's plea offer of forty-five years. The sole basis for the habeas court's conclusion that McWhirter provided ineffective assistance is that he did not advise the petitioner to accept the court's plea offer. The habeas court concluded that the petitioner's chances of prevailing at trial were "very unlikely," as the state's evidence was strong, and the state's confidence in its case was reflected in its own plea offer of sixty years—the maximum sentence. Despite crediting McWhirter's testimony that he informed the petitioner that he was unlikely to prevail at trial, the habeas court concluded that McWhirter's failure to specifically recommend that the petitioner accept the offer of forty-five years constituted deficient performance because "[t]he court indicated offer of forty-five years was the only meaningful opportunity for [the petitioner] to receive a sentence less than the maximum . . . ." The habeas court erred in relying on this fact alone to conclude that McWhirt-

er's representation was constitutionally ineffective. A reviewing court must remember that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* v. *Washington*, supra, 466 U.S. 688–89.

The present case aligns most closely with *Andrews* v. *Commissioner of Correction*, supra, 155 Conn. App. 548. In *Andrews*, trial counsel "provided the petitioner with adequate professional advice on [his] options and the best course of action"; id., 555; by "explain[ing] that the petitioner would likely receive a significantly higher sentence than twelve years if he was convicted at trial, that [trial counsel] believed that the state had a strong case against the petitioner, and that it would be a difficult case to win because most of the witnesses were police officers, and one of the police officers had sustained permanent serious injury." Id., 554–55. Trial counsel in *Andrews* did not make a specific recommendation regarding the plea offer. Id. McWhirter provided the petitioner with similar advice in the present case.[8]

From our review of the habeas court's findings, which credited McWhirter's testimony regarding his trial preparation, it is clear that, if McWhirter had considered the factors discussed in *Purdy*, it would not have been unreasonable for him not to provide the petitioner with a specific recommendation. Therefore, under the circumstances, McWhirter's representation of the peti-

[8] The petitioner distinguishes *Andrews* on the ground that, unlike the situation in the present case, even if counsel had recommended the plea offer at issue, the petitioner in *Andrews* would not have accepted it because he believed that the offered sentence was " 'too high . . . .' " The petitioner's argument conflates the first and second prongs of *Strickland*. Whether the petitioner would have accepted a plea offer if counsel had recommended that he do so is relevant in determining whether the lack of a recommendation prejudiced the petitioner, not whether counsel's representation was deficient.

tioner did not fall below the minimum required for constitutionally effective representation. Despite our holding today that McWhirter did not perform deficiently, we caution attorneys against adopting a practice, similar to McWhirter's, in which they never advise a client to accept a plea offer. As is clear from our case law, as well as federal precedent, counsel must weigh a number of factors in determining whether to recommend that a client accept a plea offer, as there will be cases when counsel will have rendered ineffective assistance by not providing a specific opinion as to whether the client should accept the offer. See *Moore* v. *Commissioner of Correction*, supra, 338 Conn. 341 n.6; see also *Purdy* v. *United* States, supra, 208 F.3d 44–45.

The judgment is reversed and the case is remanded with direction to deny the petition for a writ of habeas corpus.

In this opinion the other justices concurred.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION *v.* GEORGE S. LAKNER*
(SC 20715)

Robinson, C. J., and McDonald, D'Auria, Ecker and Alexander, Js.

Syllabus

The initial plaintiff, J Co., sought to foreclose a mortgage on certain real property owned by the defendant. J Co. alleged that the defendant was in default because he had failed to pay certain monthly installments of principal and interest. The defendant filed an answer and special defense in which he denied that he was in default, arguing that he had submitted all the required payments. After M Co. was substituted for J Co. as the plaintiff, the defendant issued a notice requesting that M Co. produce

* The Superior Court clerk is directed to amend the official case caption as set forth above.

its complete mortgage file relating to the defendant's mortgage, including all mortgage payment records. In response, M Co. filed a motion for a protective order, requesting that the trial court disallow discovery as to all the documents sought by the defendant. The trial court granted the motion on the grounds that the defendant's request was overly broad and would not lead to the admission of material evidence. Subsequently, at trial, M Co. introduced into evidence an exhibit containing a summary of the loan and payment history of the defendant's account to prove the debt. The defendant's counsel objected, arguing that the defendant was prejudiced because counsel did not have an opportunity to review that exhibit, which was never produced in discovery, or to locate specific documents to contradict the information in the exhibit. The trial court admitted the exhibit, declining to revisit another judge's decision to grant the motion for the protective order. Throughout trial, the defendant's counsel questioned M Co.'s witness, R, a representative of M Co.'s loan servicer, in order to gain an understanding of the basis for the alleged default and to resolve certain discrepancies between the testimony of R and that of the defendant. R testified that the defendant's default had started in 2002 and that the interest rate did not change through the life of the loan. R's testimony was in conflict with the fact that W Co., a predecessor in interest of J Co., was required by the federal Servicemembers Civil Relief Act (SCRA) (50 U.S.C. § 3937 (a)) to lower the defendant's interest rate after the defendant was called to active duty military service in 2001, and with the defendant's testimony that W Co. had lowered his interest rate in 2002. The defendant's counsel also asked R why there were line items in M Co.'s exhibit reflecting insurance premium disbursements in connection with the defendant's account when the defendant testified that he had paid for his homeowners insurance independently of his mortgage. R replied that he had not reviewed M Co.'s mortgage file to determine whether the defendant had been improperly charged for insurance premiums. The trial court rendered a judgment of foreclosure by sale in favor of M Co. The court concluded that the defendant had failed to prove his special defense of payment because the defendant's evidence, consisting primarily of copies of checks, demonstrated some payments to the lender, but it did not demonstrate a lack of default. The trial court also acknowledged that the defendant argued that the SCRA may provide a defense to the foreclosure action but concluded that, even if it were to consider this defense, which the defendant raised for the first time during trial, the defendant did not prove it. The defendant appealed to the Appellate Court, which summarily affirmed the trial court's judgment. On the granting of certification, the defendant appealed to this court. *Held*:

1. The trial court abused its discretion in granting M Co.'s motion for a protective order:

The trial court's conclusion that the defendant's request for documents contained in M Co.'s mortgage file would not lead to the discovery of

admissible evidence was not supported by the facts and conflicted with the general observation that a lender's mortgage file contains critical information regarding a mortgagor's account.

In a contested foreclosure case, such as the present one, a defendant, or his or her attorney, will need to review those aspects of the lender's file that may lead to the discovery of admissible evidence relating to one or more disputed issues, especially when, as here, the defendant raises the special defense of payment in the face of a claim of default.

In the present case, M Co. introduced documents from its mortgage file into evidence, and R's testimony at trial was based on his extensive review of that file, yet the defendant and his counsel were denied access to that same material, thereby denying them the opportunity to search for potentially critical information that would have supported the defendant's claim that he was not in default.

Moreover, the trial court incorrectly concluded that the defendant's request seeking production of M Co.'s mortgage file was overly broad, as the mortgage file contained records that comprised the source material that gave rise to M Co.'s foreclosure action, and the defendant was not required to rely solely on M Co.'s summary of his payment history but was entitled to review the underlying records themselves to confirm that the summary was accurate.

Furthermore, M Co. could not prevail on its claim that the defendant should have made a more narrowly tailored discovery request, as M Co. failed to comply with the mandate in the rules of practice that it engage in a good faith effort to reach agreement with the defendant on any discovery related objections and instead chose to seek a protective order completely barring discovery of many documents that plainly were subject to disclosure.

2. The defendant satisfied his burden of proving that he was harmed by the trial court's granting of M Co.'s motion for a protective order, as the defendant demonstrated that, without the requested discovery, he was unable to ascertain the precise basis for the alleged default until after the trial commenced:

The trial court's granting of M Co.'s motion for a protective order effectively prevented the defendant from discovering evidence that may have demonstrated that he had been overcharged by the lender, either through improper charges for insurance premiums or on the basis of a failure to reduce the interest rate pursuant to the SCRA, and the trial court's erroneous ruling precluded the defendant from learning of the basis of the alleged default and from challenging the accuracy of R's testimony or the information contained in the documents from the mortgage file that M Co. produced at trial.

Moreover, although the trial court faulted the defendant for failing to raise his claim under the SCRA as a defense prior to trial, that act does not constitute a distinct defense to a foreclosure action and was instead relevant to support the defendant's claim that M Co.'s debt calculations were incorrect and that he was not in default.

Furthermore, the trial court, in faulting the defendant for not raising his claim under the SCRA in a timely manner, overlooked the fact that the delay was not the defendant's fault but was a direct result of the issuance of the protective order, which prevented the defendant from accessing the very documents that would have informed him earlier that W Co. may not have lowered his interest rate in accordance with the SCRA.

In addition, there was no merit to M Co.'s claims that the trial court's error was harmless insofar as it was the defendant's burden to prove his special defense of payment and that nothing in the protective order prevented the defendant from proving his special defense with his own evidence, such as by submitting copies of cancelled checks, as M Co. could not avoid discovery on the ground that it does not bear the burden of proof, the defendant was not limited in his proof to only evidence already in his possession, the defendant likely could not produce copies of cancelled checks for each month of the alleged default because J Co. allegedly had periodically refused to accept the defendant's checks, and the mortgage file likely contained information beyond the defendant's payment history that was relevant to the defendant's claim that he was not in default, such as information related to the defendant's interest rate and insurance premiums.

Argued March 29—officially released August 8, 2023

Procedural History

Action to foreclose a mortgage on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where MTGLQ Investors, L.P., was substituted as the plaintiff; thereafter, the court, *Hon. Anthony V. Avallone*, judge trial referee, granted the substitute plaintiff's motion for a protective order; subsequently, the case was tried to the court, *Baio*, *J.*; judgment of foreclosure by sale, from which the defendant appealed to the Appellate Court, *Alvord*, *Clark* and *Harper*, *Js.*, which affirmed the trial court's judgment and remanded the case for the purpose of setting a new sale date, and

the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Thomas P. Willcutts, for the appellant (defendant).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

McDONALD, J. The sole issue in this foreclosure appeal is whether the trial court properly granted a motion for a protective order in favor of the plaintiff mortgagee, thereby resulting in the denial of all document discovery sought by the defendant mortgagor. The defendant, George S. Lakner, appeals from the judgment of the trial court in favor of the substitute plaintiff, MTGLQ Investors, L.P. On appeal, the defendant contends that the trial court improperly granted MTGLQ's motion for a protective order regarding the production of MTGLQ's mortgage file. We agree with the defendant.

In 1995, the defendant executed a promissory note in favor of Shawmut Mortgage Company in the original, principal amount of $100,000. The note was secured by a mortgage deed on the defendant's residential property located in New Haven. The interest rate on the defendant's loan was fixed at 7.25 percent for the thirty year term of the loan. Shawmut Mortgage Company subsequently merged into Fleet Mortgage Corp., which, in turn, merged into Washington Mutual Bank, F.A.

In 2007, Washington Mutual initiated a foreclosure action against the defendant, alleging that the note was in default by virtue of nonpayment of the installments of the principal and interest due on May 1, 2006, and each month thereafter. While the foreclosure action was pending, Washington Mutual's assets were sold to JPMorgan Chase Bank, National Association. In response to the foreclosure action, the defendant submitted an affidavit attesting that he made all the payments at issue,

and, as proof, he attached copies of twelve months of checks, which were endorsed by Washington Mutual, that covered the period at issue. Thereafter, JPMorgan informed the defendant that it would not pursue Washington Mutual's foreclosure action, and the action was withdrawn in July, 2011.

In January, 2013, JPMorgan filed the present foreclosure action, alleging that the defendant's note was in default "by virtue of nonpayment of the monthly installments of principal and interest due on January 1, 2008, and each and every month thereafter . . . ." The defendant filed an answer and special defense in which he denied the allegation that he was in default, arguing that he "has submitted all payments due and owing on the subject mortgage note." In January, 2016, JPMorgan filed a motion for summary judgment. The defendant opposed the motion, in part, due to his denial that he had ever been in default of his payment obligations. In an affidavit in opposition to the motion for summary judgment, the defendant attested that, after the first foreclosure action was withdrawn, "[i]nitially, my payments were accepted by [JPMorgan] without incident, but, after approximately . . . [one] year, [JPMorgan] began to periodically refuse to accept my mortgage payments . . . . Throughout, I have attempted to rectify [JPMorgan's] refusal to accept my mortgage payments . . . but, each time I am able to correct the situation, [JPMorgan] ultimately reverts back to its refusal to accept my tendered payments . . . without providing me or [its employees at the branch bank] with any explanatory statements." The court denied JPMorgan's motion for summary judgment.

Because there was an extended period of inactivity following the denial of JPMorgan's motion for summary judgment, the trial court dismissed the case in December, 2017. JPMorgan then successfully moved to open

the case, and the current plaintiff, MTGLQ, was substituted for JPMorgan.[1]

On February 15, 2019, the defendant issued a notice of deposition on MTGLQ, with an accompanying document production request that sought production of MTGLQ's "complete mortgage file . . . relating to the [m]ortgage [n]ote and [d]eed that are the subject of this action . . . ." The notice also listed, among other things, the following specific documents to be produced: "All records of mortgage payments, including payments for property taxes and/or property insurance, related to the subject [m]ortgage [n]ote, from the inception of the [m]ortgage [n]ote to the present, including records pertaining to returning payments to the [d]efendant." MTGLQ filed a motion for a protective order requesting that the trial court disallow discovery as to all of the documents sought by the defendant on the ground that the requested documents were "not reasonably calculated to lead to the discovery of admissible evidence." MTGLQ also argued that the defendant was "on a fishing expedition, indulging a hope that, by ransacking [MTGLQ's] files, [he] will find something useful." Specifically, with respect to the request that MTGLQ furnish all records of mortgage payments, including property taxes and insurance payments, related to MTGLQ's claimed debt, MTGLQ argued, in total, that the document request was "simply too vague and broad to be answered. As such, the court should grant this motion and overrule any objection."

The defendant objected to MTGLQ's motion for a protective order, arguing that two issues were in dispute between the parties: (1) the allegation that the defendant was in default of his mortgage payment obligations,

[1] It appears that, after MTGLQ was substituted for JPMorgan as the plaintiff, the case caption was erroneously changed to "*MTGLQ Investors, L.P.* v. *George S. Lakner*."

and (2) MTGLQ's standing to prosecute the foreclosure action. The defendant argued that the documents he sought in his deposition notice pertaining to the history of his mortgage account were relevant to the parties' dispute over whether the account was in default. He also argued that the documents pertaining to the history of the transfers of the mortgage note were relevant to the defendant's challenge to MTGLQ's standing.

With no ruling on MTGLQ's motion for a protective order, on June 4, 2019, the defendant filed a request for adjudication of the deposition dispute. On June 28, 2019, the defendant issued a new deposition notice, without an accompanying document production request, because the trial court had not yet ruled on MTGLQ's motion for a protective order. MTGLQ then filed a motion for a protective order as to the second deposition notice. In that motion, MTGLQ argued that the defendant "has forfeited the right to dispute the debt. The debt and default in this case [are] established through the affidavit of debt." MTGLQ argued that it was entitled to prove the default by means of an affidavit of debt only, pursuant to the provisions of Practice Book § 23-18 (a), "where no defense as to the amount of the mortgage debt is interposed . . . ."

On July 10, 2019, the trial court, *Hon. Anthony V. Avallone*, judge trial referee, granted MTGLQ's first motion for a protective order. In an articulation of its reasons for granting this motion, filed after the defendant appealed and the Appellate Court ordered such an articulation, the trial court stated that, with respect to the defendant's denial that he was ever in default, the defendant's discovery requests "do not come within the scope of [Practice Book] § 13-2. The defendant's specific request for all correspondence to and from the defendant does not meet the standard, in that [the correspondence is] already in the defendant's posses-

sion."[2] The trial court also stated, without elaboration, that the defendant's request is "overly broad and will not lead to the admission of material evidence. It would be unreasonable to require [MTGLQ] to go to the substantial expense of providing this overly broad discovery. . . . The court granted the motion for a protective order to prevent . . . the improper use of the discovery." Thereafter, the trial court, *Cordani*, *J.*, denied MTGLQ's second motion for a protective order, and the defendant subsequently deposed a representative of MTGLQ's loan servicer, Dave Rittenhouse, a "foreclosure litigation specialist," one week before trial. No documents were produced at that deposition.

Relevant to this appeal, at trial, before the court, *Baio*, *J.*, MTGLQ offered an affidavit of debt into evidence to prove its debt. The defendant's counsel objected, and the trial court sustained counsel's objection, explaining: "[T]he request to offer the affidavit pursuant to Practice Book § 23-18 is denied in light of the fact that it does require that, in an action to foreclose a mortgage . . . there must be no defense as to the amount of the mortgage debt that is interposed, and . . . [a] review of the materials available to the court and the information thus far . . . indicate[s] that there is a dispute." But

[2] The parties participated in foreclosure mediation in 2013 and 2014. See General Statutes § 49-31m. The final report issued by the mediator provided, among other things, that, "[a]t the initial mediation session on [April 18, 2013], [JPMorgan] provided a payment history from June, 1995, through the mediation date." The parties' participation in mediation was not extensively discussed at trial, and, accordingly, there is no record regarding the document containing the defendant's payment history that was purportedly provided to the defendant during mediation. The trial court's statement, in its articulation, that the "correspondence to and from the defendant . . . [is] already in the defendant's possession" appears to relate only to the correspondence between the parties and not this payment history. Even if the defendant had been provided such a payment history, under the circumstances of this case, the defendant was entitled to review the documentation in MTGLQ's mortgage file to discover any discrepancies or other problems contained therein.

see *JPMorgan Chase Bank, National Assn.* v. *Malick*, 347 Conn. 155, 163, A.3d (2023) (affidavit of debt is used to establish amount of debt averred in affidavit when amount of debt is not in dispute). Thereafter, during the testimony of MTGLQ's witness, Rittenhouse, MTGLQ introduced into evidence exhibit 12, a twenty-eight page document consisting of the "Transaction Detail," "Payments Due Detail," and "Loan History Summary" of the defendant's account in order to prove its debt. The defendant's counsel objected, arguing that exhibit 12 was never produced in discovery. As a result, the defendant's counsel argued that the defendant was prejudiced because, "I don't have the opportunity to go through this. I don't have the opportunity to find specific documents to contradict this, and I have to take the position with [the] court, Your Honor, that we're severely prejudiced by this and it—and the idea that you can conceal a payment history because you don't expect to have to use it . . . ." The trial court admitted the exhibit, explaining that "[a]ny discovery issues that you may have had, at this point, the court's not going to go back and look and see what another judge did or why another judge did what [he or she] did." The court then took a brief recess to allow the defendant's counsel to review exhibit 12. The defendant's counsel subsequently requested access to MTGLQ's mortgage file during trial because MTGLQ's counsel had brought "two large boxes" of documents to court for the trial. The trial court declined to order that the defendant's counsel be given access to the documents.

Throughout trial, the defendant's counsel questioned Rittenhouse in an attempt to gain an understanding of the basis for the alleged default. Specifically, during his cross-examination, Rittenhouse explained that he reviewed the defendant's payment history going back to 2002 because that is when the defendant's delinquency "started to occur." He also testified that the delinquency

began to build over time: "I recall seeing that [the shortfall in the payments submitted by the defendant began well before 2008], and, eventually, the [defendant] fell [one] month behind, and then, I think, it got to two months, and then it kind of snowballed." Rittenhouse also testified that the defendant's interest rate was 7.25 percent and that "[i]t [did] not appear that it change[d] through the life of the loan." The defendant, who is a retired colonel in the United States Army, testified that the interest rate on his loan had changed. Washington Mutual was required by the federal Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3937 (a),[3] to lower the defendant's interest rate to 6 percent after he was called to active duty military service following the attacks of September 11, 2001, and the defendant testified that Washington Mutual did, in fact, lower his interest rate in 2002. This 1.25 percent reduction in the interest rate on the loan had the effect of lowering the defendant's monthly mortgage payments, according to the defendant. The defendant's testimony in this regard was confirmed by a December 17, 2002 letter to the defendant from Washington Mutual.[4] During the cross-

[3] Prior to the enactment of the SCRA in 2003, the SCRA was called the Soldiers' and Sailors' Civil Relief Act of 1940. See 50 U.S.C. app. § 501 et seq. (2000 and Supp. II 2002). However, to be consistent with the parties' briefs, the trial court's decision, and trial testimony, we refer to the act by its current name.

[4] The December 17, 2002 Washington Mutual letter was not in evidence at trial. At oral argument before this court, however, MTGLQ's appellate counsel stated that this court could consider the letter, nonetheless. Because MTGLQ does not contend that consideration of the letter by this court would be improper, we have no occasion to determine whether it would have properly been admitted at trial, had MTGLQ's trial counsel objected. Cf. *In re David P.*, 154 Conn. App. 508, 516, 105 A.3d 960 (2014) ("[c]oncessions made during oral argument may be properly considered by the appellate courts in rendering their decision[s]"), cert. denied, 315 Conn. 922, 107 A.3d 959 (2015); see also, e.g., *Hirsch* v. *Braceland*, 144 Conn. 464, 469, 133 A.2d 898 (1957) (considering fact that did not appear in record but was mentioned in party's brief and "admitted to be so by the [opposing party] during the course of oral argument [before] this court").

examination of Rittenhouse, the defendant's counsel asked, "when you testified that there are deficiencies in the payment history of this mortgage loan going back to the early 2000s, do you know whether . . . these, what you identified as deficiencies, were, in fact, the result of overcharging the interest under the [SCRA]?"[5] Rittenhouse did not provide a clear answer to the question. The defendant's counsel also sought clarification regarding potentially improper insurance charges to the defendant's account. Specifically, the defendant testified that he had always maintained insurance on the property through the United Services Automobile Association, which provides insurance coverage to members of the military, veterans, and their families, and did not insure the property as part of his mortgage. The defendant's counsel asked Rittenhouse why there were line items in exhibit 12 reflecting "[i]nsurance [p]remium [d]isbursement" on the defendant's account. Rittenhouse testified that he had not reviewed MTGLQ's mortgage file to determine whether the defendant had been improperly charged for insurance premiums.

In January, 2020, the trial court issued a memorandum of decision and rendered judgment of foreclosure by sale in favor of MTGLQ. Specifically, the trial court concluded that the defendant "provided no evidence establishing a lack of standing; nor did he present any evidence contradicting [MTGLQ's] evidence. Rather, [MTGLQ] established by a fair preponderance of the evidence that it had the right to enforce the debt at issue in the present matter." The court also concluded that the defendant failed to prove his special defense of payment, explaining: "The defendant has presented evidence of various payments having been made on the

[5] The defendant had previously argued in opposition to MTGLQ's second motion for a protective order that a United States Senate investigation had uncovered that Washington Mutual had engaged in fraud, including overcharging borrowers.

mortgage debt. . . . This evidence, consisting primarily of copies of checks, demonstrates some payments to the lender, but it does not demonstrate, by a fair preponderance of the evidence, a lack of default. . . . The defendant's offer also fails to provide any claim of payments after 2009. As submitted by [MTGLQ], the evidence . . . accounts for the defendant's payment record up to and including December, 2012, reflecting that the servicer accepted some payments, which advanced the due date of the mortgage to May, 2008. . . . Consequently, the evidence presented establishes by a fair preponderance of the evidence that the payments made by the defendant were insufficient to bring the loan current, hence resulting in the [loan's being] in default." (Citations omitted.)

The trial court acknowledged that, at trial, the defendant argued that the SCRA may provide a defense to the foreclosure action. The court explained, however, that "[t]he defendant had not raised the SCRA at any time before trial and claims that the issue arose for the first time at trial. . . . Even if the court were to consider the raised defense of the SCRA, the defendant has not proven by a fair preponderance of the evidence that the SCRA provides a defense in this matter. Although the evidence submitted does establish that, at some point, the defendant was provided with an adjusted interest rate, the defendant's evidence, consisting entirely of his own testimony, demonstrates that his recollection as to the dates of his military service differ[s] from military documentation. . . . Additionally, the defendant testified that he was fortunate not to suffer any personal hardships that would make it difficult for him to meet his mortgage obligations and, moreover, that his pay was not materially affected." (Citation omitted; footnote omitted.) The trial court emphasized that, "if the defendant intended to rely on the SCRA as a defense, then he should have raised it

before trial. To consider it now would not only endorse the practice of unfair surprise but would also be prejudicial to the opposing counsel."

The Appellate Court subsequently issued a memorandum decision affirming the judgment of the trial court and remanding the case for the purpose of setting a new sale date.[6] See *MTGLQ Investors, L.P.* v. *Lakner*, 210 Conn. App. 901, 266 A.3d 200 (2022). The defendant filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly uphold the trial court's decision to grant a motion for a protective order in favor of [MTGLQ], thereby resulting in the denial of document discovery sought by the defendant related to [MTGLQ's] mortgage file that was the subject of this foreclosure action?" *MTGLQ Investors, L.P.* v. *Lakner*, 343 Conn. 913, 274 A.3d 113 (2022).

On appeal, the defendant contends that the trial court erred in granting MTGLQ's motion for a protective order. Specifically, the defendant contends that the trial court abused its discretion by granting the motion for a protective order, which resulted in a " 'complete denial' " of document discovery, in violation of Practice Book § 13-2. The defendant also argues that the protective order harmed him at trial because, without access to MTGLQ's mortgage file, he "was unable to timely discover, develop and potentially present to the [trial] court definitive evidence that [he] was the victim of being overcharged on his mortgage account, which would both undermine the judgment figure awarded to [MTGLQ] by the court, as well as undermine [MTGLQ's] allegation that the defendant was ever in default of his mortgage payment obligations . . . ." The defendant

[6] Because the Appellate Court summarily affirmed the trial court's judgment, we do not have the benefit of the Appellate Court's analysis as to why it concluded that the defendant's appeal was meritless.

argues that, because the protective order precluded his requested discovery, he did not learn until Rittenhouse's trial testimony that he had been improperly charged insurance premiums and assessed a higher interest rate in violation of the SCRA.

In response, MTGLQ contends that the trial court did not abuse its discretion in granting the motion for a protective order because the defendant's request for production of documents was overly broad, in that it did not specify the documents sought, it was not limited in time, it was not limited to documents to be used at trial, and it did not seek to clarify any entry in the payment history that the defendant purportedly received several years prior, during mediation.[7] MTGLQ also argues that, even if the trial court abused its discretion, the error was harmless because "that order did not impair or [a]ffect [the defendant's] ability to provide his own evidence in support [of] his payment defense." Under the specific circumstances of this case, we agree with the defendant and, accordingly, reverse the judgment of the Appellate Court.

We begin with the standard of review and relevant legal principles. It is well established that "[t]he rules

[7] In its brief, MTGLQ also contends that "[t]he trial court's decision to grant [the] motion for a protective order in favor of [MTGLQ] did not result in the denial of document discovery sought by the defendant related to [MTGLQ's] mortgage file because the defendant never propounded a request for documents [on MTGLQ] . . . but, instead, chose only to depose [MTGLQ] after the court had scheduled trial." To the extent MTGLQ argues that the defendant was not permitted to request document discovery in a deposition notice, it is mistaken. See, e.g., Practice Book § 13-27 (g) ("[t]he notice to a party deponent may be accompanied by a request made in compliance with Sections 13-9 through 13-11 for the production of documents and tangible things at the taking of the deposition"); Practice Book § 13-28 (c) ("[a] subpoena issued for the taking of a deposition may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents or tangible things which constitute or contain matters within the scope of the examination permitted by Sections 13-2 through 13-5").

of discovery are designed to make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks omitted.) *Wexler* v. *DeMaio*, 280 Conn. 168, 186 n.13, 905 A.2d 1196 (2006). The boundaries of discovery are broader than the boundaries of admissible evidence; see *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 139, 491 A.2d 389 (1985); and, as a result, "[d]iscovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action and if it can be provided by the disclosing party or person with substantially greater facility than it could otherwise be obtained by the party seeking disclosure." Practice Book § 13-2.

"[T]he [trial] court's inherent authority to issue protective orders is embodied in Practice Book § 13-5 . . . ." *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 221 n.59, 884 A.2d 981 (2005). "We have long recognized that the granting or denial of a discovery request rests in the sound discretion of the [trial] court, and is subject to reversal only if such an order constitutes an abuse of that discretion. . . . [I]t is only in rare instances that the trial court's decision will be disturbed. . . . Therefore, we must discern whether the court could [have] reasonably conclude[d] as it did." (Internal quotation marks omitted.) *Blumenthal* v. *Kimber Mfg., Inc.*, 265 Conn. 1, 7, 826 A.2d 1088 (2003). "That discretion is limited, however, by the provisions of the rules pertaining to discovery . . . especially the mandatory provision that discovery shall be permitted if the disclosure sought would be of assistance in the prosecution or defense of the action. . . . The court's discretion applies to decisions concerning whether the information is material, privileged, substantially more available to the disclosing party, or within the disclosing party's knowledge, possession or power

. . . . A complete denial of discovery, however, is seldom within the court's discretion unless the court finds that one or more of the limitations on discovery . . . appl[y]. . . . When discovery is warranted under the [previously discussed principles], such a denial is an abuse of discretion." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Standard Tallow Corp.* v. *Jowdy*, 190 Conn. 48, 57–60, 459 A.2d 503 (1983).

Foreclosure cases are governed by the same rules of discovery that apply in other civil cases. In this context, we are mindful that "[a]n action for foreclosure is peculiarly an equitable action"; (internal quotation marks omitted) *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 670, 212 A.3d 226 (2019); and that "[a] party that invokes a court's equitable jurisdiction by filing an action for foreclosure necessarily invites the court to undertake . . . an inquiry [into his conduct]. . . . Equity will not afford its aid to one who by his conduct or neglect has put the other party in a situation in which it would be inequitable to place him. . . . A trial court conducting an equitable proceeding may therefore consider all relevant circumstances to ensure that complete justice is done." (Citations omitted; internal quotation marks omitted.) Id., 671.

As discussed, in his first deposition notice, the defendant requested the production of MTGLQ's "complete mortgage file," including but not limited to: "All records of mortgage payments, including payments for property taxes and/or property insurance, related to the subject [m]ortgage [n]ote, from the inception of the [m]ortgage [n]ote to the present, including records pertaining to returning payments to the [d]efendant." The basis of MTGLQ's motion for a protective order, and the trial court's ruling on that motion, was that the request for MTGLQ's mortgage file would not lead to the discovery of admissible evidence and was overly broad.

Without citing to any evidence or factual predicate, the trial court summarily and without explanation concluded that the defendant's request for documents contained in MTGLQ's mortgage file pertaining to the defendant's loan would not lead to the discovery of admissible evidence. That conclusion was unsupported by any reference to the facts of the present case and runs counter to the general observation that a lender's mortgage file contains critical information regarding a mortgagor's account. See, e.g., 1 D. Caron & G. Milne, Connecticut Foreclosures (12th Ed. 2022) § 1-1:1, p. 4 ("A close examination of the lender's file is critical to a successful prosecution of the [foreclosure] action. A hurried review is apt to cause counsel to overlook some of the problems that abound in this area of the law, an oversight that can only result in delay and possible embarrassment for the attorney to whom the file has been entrusted."). This is true for the plaintiff and the defendant alike. Although many foreclosure cases will proceed without the need for discovery, it should come as no surprise, in a contested case, that a defendant or his or her attorney will need to review those aspects of the lender's file that may lead to the discovery of admissible evidence relating to one or more disputed issues. This is particularly so when, as here, the defendant raises a special defense of payment. See, e.g., *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 606 n.10, 717 A.2d 713 (1998) ("[p]ayment is an affirmative defense that must be proved by the defendant").

The point is well illustrated by the facts of this case. Some of the very documents that the defendant was blocked from obtaining in discovery—those pertaining to the defendant's payment history—were ultimately entered into evidence by MTGLQ at trial without the defendant ever having seen them. For example, to prove its debt, MTGLQ introduced into evidence exhibit 12,

a twenty-eight page document that combined "Transaction Detail," "Payments Due Detail," and "Loan History Summary" of the defendant's account. MTGLQ also introduced into evidence exhibit 14, a December, 2012 document from JPMorgan detailing "all transactions on [the defendant's] account for the period of February 7, 2006, through December 5, 2012." These documents were plainly within the scope of the defendant's request. Yet, the defendant was not allowed to see them before trial. More broadly, MTGLQ's witness, Rittenhouse, was permitted to testify based on his review of MTGLQ's mortgage file, whereas the defendant and his counsel were denied access to that same material. It can hardly be argued that access to MTGLQ's mortgage file would not lead to the discovery of admissible evidence when MTGLQ actually introduced documents from the mortgage file into evidence and its witness testified at trial based on his extensive review of that file.

We also disagree with the trial court's conclusion that the defendant's request was overly broad.[8] As illustrated by the records submitted into evidence by MTGLQ at trial, MTGLQ's mortgage file contained, among other things, the account's payment history, correspondence between the lender and borrower, and other important account information. These records make up the source material that gives rise to MTGLQ's foreclosure action. The defendant was not required to

[8] In its motion for a protective order, MTGLQ also argued that requests 1G, 1H, and 2 were too vague. Request 1G sought "[a] complete printout of [MTGLQ's] computer file records related to the subject [m]ortgage [n]ote . . . ." Request 1H asked for "[a]ll records of mortgage payments, including payments for property taxes and/or property insurance, related to the subject [m]ortgage [n]ote, from the inception of the [m]ortgage [n]ote to the present, including records pertaining to returning payments to the [d]efendant." Request 2 sought "[a]ll records relied [on] in connection with [MTGLQ's] responses to the defendant's [r]equests to [a]dmit . . . ." MTGLQ conceded at oral argument that it did not explain to the trial court why or how these requests were too vague to allow MTGLQ to comply.

rely solely on MTGLQ's summary of his payment history; he was entitled to review the underlying records themselves to confirm that the information contained in the summary was accurate. See, e.g., *Customers Bank* v. *Tomonto Industries, LLC*, 156 Conn. App. 441, 445–46, 112 A.3d 853 (2015) (originals or copies of documents used to develop summary exhibits admitted pursuant to § 10-5 of Connecticut Code of Evidence must be made available to other parties upon request); see also, e.g., *Brookfield* v. *Candlewood Shores Estates, Inc.*, 201 Conn. 1, 12–13, 513 A.2d 1218 (1986) (summaries may be admitted provided that documents on which they are based are available to opposing party). Under these circumstances, we cannot agree with the trial court that a request seeking production of a lender's mortgage file is overly broad.

The trial court's order granting MTGLQ's motion for a protective order effectively denied the defendant meaningful access to any document discovery. "A complete denial of discovery . . . is seldom within the [trial] court's discretion . . . ." *Standard Tallow Corp.* v. *Jowdy*, supra, 190 Conn. 60. Under these circumstances, we conclude that the trial court abused its discretion in granting MTGLQ's motion for a protective order, denying the defendant access to MTGLQ's mortgage file related to the defendant's loan.

MTGLQ nevertheless argues that the defendant should have made a more narrowly tailored discovery request. We are not persuaded. To the extent that MTGLQ believed that the defendant's request was overly broad, our rules of practice mandate that it engage in a good faith effort to reach agreement with the defendant on any discovery related objections. See Practice Book § 13-10 (i). It does not appear from the record that MTGLQ had engaged in this good faith effort or that such an effort was fruitless as a result of the defendant's intransigence or unreasonableness; rather, MTGLQ

chose instead to seek a protective order completely barring discovery of many documents that plainly were subject to disclosure.[9]

Having concluded that the trial court abused its discretion in granting MTGLQ's motion for a protective order, we must address whether the defendant has shown that he was harmed by that error. "The harmless error standard in a civil case is whether the improper ruling would likely affect the result." (Internal quotation marks omitted.) *Kalams* v. *Giacchetto*, 268 Conn. 244, 249, 842 A.2d 1100 (2004). In considering the question of harm, we reiterate that the defendant's issue on appeal is not whether the trial court erred in rendering judgment based on the record before it. Instead, the defendant's claim of error is that the protective order substantially prevented him from having the opportunity to pursue, develop and support the defenses he raised. Indeed, the defendant argues that, without the requested discovery, he was unable to ascertain the precise basis for the alleged default until after trial had commenced. Under the particular circumstances of this case, we conclude that the defendant has satisfied his

[9] MTGLQ also argues, for the first time on appeal, that, as a result of waiting until a little more than one month before the scheduled trial date to conduct discovery, the defendant waived his right to discovery. This argument misconstrues the relevant discovery timeline. The defendant issued a notice of deposition to MTGLQ on February 15, 2019, and trial ultimately commenced, nearly seven months later, on September 13, 2019. MTGLQ's motion for a protective order was not based on the timing of the request, and, consequently, the trial court's decision to grant the motion for a protective order was not based on the timing of the request. Because this argument was not raised before the trial court, we decline to consider it further. See, e.g., *Jobe* v. *Commissioner of Correction*, 334 Conn. 636, 643, 224 A.3d 147 (2020) ("[i]t is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial, and [o]nly in [the] most exceptional circumstances can and will [an appellate] court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court" (internal quotation marks omitted)).

burden of establishing that he was harmed by the granting of the motion for a protective order.

When the trial court granted MTGLQ's motion for a protective order, it effectively prevented the defendant from discovering evidence that may have demonstrated that he had been overcharged on his mortgage account—either through improper charges for insurance premiums or a failure to reduce the interest rate pursuant to the SCRA—or from even knowing the basis of the alleged default. The court's order granting MTGLQ's motion precluded the defendant from obtaining any document discovery related to his payment history, including any returned payments, and information pertaining to other charges to his account. Consequently, it was not until trial that the defendant discovered that a possible basis for his alleged default was the failure of Washington Mutual to lower his interest rate pursuant to the SCRA or one of the lender's improperly charging his account for insurance premiums. As a further result of the erroneous protective order, MTGLQ was allowed to selectively choose, at its sole discretion, which documents from its mortgage file it would produce at trial. Rittenhouse was also permitted to testify regarding his review of the mortgage file, the defendant's counsel was unable to challenge the veracity of this testimony because he did not have an opportunity to review this file, and the trial court made clear it was not going to revisit discovery rulings. Cf. Conn. Code Evid. § 6-9 (b) ("If a witness, before testifying, uses an object or writing to refresh the witness' memory for the purpose of testifying, the object or writing need not be produced for inspection unless the court, in its discretion, so orders. Any party may introduce the object or writing in evidence if it is otherwise admissible under the Code."). Recently, in a related context, this court explained the importance of discovery in a foreclosure action in which aspects of a historical record of debt were compiled

by a third party, but, at trial, the plaintiff introduced its own record of the debt that incorporated information that the third party had provided to the plaintiff. See *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 377–78, 389, 222 A.3d 950 (2020). Specifically, we held that such a document is admissible under the business records exception to the hearsay rule; see id., 388, 394; because, among other things, "[a] defendant is free to undertake discovery concerning the accuracy of the information in a business record as well as to introduce or cross-examine witnesses about its accuracy." Id., 393. In the present case, the defendant had no meaningful access to those very documents that would have allowed him to challenge the accuracy of Rittenhouse's testimony or the information contained in exhibit 12, which MTGLQ used to prove the amount of the debt.

In its memorandum of decision, the trial court nevertheless faulted the defendant for not raising the SCRA as a defense prior to trial. To begin with, we note that the SCRA does not, in and of itself, constitute a distinct defense to the foreclosure action. Rather, the SCRA was relevant to support the defendant's argument that MTGLQ's debt calculations were incorrect and that he was not in default. In faulting the defendant for raising the SCRA issue too late, the trial court also overlooked the fact that the delay was not the defendant's fault but, instead, was a direct result of the issuance of the protective order, which blocked the defendant's access to the very documents that would have informed him earlier that Washington Mutual may not have lowered his interest rate in accordance with the SCRA as it indicated it had in its December 17, 2002 letter. In its memorandum of decision, the trial court also noted that the "Practice Book mandates full and broad discovery prior to trial. [T]he purpose of the rules of discovery is to make a trial less a game of blindman's buff and

more a fair contest with the basic issues and facts disclosed to the fullest." (Internal quotation marks omitted.) Ironically, it was the defendant who was subjected to a game of blindman's buff throughout trial as he attempted to ascertain the basis for his alleged default.[10] Under the circumstances of this case, and given the broad scope of our discovery rules, as well as the equitable nature of a foreclosure proceeding; see, e.g., *U.S. Bank National Assn.* v. *Blowers*, supra, 332 Conn. 670–71; we conclude that the defendant has satisfied his burden of establishing that he was harmed by the issuance of the protective order.

MTGLQ argues that, even if the trial court abused its discretion in granting the motion for a protective order, that error was harmless because it was the defendant's burden to prove his special defense of payment, and nothing in the protective order prevented the defendant from proving his special defense with his own evidence. MTGLQ provides no legal authority, and we are aware of none, for the proposition that a party can avoid discovery on the basis that it does not bear the burden of proof or that the party who bears a burden can be limited in his proof to only evidence already in his possession. This argument turns upside down the fundamental idea underlying civil discovery. Additionally, although MTGLQ argues that the defendant could rebut the allegation that he was in default by submitting copies of cancelled checks, the defendant maintained throughout the course of this action that, after the first

[10] We recognize that the trial judge, *Baio, J.*, was not the same judge who ruled on MTGLQ's motion for a protective order. When the discovery issues arose during trial, Judge Baio declined to revisit "what another judge did or why another judge did what [he or she] did." Nevertheless, the denial of the defendant's discovery request prevented the defendant from participating in a trial that was "a fair contest with the basic issues and facts disclosed to the fullest practicable extent." (Internal quotation marks omitted.) *Wexler* v. *DeMaio*, supra, 280 Conn. 186 n.13. Judge Baio's decision not to revisit the discovery rulings cemented the harm to the defendant at trial.

foreclosure action was withdrawn, JPMorgan initially accepted his payments, but, after approximately one year, it began to "periodically refuse to accept [his] mortgage payments . . . ." As such, the defendant likely could not produce cancelled checks for each month of the alleged default. MTGLQ's mortgage file may well have contained information regarding these rejected payments. Without the ability to review the mortgage file, the defendant cannot be certain. Thus, access to MTGLQ's mortgage file was critical to the defendant's allegation that JPMorgan was improperly rejecting his payments. Cf. 2 D. Caron & G. Milne, supra, § 32-2:1, p. 636 ("[a] borrower who makes timely payments that are improperly rejected would appear to have a bona fide defense to the foreclosure").

Additionally, MTGLQ's mortgage file likely contains further information beyond payment history. For example, it may have contained information related to the defendant's interest rate and insurance premiums. Indeed, at trial, when MTGLQ introduced exhibit 12, the defendant's counsel discovered that there appeared to be improper insurance charges on the defendant's account. The defendant's counsel asked Rittenhouse why there were line items in exhibit 12 reflecting "[i]nsurance [p]remium [d]isbursement" on the defendant's account. Rittenhouse was unable to answer the question because he had not reviewed MTGLQ's mortgage file to determine whether the defendant had been improperly charged for insurance premiums. These line items are wholly inconsistent with the defendant's testimony that he had always maintained insurance on the property through the United Services Automobile Association and did not insure the property as part of his mortgage, and, so, the existence (or lack thereof) of underlying documentation in the mortgage file would be of critical importance to resolve the dispute. Had the defendant had access to the documents used by

MTGLQ to develop exhibit 12, as required by § 10-5 of the Connecticut Code of Evidence; see, e.g., *Customers Bank* v. *Tomonto Industries, LLC*, supra, 156 Conn. App. 445–46; he may have been able to present evidence establishing improper charges for insurance premiums. MTGLQ cannot avoid discovery simply by claiming it was the defendant's burden to prove payment.

CONCLUSION

The Appellate Court improperly upheld the trial court's decision to grant the motion for a protective order in favor of MTGLQ, thereby resulting in the denial of document discovery sought by the defendant related to MTGLQ's mortgage file. The defendant also satisfied his burden of establishing that he was harmed by the granting of that motion.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court with direction to deny the motion for a protective order and for a new trial.

In this opinion the other justices concurred.

JON L. SCHOENHORN *v.* MELODIE MOSS ET AL. (SC 20710)

Robinson, C. J., and McDonald, Mullins, Ecker and Alexander, Js.

Syllabus

The plaintiff attorney sought a writ of mandamus to compel the defendant, the chief court reporter for the judicial district of Stamford-Norwalk, to produce certain transcripts that were sealed by another court in a marital dissolution action involving different parties. In the dissolution action, the family court had held a hearing concerning child custody, during which it issued an oral order closing the courtroom to the public and sealing the hearing transcripts. Following the dismissal of the dissolution action, the defendant declined to provide the transcripts of the custody hearing to the plaintiff, and the plaintiff commenced the present

mandamus action against the defendant individually and in her official capacity as chief court reporter, seeking an injunction compelling the defendant, pursuant to statute (§ 51-61 (c)), to produce those transcripts. The trial court granted the defendant's motion to dismiss and rendered judgment dismissing the action for lack of subject matter jurisdiction. Relying on *Valvo* v. *Freedom of Information Commission* (294 Conn. 534), in which this court concluded that a trial court presiding over an administrative appeal did not have subject matter jurisdiction to overturn sealing orders issued by another court in an unrelated case involving different parties, the trial court in the present case concluded that the plaintiff's mandamus action constituted an impermissible collateral attack on the family court's sealing order, and, therefore, the action was nonjusticiable because no practical relief was available to the plaintiff. On appeal from the trial court's judgment of dismissal, the plaintiff claimed that the trial court incorrectly had determined that his action was nonjusticiable.

Held that the trial court properly dismissed the plaintiff's mandamus action on the ground that it was nonjusticiable, as the trial court could not afford the plaintiff any practical relief:

The plaintiff's action seeking to compel the defendant to produce the transcripts at issue constituted an impermissible collateral attack on a sealing order issued by a different court in a different action involving different parties.

The plaintiff's mandamus action, like the administrative appeal in *Valvo*, did not adequately protect the interests of all affected parties, such as the children in the marital dissolution action whose custody was the subject of the hearing at issue, and, because the trial court in the present case had no continuing jurisdiction over the marital dissolution action and no custody or control over the sealed transcripts, it had no authority to overturn the family court's sealing order.

This court's conclusion that the plaintiff's action was nonjusticiable accorded not only with *Valvo* and the principles cited therein but also with this court's deep-rooted public policies favoring consistency and stability of judgments, the orderly administration of justice, and the prevention of inconsistent rulings.

Moreover, although the plaintiff claimed that *Valvo* was distinguishable from the present case because a trial court's powers in a mandamus action are broader than they are in an administrative appeal and that his mandamus action was justiciable by virtue of a trial court's broad, equitable powers to issue a writ of mandamus, the mere fact that the plaintiff sought a writ of mandamus did not relieve him from proving that his claim was justiciable, and when a plaintiff brings an impermissible collateral attack on another court's sealing order by way of a mandamus

action, no practical relief can be granted, and the court lacks competency to adjudicate the matter.

The plaintiff's reliance on *Lechner* v. *Holmberg* (165 Conn. 152), in which this court recognized that an action for a writ of mandamus is the proper vehicle for compelling the production of court transcripts, was misplaced, as that case does not stand for the broad proposition that a plaintiff can bring a mandamus action requesting the trial court to revoke, undo, or ignore a sealing order imposed by a different court in a separate proceeding.

Furthermore, there was no merit to the plaintiff's claim that a collateral attack on the family court's sealing order was permissible in this case on the ground that the order was void ab initio in light of the family court's failure to follow certain procedures set forth in the rule of practice (§ 25-59) governing the closure of courtrooms in family matters, which, in turn, deprived the family court of subject matter jurisdiction to close the courtroom and to seal the transcripts, as this court could not conclude that the family court's jurisdiction over the marital dissolution action was so lacking as to be entirely obvious.

In addition, even if the family court had violated the rules of practice in issuing the sealing order, any error in applying the rules of practice is not even arguably jurisdictional and does not affect a trial court's competency to adjudicate the type of action before it, and, accordingly, the family court's sealing order was not void ab initio and was not open to collateral attack.

(*One justice concurring separately*)

Argued March 22—officially released August 8, 2023

Procedural History

Action for a writ of mandamus to compel the defendants to produce transcripts of certain court proceedings, brought to the Superior Court in the judicial district of Hartford, where the court, *Sheridan*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Jon L. Schoenhorn, self-represented, the appellant (plaintiff).

Emily Adams Gait, assistant attorney general, with whom were *Robert J. Deichert*, assistant attorney general, and, on the brief, *William Tong*, attorney general,

and *Alma Rose Nunley*, assistant attorney general, for the appellees (defendants).

Opinion

ALEXANDER, J. The plaintiff, Attorney Jon L. Schoenhorn, appeals[1] from the judgment of the trial court dismissing his action for a writ of mandamus[2] ordering the defendant, Melodie Moss, the chief court reporter for the judicial district of Stamford-Norwalk, to produce certain transcripts that were sealed by another trial court in a separate proceeding involving different parties. The plaintiff claims that the trial court incorrectly determined that his action was nonjusticiable and, therefore, the court lacked subject matter jurisdiction over it. We disagree and affirm the judgment of the trial court.

The record reveals the following facts and procedural history. In 2017, Jennifer R. Dulos commenced a marital dissolution action against her husband, Fotis Dulos, in the family division of the Superior Court in the judicial district of Stamford-Norwalk (family court). *Dulos* v. *Dulos*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-FA-17-5016797-S. As a part of that proceeding, the family court conducted a hearing on May 14 and 17, 2019, relating to the custody of the Dulos children. At the commencement of the hearing, the family court issued an oral order closing the courtroom to the public and sealing the hearing transcripts. On February 4, 2020, following the death of Fotis Dulos, the family court rendered a judgment of dismissal in

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

[2] General Statutes § 52-485 (a) provides: "The Superior Court may issue a writ of mandamus in any case in which a writ of mandamus may by law be granted, and may proceed therein and render judgment according to rules made by the judges of the Superior Court or, in default thereof, according to the course of the common law."

the Dulos marital dissolution action. The transcripts of the hearing are the subject of this appeal.

In April, 2021, the plaintiff commenced the present mandamus action in the Superior Court in the judicial district of Hartford, against the defendant, individually and in her official capacity as the chief court reporter for the judicial district of Stamford-Norwalk, after she declined to produce the transcripts to the plaintiff. In his complaint, the plaintiff sought an injunction compelling the defendant, pursuant to General Statutes § 51-61 (c),[3] to produce the transcripts. The defendant thereafter filed a motion to dismiss, arguing that the trial court lacked subject matter jurisdiction to issue the writ of mandamus because to grant the requested relief would require the trial court to overturn the family court's order sealing the transcripts. In support of her motion, the defendant attached certified transcript pages from the hearing that contained the family court's oral ruling sealing the transcripts and closing the courtroom to the public.[4]

The trial court granted the defendant's motion to dismiss and rendered judgment dismissing the action for lack of subject matter jurisdiction. Relying on *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 985 A.2d 1052 (2010), the trial court concluded that

[3] General Statutes § 51-61 (c) provides: "Each official court reporter and court recording monitor shall, when requested, furnish to the court, to the state's attorney, to any party of record and to any other person, within a reasonable time, a transcript as may be desired, except that, if the proceedings were closed to the public, such official court reporter or court recording monitor shall not furnish such transcript to such other person unless the court in its discretion determines that such disclosure is appropriate."

[4] The defendant represents that the attached transcript pages were sealed due to "clerical error" and that, after the error was discovered but before the defendant filed her motion to dismiss, the defendant sent the plaintiff an electronic copy of the portion of the hearing that was not under seal. The plaintiff claims that he became aware of the sealing order for the first time when the defendant attached the transcript pages to her motion to dismiss.

"[t]he plaintiff's . . . mandamus [action was] nothing more than an impermissible collateral attack on the sealing order imposed by the [family] court," and, therefore, the action was "nonjusticiable because no practical relief [was] available to the plaintiff . . . ."

On appeal, the plaintiff contends that the trial court incorrectly determined that *Valvo* required dismissal of his mandamus action. The plaintiff argues that, in *Lechner* v. *Holmberg*, 165 Conn. 152, 157–58, 328 A.2d 701 (1973), this court recognized that an action for a writ of mandamus is an appropriate vehicle for compelling the production of judicial transcripts. The plaintiff further argues that *Valvo* is inapposite because, unlike the sealing order in that case, which was properly issued, the order in *Dulos* violated Practice Book § 25-59 and the constitutional principles underlying that section, rendering the order void ab initio.[5] The plaintiff argues that, because the sealing order in *Dulos* was void from its inception, the trial court in the present case had subject matter jurisdiction to issue the writ of mandamus. We conclude that the plaintiff's action is nonjusticiable.[6]

[5] Practice Book §§ 25-59 and 25-59A govern closure of courtrooms and sealing of files in family matters, respectively. The plaintiff relies on § 25-59 (a), which provides that, "[e]xcept as otherwise provided by law, there shall be a presumption that courtroom proceedings shall be open to the public" and § 25-59 (b), which provides that, "[e]xcept as provided in this section and except as otherwise provided by law, the judicial authority shall not order that the public be excluded from any portion of a courtroom proceeding."

[6] As a preliminary matter, the plaintiff asks this court not to take judicial notice of the certified transcript pages from the hearing. He argues that the trial court erred in basing its decision to dismiss the action on those pages without first conducting an evidentiary hearing to determine how the "clerical error" was discovered and how the transcript was obtained by the Office of the Attorney General. See footnote 4 of this opinion. We disagree. It is well established that courts can take judicial notice of court transcripts. See, e.g., *State* v. *Gore*, 342 Conn. 129, 139 n.9, 269 A.3d 1 (2022). In addition, because the plaintiff did not produce any contrary evidence to contest that a sealing order had, in fact, been imposed, the trial court was permitted to rely on the transcript and to dismiss the plaintiff's action without further

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations . . . ." (Internal quotation marks omitted.) *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 522, 187 A.3d 1154 (2018). "[T]he plaintiff bears the burden of proving subject matter jurisdiction, whenever and however [that issue is] raised." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 430 n.12, 829 A.2d 801 (2003).

"Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . As we have recognized, justiciability . . . implicate[s] a court's subject matter jurisdiction and its competency to adjudicate a particular matter. . . . [B]ecause . . . justiciability raises a question of law, our appellate review is plenary." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 254–55, 990 A.2d 206 (2010).

proceedings. See, e.g., *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009) ("[i]f . . . evidence submitted in support of a defendant's motion to dismiss conclusively establish[es] that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings" (citation omitted)).

"In deciding whether the plaintiff's complaint presents a justiciable claim, we make no determination regarding [the complaint's] merits. Rather, we consider only whether the matter in controversy [is] capable of being adjudicated by judicial power according to the aforestated well established principles." (Internal quotation marks omitted.) *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 525.

In *Valvo*, this court concluded that a trial court presiding over an administrative appeal did not have subject matter jurisdiction to overturn sealing orders issued by another trial court in an unrelated case involving different parties. *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 543. We stated that to conclude otherwise would be "completely unworkable"; id.; because "[o]ur jurisprudence concerning the trial court's authority to overturn or to modify a ruling in a particular case assumes, as a proposition so basic that it requires no citation of authority, that any such action will be taken only by the trial court with continuing jurisdiction over the case, and that the only court with continuing jurisdiction is the court that originally rendered the ruling. . . . This assumption is well justified in light of the public policies favoring consistency and stability of judgments and the orderly administration of justice. . . . It would wreak havoc on the judicial system to allow a trial court in an administrative appeal to second-guess the judgment of another trial court in a separate proceeding involving different parties, and possibly to render an inconsistent ruling. This is especially true when a direct challenge to the original ruling can be made by any person at any time in the trial court with continuing jurisdiction, as is the case with sealing orders." (Citations omitted; footnote omitted.) Id., 543–45. Of particular concern to this court was the fact that the interests of all of the affected parties may not be adequately protected in a collateral

proceeding. See id., 545 ("it is by no means clear that procedures adequate to protect the interests of all affected parties could even be devised in such a proceeding"); id., 545 n.13 ("[t]he trial court . . . would have no jurisdiction to order the trial courts that issued the sealing orders to do anything unless those courts and the parties in the underlying cases were named as parties in this administrative appeal, which they were not"). In light of the foregoing, we held that, because the trial court in *Valvo* did not have continuing jurisdiction over the cases in which the sealing orders were imposed or custody or control over the sealed documents, and because the interests of all parties affected by the sealing orders were not adequately represented in the appeal, the trial court was without jurisdiction to adjudicate the plaintiffs' claim. Id., 545.

In the present case, we agree with the defendant that the plaintiff's action is nonjusticiable because no relief can be granted to him by the trial court. The plaintiff sought an injunction by way of a writ of mandamus to compel the defendant to produce transcripts that were sealed by another trial court in a separate proceeding involving different parties. The plaintiff's action is, therefore, a collateral attack on a sealing order imposed by a different court in a different action, which is not permissible. See, e.g., *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 741 n.7, 219 A.3d 744 (2019) ("a party may not bring an action in the [trial court] effectively asking that court to review a ruling of another trial court in another case"); *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 527 (declaratory judgment action seeking to undo another trial court's protective order was nonjusticiable); *Traylor* v. *State*, Superior Court, judicial district of Hartford, Complex Litigation Docket, Docket No. X03-HHD-CV-16-5042400-S (June 6, 2017) ("to the extent the plaintiff asserts claims for declaratory and injunctive relief

whereby he seeks to have this court overturn, revoke, ignore, or reverse the actions of another [trial court] in another action, or even an action taken by the Appellate Court, those claims are clearly nonjusticiable").

Furthermore, the present mandamus action, like the administrative appeal in *Valvo*, does not adequately protect the interests of all affected parties, such as the Dulos children, whose custody is the subject of the sealed transcripts. See *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 545 ("it is by no means clear that procedures adequate to protect the interests of all affected parties could even be devised in such a proceeding"); see also id., 545 n.13 ("the trial court . . . would have no jurisdiction to order the trial courts that issued the sealing orders to do anything unless those courts and the parties in the underlying cases were named as parties in this . . . appeal, which they are not"). Because the trial court in the present case had no continuing jurisdiction over the Dulos marital dissolution action and no custody or control over the sealed transcripts, it had no authority to overturn the family court's sealing order. Our conclusion accords not only with *Valvo* and the principles cited therein but also with our deep-rooted public policies favoring "consistency and stability of judgments," "the orderly administration of justice," and the prevention of inconsistent rulings.[7] Id., 545; see also id. (collateral attack is impermissible when "direct challenge to the original ruling can be made by any person at any time in the trial court with continuing jurisdiction, as is the case with sealing orders"); cf. *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 220–21, 884 A.2d 981 (2005) (Nonparties could intervene in withdrawn cases

[7] As we explained in *Valvo*, we do not suggest that "a ruling may be overturned or modified only by the same *judge* that issued the original ruling." (Emphasis in original.) *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 543 n.11.

to challenge protective orders when the trial court that issued the orders "had inherent power to vacate or modify [them] in the withdrawn cases—even though [presumably], by operation of [the applicable statute], the court otherwise had been divested of its authority to affect the substantive rights of the parties to those cases—as long as those protective orders remained in effect. To conclude otherwise would . . . ignore both the court's inherent common-law authority to vacate or modify its own equitable orders and the . . . public interest in documents filed with the court in connection with its adjudicatory function.")

The plaintiff argues that *Valvo* is distinguishable from the present case because it involved an administrative appeal, whereas the present case involves an action for a writ of mandamus. The plaintiff contends that a court's powers in a mandamus action are not as limited as they are in an administrative appeal.[8] The plaintiff asserts that, given a trial court's broad equitable powers to issue a writ of mandamus and our decision in *Lechner*, in which we acknowledged that an action for a writ of mandamus is the proper vehicle for obtaining court transcripts; *Lechner* v. *Holmberg*, supra, 165 Conn. 157–58; his action is justiciable because practical relief is available to him. We disagree.

General Statutes § 52-485 (a) provides that "[t]he Superior Court may issue a writ of mandamus in any case in which a writ of mandamus may by law be granted, and may proceed therein and render judgment according to rules made by the judges of the Superior

[8] The plaintiff relies on this factual difference and other differences to argue that *Valvo* should not control the outcome of the present case. We are not persuaded. Our holding in *Valvo* was largely premised on the well established principles concerning a trial court's continuing jurisdiction over its own rulings, the importance of fairness to all interested parties, the orderly administration of justice, and consistency and stability of judgments. See *Valvo* v. *Freedom of Information Commission*, supra, 294 Conn. 545.

Court or, in default thereof, according to the course of the common law." Although the statute confers broad power on our trial courts to issue writs of mandamus, it cannot be used as a vehicle to create jurisdiction where it does not otherwise exist. See, e.g., *Connecticut Pharmaceutical Assn., Inc.* v. *Milano*, 191 Conn. 555, 559, 468 A.2d 1230 (1983) ("[a] trial court that has *the competency to adjudicate* what duties can be compelled by mandamus has subject matter jurisdiction" (emphasis added)).

In this regard, this court's decision in *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 515, is instructive. In that case, we held that a declaratory judgment action before a trial court seeking to undo another trial court's protective order was nonjusticiable because no practical relief could be granted. Id., 527. Although broad power to issue a declaratory judgment is vested in our trial courts under General Statutes § 52-29 (a),[9] we held that "[a] declaratory judgment action is not . . . a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies. . . . Invoking § 52-29 does not create jurisdiction where it would not otherwise exist." (Internal quotation marks omitted.) Id., 524. Looking to our prior jurisprudence, we emphasized that, although "the declaratory judgment procedure . . . may be employed in a justiciable controversy . . . the determination of the controversy must be capable of resulting in practical relief . . . ." (Internal quotation marks omitted.) Id.; see also *Wilson* v. *Kelley*, 224 Conn. 110, 116, 617 A.2d 433 (1992) ("[A] declaratory judgment must rest on some cause of action that would be cognizable in a nondeclaratory suit. . . . To hold otherwise

[9] General Statutes § 52-29 (a) provides: "The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment."

would convert our declaratory judgment statute and rules into a convenient route for procuring an advisory opinion on [nonjusticiable] question*s* . . . and would mean that the . . . statute and rules created substantive rights that did not otherwise exist." (Citations omitted.)).

Likewise, a writ of mandamus is not "a procedural panacea for use on all occasions"; (internal quotation marks omitted) *Mendillo* v. *Tinley*, *Renehan & Dost*, *LLP*, supra, 329 Conn. 524; and does not relieve the plaintiff from justiciability requirements. As we have explained, justiciability goes to a court's competency to adjudicate a particular matter. See, e.g., *Connecticut Coalition for Justice in Education Funding*, *Inc.* v. *Rell*, supra, 295 Conn. 254. When justiciability is raised, the burden rests on the plaintiff to show that his or her claim is justiciable, regardless of the nature of the claim or procedural vehicle utilized in pursuing it. See, e.g., *Fort Trumbull Conservancy*, *LLC* v. *New London*, 265 Conn. 430 n.12; see also *Wozniak* v. *Colchester*, 193 Conn. App. 842, 853–54, 220 A.3d 132 (conducting justiciability analysis with respect to mandamus action and concluding that appeal was not moot), cert. denied, 334 Conn. 906, 220 A.3d 37 (2019). Accordingly, when a plaintiff brings an impermissible collateral attack on another trial court's sealing order by way of an action for a writ of mandamus, no practical relief can be granted, and the court lacks the competency to adjudicate the matter.

For the same reason, the plaintiff's reliance on *Lechner* is unavailing. In *Lechner*, the plaintiff brought a mandamus action to compel the release of certain transcripts in the possession of the court reporter, court clerk, and chief judge of the Circuit Court after the Circuit Court had ordered that the transcripts be released to him. *Lechner* v. *Holmberg*, supra, 165 Conn. 154. We concluded that, because "[c]ourt reporters generally have

a ministerial duty to furnish transcripts to parties," a mandamus action was proper to compel the defendants to produce the transcripts. Id., 157–58. We, however, ultimately reversed the trial court's grant of mandamus in light of our determination that the defendants were precluded by statute from producing the transcripts. Id., 162. Contrary to the plaintiff's assertion, *Lechner* does not stand for the broad proposition that a plaintiff can bring a mandamus action requesting the trial court to revoke, undo, or ignore a sealing order imposed by a different trial court in a separate proceeding. Although an action for a writ of mandamus is a proper vehicle for obtaining court transcripts, that is so only when the action is not a collateral attack on a court order entered in a different case.[10]

Finally, the plaintiff contends that a collateral attack on the sealing order issued by the family court is permissible under the circumstances of this case because the oral sealing order was void ab initio. In support of his contention, the plaintiff argues that the family court's failure to follow certain procedures for closing the courtroom to the public under Practice Book § 25-59 deprived the court of subject matter jurisdiction to close the courtroom and to seal the transcripts. We disagree.

Generally, "[a]s a matter of law, in the absence of jurisdiction over the parties, a judgment is void ab initio and is subject to both direct and collateral attack." (Internal quotation marks omitted.) *Reiner, Reiner & Bendett, P.C.* v. *Cadle Co.*, 278 Conn. 92, 99 n.7, 897 A.2d 58 (2006). In *Sousa* v. *Sousa*, 322 Conn. 757, 143

[10] The plaintiff also argues that the defendant has a mandatory duty under *Lechner* and § 51-61 (c) to produce the transcripts because the family court's sealing order is unlawful. The legality of the family court's sealing order does not change the fact that an order is in place, which precludes the defendant from producing the transcripts under § 51-61 (c). The plaintiff's argument further exemplifies that he is seeking a collateral review of the family court's sealing order.

A.3d 578 (2016), this court held that "it is now well settled that, [u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal *entirely invalid*, he or she must resort to direct proceedings to correct perceived wrongs," rather than to a collateral proceeding. (Emphasis in original; internal quotation marks omitted.) Id., 771–72. We concluded that, to sustain a collateral attack on a judgment, the lack of jurisdiction must be "entirely obvious" and that the alleged deficiency "must amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority." (Internal quotation marks omitted.) Id., 773; see also id. ("[o]ur cases demonstrate that it is extraordinarily rare for a tribunal's jurisdiction to be so plainly lacking that it is entirely obvious [that a court lacks subject matter jurisdiction]" (internal quotation marks omitted)); *Vogel* v. *Vogel*, 178 Conn. 358, 363, 422 A.2d 271 (1979) ("A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Lesser irregularities do not make a final judgment void." (Internal quotation marks omitted.)).

Under the standard set forth in *Sousa*, we cannot conclude that the family court's jurisdiction over the Dulos marital dissolution action was so lacking as to be entirely obvious. To the contrary, our trial courts have the broad power and competence to adjudicate dissolution matters, to close their courtrooms to the public, and to issue sealing orders. See, e.g., General Statutes § 46b-1 (a) (family relations matters, including marital dissolution actions, are within jurisdiction of trial court); General Statutes § 46b-11 ("Any case which is a family relations matter may be heard in chambers or, if a jury case, in a courtroom from which the public and press have been excluded, if the judge hearing the case determines that the welfare of any children

involved or the nature of the case so requires. The records and other papers in any family relations matter may be ordered by the court to be kept confidential and not to be open to inspection except upon order of the court or judge thereof for cause shown.''); General Statutes § 46b-49 (''When it considers it necessary in the interests of justice and the persons involved, the court shall, upon the motion of either party or of counsel for any minor children, direct the hearing of any [family relations] matter . . . to be private. The court may exclude all persons except the officers of the court, a court reporter, the parties, their witnesses and their counsel.''); see also Practice Book § 25-59 (governing closure of courtrooms in family matters); Practice Book § 25-59A (governing sealing of files and limiting disclosure of documents in family matters). Accordingly, because the family court had subject matter jurisdiction over the Dulos marital dissolution action, it had jurisdiction to issue the sealing order.

The plaintiff argues that the family court's sealing order is void ab initio because the court violated Practice Book § 25-59 in issuing the order.[11] We disagree. An error in applying such rules of practice or statutory procedures is not even arguably jurisdictional and does not affect a trial court's competency to adjudicate the type of action before it.[12] See, e.g., *Meinket* v. *Levinson*, 193 Conn. 110, 115, 474 A.2d 454 (1984) (''[In] this

[11] We express no opinion as to whether the family court violated any rule of practice in issuing the sealing order. See, e.g., *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 525 (''In deciding whether [a] complaint presents a justiciable claim, we make no determination regarding merits. Rather, we consider only whether the matter in controversy [is] capable of being adjudicated by judicial power according to the aforestated well established principles'' (Internal quotation marks omitted.))

[12] The plaintiff also argues that the family court's sealing order is void ab initio because the family court's issuance of the order was in derogation of the constitutional principles that underlie Practice Book § 25-59. Again, we reiterate that the family court's sealing order is not open to a collateral attack under the standard set forth in *Sousa*.

appeal, the defendant attacks the validity of the original judgment on the ground that the trial court rendered judgment without requiring the plaintiff to produce either an affidavit of debt or live testimony at a hearing in damages. The defendant claims that by virtue of this error the judgment was in excess of [the trial court's] jurisdiction, and therefore [the judgment is] unenforceable. We disagree. Such an error in applying the [rules of practice] governing judgments following default is not even arguably jurisdictional. . . . [*A*] *court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it.*" (Emphasis added; internal quotation marks omitted.)); see also *Amodio* v. *Amodio*, 247 Conn. 724, 729–30, 724 A.2d 1084 (1999) ("[Section] 46b-1 . . . provides the [trial court] with plenary and general subject matter jurisdiction over legal disputes in 'family relations matters,' including alimony and support. General Statutes § 46b-86 (a) provides the trial court with continuing jurisdiction to modify support orders. Together, therefore, these two statutes provided the trial court with subject matter jurisdiction [to modify support orders]. Separate and distinct from the question of whether a court has jurisdictional power to hear and determine a support matter, however, is the question of whether a trial court *properly* applies § 46b-86 (a), that is, properly exercises its statutory authority to act." (Emphasis in original; footnotes omitted.)). See generally *Reinke* v. *Sing*, 328 Conn. 376, 390, 179 A.3d 769 (2018) (following reasoning in *Amodio* concerning distinction between jurisdiction and exercise of authority). As such, the family court's order sealing the transcripts in *Dulos* was not void ab initio and is not open to collateral attack.

In light of the foregoing, we conclude that the trial court did not err in dismissing the plaintiff's action for a writ of mandamus on the ground that it was nonjusticiable.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and MCDONALD and MULLINS, Js., concurred.

ECKER, J., concurring in the judgment. I agree with the majority that the plaintiff, Jon L. Schoenhorn, is not entitled to relief because his action for a writ of mandamus is an impermissible collateral attack on a sealing order imposed in a different action. I write separately because I have serious doubts about whether the justiciability doctrine applied by the majority, which it borrows from *Valvo* v. *Freedom of Information Commission*, 294 Conn. 534, 543–45, 985 A.2d 1052 (2010), and its progeny, provides the appropriate analytic framework to decide these cases. I also question whether the majority's analysis pertains to the subject matter jurisdiction of the trial court or whether, instead, it is a prudential limitation on the trial court's authority to grant relief. Because these issues have not been raised by the parties or briefed and argued on appeal, I concur in the judgment affirming the trial court's dismissal of the plaintiff's action.

As the majority correctly points out, in *Valvo*, this court held that a trial court does not have the "authority to overturn sealing orders issued by another trial court in a separate case" because "[i]t would wreak havoc on the judicial system to allow a trial court . . . to second-guess the judgment of another trial court in a separate proceeding involving different parties, and possibly to render an inconsistent ruling." Id., 543, 545. Indeed, it would be "completely unworkable" and unnecessary to permit such a collateral attack "when a direct challenge to the original ruling can be made by any person at any time in the trial court with continuing jurisdiction . . . ." Id. Notably, in *Valvo*, we characterized the plaintiff's collateral challenge as moot and

"nonjusticiable because no practical relief [was] available . . . ." Id., 548; see also *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 527, 187 A.3d 1154 (2018) ("we agree with the defendants that the . . . case is nonjusticiable because no practical relief is available to the plaintiff insofar as the allegations in the declaratory judgment complaint demonstrate that it is nothing more than a collateral attack on the protective order imposed by the trial court [in a different case]").

The concern I have is that the inability of a trial court to grant practical relief is a necessary but not a sufficient condition to render a case moot. A court's inability to grant practical relief in any particular case can arise for countless reasons, most of which have nothing to do with mootness or justiciability. To illustrate the point, a claim for damages against the state is subject to dismissal for lack of subject matter jurisdiction due to sovereign immunity, but the case is neither moot nor nonjusticiable.[1] More broadly, practical relief is unavail-

[1] In the federal courts, the doctrines of justiciability and jurisdiction are not synonymous. As the United States Supreme Court has explained, "there is a significant difference between determining whether a federal court has jurisdiction of the subject matter and determining whether a cause over which a court has subject matter jurisdiction is justiciable." (Internal quotation marks omitted.) *Powell* v. *McCormack*, 395 U.S. 486, 512, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969); see also *Baker* v. *Carr*, 369 U.S. 186, 198, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (noting that "[t]he distinction between the two grounds [jurisdiction and justiciability] is significant"); *Rinsky* v. *Cushman & Wakefield, Inc.*, 918 F.3d 8, 18 (1st Cir.) (cautioning against confusion of "the very different concepts of subject matter jurisdiction and justiciability"), cert. denied, U.S. , 140 S. Ct. 455, 205 L. Ed. 2d 272 (2019); *Oryszak* v. *Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) ("[t]hat the nonjusticiability of a claim may not be waived does not render justiciability a jurisdictional issue, and this court has been careful to distinguish between the two concepts"); *Gross* v. *German Foundation Industrial Initiative*, 456 F.3d 363, 376 (3d Cir. 2006) ("[q]uestions of justiciability are distinct from questions of jurisdiction, and a court with jurisdiction over a claim should nonetheless decline to adjudicate it if it is not justiciable"). The justiciability doctrine, which derives from the case or controversy requirement in article three, § 2, of the United States constitution; *Flast* v. *Cohen*, 392 U.S. 83, 94, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968);

able as a matter of law in every case that is subject to dismissal on the basis of a dispositive motion. The most obvious example is a case in which a plaintiff's complaint fails to state a claim on which relief can be granted. No one would call such a case moot or nonjusticiable, even though it cannot be adjudicated because no relief can be granted. In order to determine whether a case is moot, and therefore not justiciable, we must ascertain *why* no practical relief can be granted.

Mootness, like the related justiciability doctrines of standing and ripeness,[2] is intended to ensure that "Con-

"limit[s] the business of federal courts to questions presented in an adversary context" and ensures that "the federal courts will not intrude into areas committed to the other branches of government." Id., 95.

Whether deliberate or by oversight, the conceptual distinction between justiciability and jurisdiction, to my knowledge, has not yet been recognized by the courts of this state. Our cases typically provide that "[j]usticiability . . . implicate[s] a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Chapman Lumber, Inc.* v. *Tager*, 288 Conn. 69, 86, 952 A.2d 1 (2008). Our reason for equating justiciability with jurisdiction is not obvious and warrants further consideration, particularly "because our state constitution contains no case or controversy requirement like that found in article three of the United States [c]onstitution . . . [and] unlike the federal courts, we do not concern ourselves with the question of whether our [justiciability] principles—e.g., standing, ripeness, mootness and political question—derive from the constitution itself or from prudential considerations." (Citation omitted; internal quotation marks omitted.) *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 26–27, 287 A.3d 557 (2023). The fact that our justiciability doctrine has "evolved under [the] common law"; (internal quotation marks omitted) id., 27; and is not rooted in constitutional limitations, raises the question whether it truly "implicate[s] a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 254, 990 A.2d 206 (2010).

[2] In addition to mootness, standing, and ripeness, justiciability also includes the political question doctrine. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 254, 990 A.2d 206 (2010) ("justiciability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine" (internal quotation marks omitted)). "The political question doctrine itself is based on the principle of separation of powers . . . ." (Internal quotation marks omitted.) Id., 255.

necticut courts will rule only on live controversies—i.e., those in which the parties before us require resolution." *CT Freedom Alliance, LLC* v. *Dept. of Education*, 346 Conn. 1, 27, 287 A.3d 557 (2023). Standing, ripeness, and mootness are "gatekeeper doctrines," each of which "regulates a different dimension of entrance to the . . . courts. The law of standing considers whether the plaintiff is the proper person to assert the claim, the law of ripeness ensures that the plaintiff has not asserted the claim too early, and the law of mootness seeks to prevent the plaintiff from asserting the claim too late." (Footnote omitted.) E. Lee, "Deconstitutionalizing Justiciability: The Example of Mootness," 105 Harv. L. Rev. 603, 606 (1992); see also *Warshak* v. *United States*, 532 F.3d 521, 525 (6th Cir. 2008) (claim is not justiciable "when it is filed too early (making it unripe), when it is filed too late (making it moot) or when the claimant lacks a sufficiently concrete and redressable interest in the dispute (depriving the plaintiff of standing)"). In one paradigmatic scenario, a case becomes moot "during the pendency of an appeal, [when] events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits . . . ." (Internal quotation marks omitted.) *Loisel* v. *Rowe*, 233 Conn. 370, 378, 660 A.2d 323 (1995). Mootness "fundamentally [is] temporal . . . ." *Gardner* v. *Mutz*, 962 F.3d 1329, 1337 (11th Cir. 2020).

In the present case, the fatal defect in the plaintiff's claim is not temporal in nature; his action for a writ of mandamus was not filed too early or too late to obtain practical relief. The defect has nothing to do with *when* the plaintiff's action was filed. Nor is *who* filed the action the impediment to adjudication. To the contrary, the controversy seems to be very much alive, adverse, and contested: the plaintiff wants access to the sealed transcript and the defendant, Melodie Moss, the chief court reporter in the judicial district of Stamford-Nor-

walk, refuses to release the transcript unless and until it is unsealed. The problem, instead, is that our collateral attack doctrine holds that relief is available only in the case in which the sealing order was filed.[3] The singular method and means by which relief must be sought (i.e., by filing a motion to intervene and open the family case to obtain an order vacating the sealing order) do not appear to me to affect the nature of the controversy between the parties. The problem seems not to involve either justiciability or jurisdiction but, instead, implicates the important prudential interests of maintaining "fairness to all interested parties, the orderly administration of justice, and [the] consistency and stability of judgments." Footnote 8 of the majority opinion.

The proper characterization of the defect at issue in the present case as jurisdictional, nonjusticiable, and/or prudential is not merely a matter of semantics without practical effect. The United States Supreme Court has cautioned against the "profligate" and indiscriminate description of all limitations on judicial authority as " 'mandatory and jurisdictional' "; *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 510, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006); and for good reason. Such "drive-by jurisdictional rulings"[4] should be avoided precisely because labeling an issue as jurisdictional can have profound procedural implications that could affect the course, and even the outcome, of a case.[5] See *MOAC*

[3] The present case was filed in the judicial district of Hartford, but, to obtain relief, the plaintiff must file a motion to intervene and open the family case in which the transcript was sealed in the judicial district of Stamford-Norwalk. The problem is not one of venue, but, even if it were, it is well established that "[v]enue does not involve a jurisdictional question but rather a procedural one . . . ." (Internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 814, 925 A.2d 292 (2007).

[4] *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 91, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998).

[5] I venture no opinion about whether any practical effects would flow from a determination that the defect in the present case was nonjurisdictional. It is clear that the action cannot be maintained as filed.

Mall Holdings, LLC v. *Transform Holdco, LLC*, U.S. , 143 S. Ct. 927, 936, 215 L. Ed. 2d 262 (2023) ("The 'jurisdictional' label is significant because it carries with it unique and sometimes severe consequences. An unmet jurisdictional precondition deprives courts of power to hear the case, thus requiring immediate dismissal. *Hamer* v. *Neighborhood Housing* [*Services*] *of Chicago*, [U.S. , 138 S. Ct. 13, 17, 199 L. Ed. 2d 249 (2017)]. And jurisdictional rules are impervious to excuses like waiver or forfeiture. [*Boechler, P.C.* v. *Commissioner of Internal Revenue*, U.S. , 142 S. Ct. 1493, 1497, 212 L. Ed. 2d 524 (2022)]. Courts must also raise and enforce them sua sponte. [*Fort Bend County* v. *Davis*, U.S. , 139 S. Ct. 1843, 1849, 204 L. Ed. 2d 116 (2019)].").[6]

The plaintiff has challenged neither the mootness rubric as the basis for dismissal nor the characterization of the *Valvo* rule as jurisdictional in nature, and, therefore, I need not resolve those issues in this opinion. I raise them for future consideration in the appropriate case. In the meantime, I agree with the majority that, regardless of whether the defect in the plaintiff's action for a writ of mandamus is denominated jurisdictional, justiciable, or something else, the bottom line is that the plaintiff is precluded from collaterally attacking another court's sealing order in the present action. Accordingly, I concur in the judgment.

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[6] I add one word of caution. The significance of the jurisdictional label should not be overlooked, but neither should it be overstated. " '[C]alling a rule nonjurisdictional does not mean that it is not mandatory.' " *Donnelly* v. *Controlled Application Review & Resolution Program Unit*, 37 F.4th 44, 55–56 (2d Cir. 2022), quoting *Gonzalez* v. *Thaler*, 565 U.S. 134, 146, 132 S. Ct. 641, 181 L. Ed. 2d 619 (2012).