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ORDERS

CONNECTICUT REPORTS

VOL. 335

STATE OF CONNECTICUT *v.* JERMAINE SMITH
(SC 190482)

The defendant's petition for certification, filed June 16, 2020, for review of the Appellate Court's order (AC 194213) granting review of the trial court's order concerning release on bail but denying the relief requested is dismissed.

July 28, 2020

PER CURIAM. In most circumstances, this court has little or no role in reviewing trial court orders concerning bail or pretrial release of an accused. In the ordinary course, a petition seeking review of such an order is ruled on by our Appellate Court, and the road for review of these petitions pursuant to Practice Book § 78a-1[1] and General Statutes § 54-63g ends there.[2] Although we dismiss the petition for certification to appeal from the order of the Appellate Court in the present case, we recognize that these are unprecedented times and that, as the highest court in our judicial system, we play a critical role in providing guidance to lower courts. All branches of government, and the public we serve, are confronted with a global pandemic that challenges, in every way, how we operate, deliver services, strive to fulfill our core missions, and discharge our constitutional and other legal responsibilities. The conditions

[1] Practice Book § 78a-1 provides: "Any accused person or the state, aggrieved by an order of the Superior Court concerning release, may petition the Appellate Court for review of such order. Any such petition shall have precedence over any other matter before the Appellate Court and any hearing ordered by the court shall be held expeditiously with reasonable notice.

"Petitions for review of bail must conform to the requirements for motions for review set forth in Section 66-6 and are subject to transfer to the Supreme Court pursuant to Section 65-3."

[2] General Statutes § 54-63g provides: "Any accused person or the state, aggrieved by an order of the Superior Court concerning release, may petition the Appellate Court for review of such order. Any such petition shall have precedence over any other matter before said Appellate Court and any hearing shall be heard expeditiously with reasonable notice."

created by the pandemic challenge every convention that we typically rely on, reflexively and as a matter of routine, to conduct our business under normal circumstances. Guidance is needed to delineate procedures for the appropriate consideration and disposition of claims like those in the present case during these extraordinary times, and it is our responsibility to provide it. Despite our capacity to do so, we have concluded that it would be unwise to articulate procedural guidelines in the context of this case because of its particular procedural posture. The purpose of this written order is to explain what prevents us from doing so and, in the process, to give trial courts, lawyers, and litigants as much general guidance as possible under the circumstances.

I
FACTS AND PROCEDURAL HISTORY

On April 22, 2020, the defendant, Jermaine Smith, moved for modification of his $250,000 bond and an order granting his release on a promise to appear. In support of his release, he explained that the Department of Correction has experienced an increase in inmates and staff members with confirmed cases of COVID-19. The defendant asserted that his "severe asthma and sleep apnea put him at an alarmingly heightened risk of very serious and even fatal consequences should he contract the virus." According to the defendant, confinement under these conditions "violates his [federal] constitutional rights pursuant to the due process clause of the fifth amendment as well as the eighth amendment's prohibition of cruel and unusual punishment . . . ." He requested that the trial court modify his bond and release him from custody as a pretrial detainee.

The trial court held a hearing on the motion on April 27, 2020. The state responded to the defendant's arguments by relying on the seriousness of the allegations and the defendant's criminal history. The trial court

agreed with the state and denied the motion for bond reduction "[b]ased on the nature of the allegations [and] the defendant's criminal history . . . ." The defendant sought review of the trial court's order pursuant to Practice Book § 78a-1. The Appellate Court granted review of the trial court's order denying bail modification but denied the relief requested. The defendant then filed a petition for certification with this court on June 16, 2020, requesting review of the Appellate Court's denial of relief.

II
DISCUSSION

The general rule is that "interlocutory orders in criminal cases are not immediately appealable"; *State* v. *Ayala*, 222 Conn. 331, 339, 610 A.2d 1162 (1992); and a judgment becomes final in a criminal case only after the imposition of a sentence. See Practice Book § 61-6 (a) (1). The legislature has provided for an exception when it comes to the setting of a defendant's bail. Specifically, General Statutes § 54-63g permits "[a]ny accused person . . . aggrieved by an order of the Superior Court concerning release, [to] petition the Appellate Court for review of such order." Our own rules of appellate procedure contain the same avenue for review. Practice Book § 78a-1. In *State* v. *Fernando A.*, 294 Conn. 1, 981 A.2d 427 (2009), we observed that an appeal to this court ordinarily would not lie from a trial court order concerning pretrial conditions of release because the "exclusive nondiscretionary remedy from an order concerning conditions of release is a petition to the Appellate Court pursuant to . . . § 54-63g." Id., 5 n.3. We also have adhered to the view that a petition for certification does not lie from the Appellate Court's denial of a petition for review of a defendant's bail determination. See *State* v. *Ayala*, supra, 341; see also *State* v. *McCahill*, 261 Conn. 492, 503, 811 A.2d 667 (2002) ("The petition for review, authorized by § 54-63g, is not an appeal by which we

appropriately could exercise jurisdiction via the certification authority conferred upon us by General Statutes § 51-197f."). But see *In re Judicial Inquiry No. 2005-02*, 293 Conn. 247, 254–55, 977 A.2d 166 (2009) (questioning reasoning employed in *Ayala* to reach its jurisdictional holding).

Although there may not have been a bar to our review of the trial court's order regarding bail or pretrial release had the case been presented under a different posture,[3] three related concerns inform our decision not to exer-

[3] There may be other procedural approaches that would lead to review of this claim. For example, General Statutes § 51-199 (c) authorizes us to transfer to our court "a cause in the Appellate Court," which includes a motion for review of a bail decision initially brought in the Appellate Court pursuant to § 54-63g. See *State* v. *McCahill*, supra, 261 Conn. 503 ("our transfer authority by way of § 51-199 (c) is not limited to a formal appeal, but encompasses causes"). General Statutes § 52-265a provides another route by which this court could review a trial court's denial of a bail modification request. Section 52-265a (a) permits "any party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, [to] appeal under this section from the order or decision to the Supreme Court within two weeks from the date of the issuance of the order or decision." This court's decision in *Ayala* followed just that procedure. See *State* v. *Ayala*, supra, 222 Conn. 341. In addition, the conditions of the defendant's confinement may conceivably be challenged in a separate proceeding through a petition for a writ of habeas corpus. See General Statutes § 52-466. Finally, our long-standing jurisprudence governing appellate jurisdiction also provides a potential avenue for this court to exercise review over a bail determination, because our precedent allows us to treat an interlocutory order as a final judgment for purposes of appeal when the order "so concludes the rights of the parties that further proceedings cannot affect them." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 41, 213 A.3d 1110 (2019), quoting *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). This doctrine, which is embodied in the second prong of *Curcio*, "focuses on the nature of the right involved." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 41. We offer no opinion as to whether any of these potential procedural opportunities would succeed in the Appellate Court or in the trial courts of this state. We elaborate on our dismissal of the petition before us simply to state that the posture of this particular case impedes our direct review. Other cases might reach a different outcome.

cise jurisdiction over the defendant's claims. First, the procedural posture of the case would require us to exercise jurisdiction on grounds that have not been raised by the defendant. Standing alone, this fact may not prevent us from taking the case up nonetheless if that step was warranted, either by the demands of justice or by an overriding public interest in prompt resolution of the underlying legal issues. Our own rules of practice confer broad authority on this court to act to prevent injustice. See Practice Book § 60-1 ("[t]he design of these rules being to facilitate business and advance justice, they will be interpreted liberally in any appellate matter where it shall be manifest that a strict adherence to them will work *surprise or injustice*" (emphasis added)).

This leads to our second concern, which is that the record in the present case is devoid of any evidence regarding the relevant conditions at the correctional facility at which the defendant is incarcerated or the nature and degree of the risk that the defendant claims is heightened by his detention at that facility. We do not necessarily fault the defendant for failing to make a record in this regard because of the difficult circumstances under which the motion for modification was litigated. However, defendants raising claims of this nature should make efforts to provide the trial court with all necessary information,[4] and trial judges need to give defendants an opportunity to do so in cases in which they have raised legitimate health concerns. We

[4] The record is silent as to whether the trial court was provided with any information about the relevant conditions at the correctional facility where the defendant was being held, and the status of COVID-19 within that facility. In addition, although the record does not reflect that the trial court expressly considered the potential risks of the COVID-19 pandemic in denying the motion for bond modification, it is hard to imagine that trial judges operating in courtrooms and conditions designed to address the risk of contagion would not take such considerations into account in making decisions relating to bond or bail.

do not see how a claim of this kind can be properly litigated or adjudicated in the absence of that information.

Our third reservation is related to the first two. This court has been provided with no information regarding the scope of the problem, if any, beyond the present case. We do not know if any other pretrial detainees have raised similar claims, or whether there is in fact a systemic need for the type of procedural guidance that we anticipate would be required with respect to pretrial detention during this pandemic. Other courts issuing guidelines of this type have done so when confronted with a demonstrated need. See *Committee for Public Counsel Services* v. *Chief Justice of the Trial Court*, 484 Mass. 431, 449, 142 N.E.3d 525 ("Following any arrest during the COVID-19 state of emergency, and until further order of this court, a judicial officer should consider the risk that an arrestee either may contract COVID-19 while detained, or may infect others in a correctional institution, as a factor in determining whether bail is needed as a means to assure the individual's appearance before the court. Given the high risk posed by COVID-19 for people who are more than sixty years of age or who suffer from a [high risk] condition as defined by the [Centers for Disease Control and Prevention], the age and health of an arrestee should be factored into such a bail determination. This is an additional, temporary consideration beyond those imposed by the relevant bail statutes . . . and by due process principles." (Citation omitted.)), modified on other grounds, 484 Mass. 1029, 143 N.E.3d 408 (2020). While we do not require a crisis before we take action, we have a strong preference for a better understanding as to whether other pretrial detainees are similarly situated as the defendant claims to be.

The petition for certification is dismissed.

IN RE GABRIEL C.

IN RE CATALEYA M.

IN RE ISABELLA M.

IN RE SAVANAH F.

The petition of the respondent mother for certification to appeal from the Appellate Court, 196 Conn. App. 333 (AC 42961, AC 42962, AC 42963 and AC 42964), is denied.

David E. Schneider, Jr., in support of the petition.

Carolyn Signorelli, assistant attorney general, *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Hilliary Horrocks*, in opposition.

Decided July 28, 2020

JERMAINE WOODS *v.* COMMISSIONER OF CORRECTION

The petitioner Jermaine Woods' petition for certification to appeal from the Appellate Court, 197 Conn. App. 597 (AC 41987), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the petitioner's petition for a writ of habeas corpus, which was filed pro se, did not raise a claim of ineffective assistance of counsel with respect to the petitioner's second habeas trial?"

Vishal K. Garg, assigned counsel, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided July 28, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 199

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE AISJAHA N.*
(AC 43680)

DiPentima, C. J., and Moll and Harper, Js.**

Syllabus

The respondent mother appealed to this court from the judgment of the trial court adjudicating her minor child, A, neglected. On appeal, the mother claimed that the trial court violated her due process rights when it denied her counsel's oral motion for a continuance of the neglect trial because the mother was allegedly hospitalized. The mother had previously been found to be incompetent and was appointed a guardian ad litem. On the day of trial, the mother failed to appear. Counsel for the mother moved for a continuance, indicating to the court that she had been informed by the mother's social worker that she could not attend because she had been hospitalized and asked that the trial not proceed without her. The mother's guardian ad litem also objected to proceeding without her. Counsel for A objected to the continuance and contended that further delay would not be in the best interest of A. The court denied the motion and the trial proceeded without the mother. A was adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families. *Held* that the respondent mother's due process rights were not violated by the trial court's denial of her motion for a continuance of the neglect trial; this court, considering the three-pronged test set forth in *Mathews* v. *Eldridge* (424 U.S. 319), determined that the mother failed to present any authority for her proposition that a neglect proceeding necessarily implicates the fundamental right to parent one's child, and her reliance on cases involving the termination of parental rights was misplaced because termination proceedings differ vastly from neglect proceedings, as a petition for neglect does not seek the permanent and irrevocable ending of parental rights, the mother had both an attorney and a guardian ad litem present to advocate on her behalf and, thus, the probable value of a continuance was lessened, and the government's interest in ensuring the health and safety of A was significant, an interest that would have been substantially impacted by further delaying the resolution of A's

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

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

custodial placement, particularly in light of the fact that at the time of the trial, A was been under a temporary order of custody for almost one year.

Argued May 18—officially released August 3, 2020***

Procedural History

Petition by the Commissioner of Children and Families to adjudicate the respondents' minor child neglected, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, and tried to the court, *Hon. John Turner*, judge trial referee; judgment adjudicating the minor child neglected and ordering commitment to the custody of the Commissioner of Children and Families, from which the respondent mother appealed to this court. *Affirmed.*

Benjamin M. Wattenmaker, assigned counsel, for the appellant (respondent mother).

Stephen G. Vitelli, assistant attorney general, with whom were *Benjamin Zivyon*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

DiPENTIMA, C. J. The sole issue in this appeal is whether the court, *Hon. John Turne*r, judge trial referee, erroneously denied the respondent mother's motion for a continuance during a trial in which her daughter, Aisjaha N. (child), was adjudicated neglected. The oral motion, made by counsel for the respondent mother at the start of the hearing, was based on her alleged emergency hospitalization at the time of the hearing. The court denied the motion and the neglect hearing proceeded without the respondent mother present. The court found that the child was neglected and

*** August 3, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

committed her to the care of the petitioner, the Commissioner of Children and Families. This appeal followed. In her appeal, the respondent mother argues that the trial court violated her due process rights under the fifth amendment to the United States constitution by denying her motion for a continuance of the petitioner's neglect petition. The petitioner argues that the court properly denied her motion for a continuance and that the respondent mother's due process rights were not implicated. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The petitioner filed a petition for neglect on November 25, 2018, alleging that the child had been abandoned, had been denied proper care and attention and was living under conditions injurious to her well-being. The respondent mother was served with an order for temporary custody, petition, summons, notice and an order to appear on December 7, 2018, and January 9, 2019. She appeared on December 7, 2018, and entered a plea of denial. The case was continued until January 23, 2019, for a case status conference and for the respondent mother to undergo a competency examination. The respondent mother failed to attend the hearing and the trial was continued to February 20, 2019, when the respondent mother again failed to appear. On March 14, 2019, after a competency hearing, the respondent mother was found to be incompetent and proceedings were stayed for sixty days to allow the respondent mother to be restored to competency. On May 29, 2019, the court found that the respondent mother had not been restored to competency and appointed a guardian ad litem for her. The case then was continued to July 16, 2019, for a case status conference at which a trial on the neglect petition was scheduled for October 28, 2019.

The respondent mother failed to appear for the October 28, 2019 trial. At trial, counsel for the respondent

mother reported that the respondent mother would not be present because she was hospitalized. Counsel stated: "I received word from [the social worker for the respondent mother] last week that she—although she had no verification because she didn't have a release that she was told by the maternal grandmother that my client had been admitted to the hospital. This weekend I actually did receive a voice mail from my client stating that she was admitted to the hospital and would not be at today's court date. She was anticipating that she would be released tomorrow, however, I'm not so sure that that will actually happen. I do not have a release. I just found out where she was and they're not going to talk to me at the hospital. We're hoping that perhaps the guardian ad litem will be able to . . . verify information with— by presenting papers to them that she's been appointed as . . . the guardian ad litem." Following a discussion between the attorneys and the court about the role of the guardian ad litem, the court asked if the parties were ready to proceed. Counsel for the respondent mother objected: "We are not [ready], Your Honor . . . [b]ecause my client is not present. She's not competent. She can't be defaulted and she's admitted to the hospital. . . . And she also left me a voice mail requesting that because she can't be present that we not proceed without her and that we continue the matter. So I cannot agree to proceed in her absence." The court stated: "Your client is not being defaulted. Your client is incompetent and because she is incompetent a guardian ad litem was appointed because she was unable to understand the nature of the proceedings and to assist her counsel in her defense. That's the reason that we have [the] guardian ad litem."

The guardian ad litem for the respondent mother also opposed proceeding: "I also object to the matter proceeding because although she is not competent to

assist her counsel, that does not mean she is not competent to assist me as her guardian ad litem and, in fact, I believe it is required of me as guardian ad litem to first attempt to . . . explain proceedings in a manner that she can understand. She has the right to be present during her trial and it is also incumbent upon me as her guardian ad litem to request such accommodations as are necessary to best serve . . . my ward given her limitations." The attorney for the minor child stated that further delaying the proceedings would not be in the best interest of the child. After a brief recess, the hearing began with counsel for the respondent mother renewing her objection to the trial proceeding: "Your Honor, at this time I . . . would like to renew my objection to proceeding in my client's absence given that she is incompetent. The guardian ad litem is supposed to explain the process as it goes . . . along in a manner she can understand. She can't do that without her being present and my client did leave me a voice mail saying that she was involuntarily hospitalized and that she wanted this matter continued."

The court then stated: "I'll point out that mother underwent a competency evaluation. It was determined that she is incompetent and in need of a guardian ad litem. She was determined to be incompetent because she was unable to understand the nature of the proceedings and to assist her lawyer with regard to her defense, and that [the guardian ad litem] was appointed . . . in May of 2019 and [the guardian ad litem] filed her appearance as [guardian ad litem] for mother shortly thereafter, and I understand it's been orally represented without any documentation or other corroboration that mother is not present today because she is undergoing treatment in a facility . . . ."

During the trial, the child's maternal grandmother testified that her daughter, the respondent mother, was hospitalized at the time of trial at Saint Raphael's

Hospital. She testified that she knew that because she went to visit her there during the week before trial. The child's grandmother brought forms completed by the respondent mother's physician that the grandmother planned to submit to the Probate Court in order to seek conservatorship. These forms, admitted into evidence during the hearing, however, did not indicate that the respondent mother was hospitalized the morning of trial.

In the court's memorandum of decision finding the petitioner had proved the allegations of neglect as to the child, the court set forth the explanation for the respondent mother's failure to appear provided by her counsel. "Counsel for [the respondent mother] reported that she believed [respondent mother] was not present because [she] was in a hospital. Reportedly, her client's mother (maternal grandmother) had been told a week prior to the trial (by someone not identified) that [respondent mother] had been admitted to the hospital. Counsel's representation that [respondent mother] had been admitted to the hospital was based on a message from a social worker stating she'd been told by the maternal grandmother that her client had been admitted to the hospital. The social worker further stated to . . . counsel she'd been unable to verify the information. Counsel's representation that [her client] had been admitted to the hospital and could not attend the trial was further based on a voice mail message from an unidentified person (whom counsel believed to be [her client]), that she 'was admitted to the hospital and would not be at today's court date.' Counsel stated because she had no release, no verification or other corroboration to offer the court, she was unable to confirm that [respondent mother] was in fact in the hospital. Counsel was without knowledge or reliable information regarding [her client's] purported admission to a hospital or whether [she] had been discharged from the hospital and was unable to come to

court following her discharge. Given the above, the court ordered the parties to proceed with the trial." The court further noted that the "request for a continuance was predicated upon counsel's unsubstantiated and uncorroborated hearsay twice removed. If true, [the respondent] mother had been hospitalized for about one week thus, there had been adequate time to obtain some written corroboration of [the respondent] mother's hospitalization and moreover, a written motion for a continuance of the trial should have been filed. Neither occurred. The court regarded counsel's statement of what was reported to her via a voice mail message from an unidentified person, to be untrustworthy and unreliable. The court declined to rely on it and attached no weight or credibility to it. Counsel's objection to proceeding with the trial was overruled and her request for a continuance was denied." The court also noted that, following the objection, the attorney for the minor child "immediately requested the court to proceed with the trial citing her client has been under an order of temporary custody for a long time and averring that further delay was not in the child's best interest." The court found that the child was in a state of neglect. The court determined that it was in the best interest of the child that she be placed in the custody of the petitioner. This appeal followed.

We first address the standard of review. The petitioner and the respondent mother differ on the applicable standard of review that should guide our review of the respondent mother's claim. The respondent mother argues that our review is plenary because her due process rights were implicated in the court's denial of her continuance. In support of her argument that plenary review should apply, the respondent mother emphasizes that the right to parent a child is a fundamental one and discusses the procedural protections that are offered during a hearing on the termination of parental rights. A motion for a continuance that is denied, if

it implicates a fundamental right, can prompt plenary review to determine if it constituted a denial of procedural due process. See *In re Shaquanna M.*, 61 Conn. App. 592, 602, 767 A.2d 155 (2001) (reviewing denial of motion for continuance during petition for termination of parental rights). Here, however, the motion for a continuance was denied during a trial on a petition for neglect, not a petition for the termination of parental rights, as in *In re Shaquanna M.*

Conversely, the petitioner argues that, because the respondent mother's due process rights were not affected, the applicable standard of review is abuse of discretion. Further, the petitioner emphasizes that we generally review a denial of a motion for a continuance for an abuse of discretion. See *State* v. *Beckenbach*, 198 Conn. 43, 47, 501 A.2d 752 (1985).

To determine which standard of review is applicable, we turn to *In re Shaquanna M.*, supra, 61 Conn. App. 594. In that case, the respondent claimed that she was denied her procedural due process rights when the trial court denied her motion for a continuance during a termination of parental rights trial. Id. This court framed the issue as "whether a continuance was necessary to ensure the respondent's right to due process." Id., 600. In addressing the respondent's claim, this court began its analysis with the following: "Whether the denial of a continuance has been shown by the respondent to have interfered with her basic constitutional right to raise her children, thereby depriving her of procedural due process, is the issue of this case. Its resolution is a question of law for which our review is plenary. . . . The abuse of discretion standard does not apply to constitutional . . . claims, which are reviewed de novo by the courts." (Internal quotation marks omitted.) Id.

Although, in the present case, the respondent's motion for a continuance was denied in a neglect proceeding,

and not a termination of parental rights proceeding, the respondent's claim and arguments in support thereof are similar to those presented in *In re Shaquanna M.*—that the denial of the motion for a continuance interfered with her fundamental right. Therefore, in accordance with *In re Shaquanna M.*, we exercise plenary review and, accordingly, we conclude that the trial court did not err in denying the respondent mother's motion for a continuance and proceeding to trial on the neglect petition.[1]

A denial of procedural due process triggers analysis under the three-pronged test developed in *Mathews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). This test balances three competing interests: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirements would entail." Id., 335.

As to the first prong, the respondent mother argues that the interest involved here is her fundamental right to parent her child. She contends that the petitioner's neglect petition, which sought to place her child in the custody of the petitioner, infringed on that constitutional right. In support of this position, the respondent mother cites to cases involving the termination of parental rights. See *In re Matthew P.*, 153 Conn. App. 667, 102 A.3d 1127, cert. denied, 315 Conn. 902, 104 A.3d 106 (2014); *In re Shaquanna M.*, supra, 61 Conn. App.

[1] This claim was preserved, and thus we need not consider the *Golding* factors as presented in the respondent mother's brief. See *State* v. *Golding*, 213 Conn, 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

592. At issue here, however, is a petition for neglect. General Statutes § 46b-129 (b) provides in relevant part that a child may be found neglected if "there is reasonable cause to believe that (1) the child or youth is suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings, and (2) as a result of said conditions, the child's or youth's safety is endangered and immediate removal from such surroundings is necessary to ensure the child's or youth's safety . . . ." The court then either holds a hearing with the parents or caretaker of the child to determine whether the court should vest the child's *temporary* care and custody in another person or suitable agency, or issues an ex parte order vesting the child's *temporary* care in another person or agency. See General Statutes § 46b-129 (b). Following the hearing, the court shall issue "specific steps the commissioner and the parent or guardian shall take for the parent or guardian to regain or to retain custody of the child or youth . . . ." General Statutes § 46b-129 (c) (6).

The respondent mother argues that the neglect proceeding is an infringement on her fundamental right to parent her child. She cites no authority for the proposition that a neglect proceeding necessarily implicates that right. Moreover, the right to parent a child is not limitless. See *Roth* v. *Weston*, 259 Conn. 202, 224, 789 A.2d 431 (2002). In fact, the state has the responsibility to act in order to protect the health and safety of children. Id. Indeed, "it is unquestionable that in the face of allegations that parents are unfit, the state may intrude upon a family's integrity.§ Id.; see also General Statutes §§ 17a-112 (j) and 45a-717.

The respondent mother's argument also overlooks the fact that a neglect petition initiates a proceeding that has a distinctly different goal from that of a termina-

tion of parental rights proceeding. A petition for neglect does not seek the permanent and irrevocable ending of the parental rights that is central to the termination proceeding. See, e.g., *In re Jermaine S.*, 86 Conn. App. 819, 828 n.7, 863 A.2d 720, cert. denied, 273 Conn. 938, 875 A.2d 43 (2005). Indeed, one of the goals of a neglect proceeding is the development of specific steps that will allow the parent to regain custody of his or her child. Accordingly, the respondent mother's reliance on termination of parental rights cases is misplaced.

The second prong of *Mathews* addresses the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards. See *Mathews* v. *Eldridge*, supra, 424 U.S. 335. The respondent mother contends that granting her motion for a continuance was an additional procedure that would have substantial value. She argues further that the presence of the guardian ad litem and attorney were not enough to protect the respondent mother from wrongful deprivation. The petitioner maintains that granting the continuance would not have added significant value because the respondent mother's interests were protected sufficiently by her attorney and the guardian ad litem who was assigned to represent the respondent mother's interests.

It is well established that "each party to a litigation has the undoubted right to be present at the trial." *Anderson* v. *Snyder*, 91 Conn. 404, 408, 99 A. 1032 (1917). This right, however, is not absolute. If a litigant does not appear or is voluntarily absent from court, the court is not required to halt proceedings until that person can attend. See *Automotive Twins, Inc.* v. *Klein*, 138 Conn. 28, 35, 82 A.2d 146 (1951).

The guardian ad litem supported the respondent mother's motion for continuance and told the court that, "although [the respondent mother] is not competent

to assist her counsel, that does not mean she is not competent to assist me as her guardian ad litem and, in fact, I believe it is required of me as guardian ad litem to first attempt to . . .explain proceedings in a matter that she can understand. She has the right to be present during her trial and it is incumbent upon me as her guardian ad litem to request such accommodations as are necessary to best serve . . . my ward given her limitations."

The court denied the motion for a continuance and stated: "Your client is not being defaulted. Your client is incompetent and because she is incompetent a guardian ad litem was appointed because she was unable to understand the nature of the proceedings and to assist her counsel in her defense."

The record reveals that the respondent mother's attorney and her guardian ad litem advocated zealously on her behalf throughout the trial. Further, the court did not default the respondent mother for not attending the hearing. Although the guardian ad litem does not replace the respondent mother at trial, the potential value of a continuance was lessened by the presence of the guardian ad litem and the previous finding that the respondent mother was incompetent. Significantly, in response to the request for the continuance, the attorney for the minor child stated: "Your Honor, I ask that the trial proceed. . . . [T]his child has been under an order of temporary custody for quite a long time. Mother is incompetent to participate in any proceedings at any rate. I just think that further delay is not in the best interest of the child." In addition, as noted by the trial court, if the respondent mother had been hospitalized since the prior week, "there had been adequate time to obtain some written corroboration of [her] hospitalization and moreover, a written motion for a continuance of the trial should have been filed."

The final prong to be considered is the government's interest, including the financial and administrative burdens of additional procedures. See *Mathews* v. *Eldridge*, supra, 424 U.S. 335. The government's interest here, ensuring the health and safety of the child, is significant. Granting the continuance likely would have placed a substantial burden on this governmental interest, particularly, as noted by the attorney for the minor child, in light of the prior repeated delays in this case, mostly as a result of the respondent mother's failure to appear. As discussed previously in this opinion, the petitioner invoked a ninety-six hour hold on November 25, 2018, and then moved for an order of temporary custody and a neglect petition on November 28, 2018. The respondent mother appeared on the first court date on December 7, 2018, but failed to appear on January 23 and February 20, 2019, for subsequent hearings. At the time of the trial on October 28, 2019, the child had been under an order of temporary custody for almost one year. As discussed previously in this opinion, at trial, the attorney for the minor child noted that the child had been under the order of temporary custody for a lengthy period of time and argued that further delay was not in the best interest of the child.

Although the financial and administrative burdens of continuing the hearing may not have been significant, the delay in resolving the child's custodial placement would have substantially impacted the government's interest in resolving the child's custodial determination swiftly and ensuring the care and safety of the child.

We note the importance of individuals, especially parents in child custody proceedings, being able to attend hearings in which their fundamental rights are at issue. This, however, is not such a case. Accordingly, our consideration of the *Mathews* factors leads us to conclude that the respondent mother's procedural due process

rights were not violated by the court's denial of her motion for a continuance of the neglect proceeding.[2]

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE PROBATE APPEAL OF MICHAEL NGUYEN (AC 42922)

Lavine, Alvord and Moll, Js.

Syllabus

The plaintiff appealed to the trial court from the decree of the Probate Court ordering his involuntary commitment to a psychiatric hospital for treatment of his psychiatric disabilities. The plaintiff had been admitted to the hospital pursuant to a physician's emergency certificate. Prior to the expiration of the certificate, the plaintiff signed a voluntary application to be admitted to the hospital as a patient, but, a few hours later, he gave the hospital three business days' notice in writing of his desire to leave. Four days later, the plaintiff's primary clinician filed on behalf of the hospital a petition in the Probate Court for the plaintiff's involuntary commitment to the hospital. That same day, the Probate Court, pursuant to the statute (§ 17a-498) that governs commitment hearings, appointed two psychiatrists to examine the plaintiff and to report their findings to the court on a physician's certificate form. Following a hearing, at which a treating psychiatrist at the hospital and the appointed psychiatrists testified, the Probate Court issued a decree in which it found by clear and convincing evidence that the plaintiff had psychiatric disabilities and was gravely disabled and that a less restrictive placement was not available and ordered the plaintiff's commitment to the hospital for treatment. The plaintiff appealed from the decree to the trial court, which affirmed the Probate Court's decision, and the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on his claim that the Probate Court exceeded its statutory authority by involuntarily committing him because the hospital failed to comply with the notice requirements set forth in § 17a-498 (e); although the hospital staff failed to comply with certain notice requirements of that statute, that failure did not nullify the statutory

[2] We also note that the court did not default the respondent mother for not attending the hearing and, therefore, the petitioner was put to her proof on the allegations of the petition.

authority of the Probate Court to hold an involuntary commitment hearing, as the plain language of § 17a-498 does not condition the Probate Court's exercise of power.

2. Although the Probate Court improperly admitted into evidence a police report that documented an anonymous complaint that the plaintiff had told someone at his therapy group that he had homicidal fantasies, that evidentiary impropriety constituted harmless error, as the police report was admitted in reference to the issue of whether the plaintiff was a danger to others and the Probate Court found that he was not.

3. The plaintiff's claim that the Probate Court improperly admitted two physician's certificates into evidence because § 17a-498 (c) does not provide that sworn certificates by psychiatrists are evidence was unavailing; the plain and unambiguous meaning of § 17a-498 (c) dictates that the Probate Court must require, and therefore consider as evidence, the certificates of at least two physicians as a prerequisite to involuntarily committing a person, and it does not make sense that the Probate Court would be prohibited from considering those required certificates unless formally admitted into evidence.

4. The plaintiff could not prevail on his claim that the Probate Court's findings that he was gravely disabled and that a less restrictive placement was not available were clearly erroneous, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion, there having been substantial evidence in the record to support those findings; the Probate Court reasonably could have inferred from the substantial evidence, including the plaintiff's homicidal fantasies, persecutory delusions and objections to medication, that he was in danger of serious harm as a result of an inability to provide for his own basic needs and that he was incapable of determining whether to accept hospital treatment because his judgment was impaired.

Submitted on briefs April 6—officially released August 11, 2020

Procedural History

Appeal from the decree of the Probate Court for the district of Hartford ordering the involuntary commitment of the plaintiff to a psychiatric hospital, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Scholl*, *J.*; judgment affirming the decision of the Probate Court, from which the plaintiff appealed to this court. *Affirmed.*

Peter M. Van Dyke, filed a brief for the appellant (plaintiff).

Mitchell Lake and *Rebecca M. Harris*, filed a brief for the appellees (defendant Kevin Cobb et al.).

Opinion

LAVINE, J. The plaintiff, Michael Nguyen (respondent), appeals from the judgment of the Superior Court affirming the decision of the Probate Court for the district of Hartford ordering the involuntary commitment of the respondent to The Institute of Living (institute) for treatment of his psychiatric disabilities. On appeal, the respondent claims that the Superior Court erred in determining that his substantial rights were not prejudiced when the Probate Court (1) lacked jurisdiction and exceeded its statutory authority because the institute failed to comply with the notice requirements of General Statutes § 17a-498 (e),[1] (2) improperly admitted a police report and two physician's certificates into evidence, and (3) entered an order that was clearly erroneous, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion because it was based on inadmissible evidence. We affirm the judgment of the Superior Court.

The record reveals the following facts and procedural history. The respondent was admitted to the institute on November 30, 2018, pursuant to a physician's emergency certificate (emergency certificate). On the morning of Friday, December 14, 2018, prior to the expiration of the emergency certificate, the respondent signed a

[1] General Statutes § 17a-498 (e) provides in relevant part: "The respondent shall be given the opportunity to elect voluntary status under section 17a-506 at any time prior to adjudication of the application, subject to the following provisions: (1) In the event that a patient is in the hospital, the patient shall be informed by a member of the hospital staff within twenty-four hours prior to the time an application is filed with the court, that he or she may continue in the hospital on a voluntary basis under the provisions of section 17a-506, and any application for involuntary commitment by the hospital shall include a statement that such voluntary status has been offered to the respondent and refused . . . ."

voluntary application to be admitted as a patient in the institute, pursuant to General Statutes § 17a-506 (a),[2] whereby he agreed to abide by the rules and regulations of the institute and to give at least three business days' written notice if he wished to terminate his hospitalization before his discharge was ordered. A few hours later, the respondent completed a form, in which he gave the institute three business days' notice of his desire to leave.

On Tuesday, December 18, 2018, the defendant Kevin Cobb[3] (petitioner), a licensed clinical social worker and the respondent's primary clinician, filed on behalf of the institute a petition in the Probate Court for the respondent's involuntary commitment to the institute, alleging that the respondent "has psychiatric disabilities and is dangerous to himself or others or gravely disabled in the following respects . . . . [He] presented to the hospital upon concern over statements [that he] made in the community and the findings of several weapons and bomb making instructions at [his] home by [the] local police department. [The respondent] presents with symptoms that align with a psychotic disorder. Continuation of suspiciousness and paranoia toward both [institute] staff and peers remain consistent. [The respondent] feels he [does not] need medication. Further, [the respondent] misinterprets information as to

[2] General Statutes § 17a-506 (a) provides: "Any hospital for psychiatric disabilities may receive for observation and treatment any person who in writing requests to be received; but no such person shall be confined in any such hospital for psychiatric disabilities for more than three business days, after he or she has given notice in writing of his or her desire to leave, unless an application for commitment has been filed in a court of competent jurisdiction. Such person shall be informed at the time of such admission concerning such patient's ability to leave after three days' notice pursuant to this subsection and shall also be informed that an application may be filed under subsection (e) of this section in which case such patient's ability to leave may be delayed in accordance with the provisions of said subsection."

[3] Joanne Fogg-Waberski, the superintendent of the institute; Michael Nelken, a psychiatrist; Gregory Peterson, a psychiatrist; and the respondent's father were also named as defendants.

be threatening. His judgment and insight are impoverished. The treatment team feels a longer period of hospitalization is needed at this time to further stabilize [him] on medication."

That same day, pursuant to § 17a-498 (c) (1), the Probate Court appointed two psychiatrists, Michael Nelken and Gregory Peterson (appointed physicians), to examine the respondent and to report their findings to the court on a physician's certificate.[4] Thereafter, the respondent filed a notice, also pursuant to § 17a-498 (c) (1), that he wished to cross-examine the appointed physicians at the scheduled commitment hearing.

The involuntary commitment hearing took place before the Probate Court on January 2, 2019. Peter Sugarman, a treating psychiatrist at the institute, and the appointed physicians testified. A police report from November 28, 2018, was admitted into evidence, which documented an anonymous complaint that the respondent had told someone at his mediation therapy group that he had homicidal fantasies. Following the hearing, the Probate Court issued a decree in which it found that the respondent was not a danger to others; however, it found by clear and convincing evidence that he was gravely disabled. The Probate Court also found that a less restrictive environment was not a viable option for the respondent because he remained under an order for involuntary medication and he was neither participating in his treatment plans nor was he communicating his intent to comply with the treatment plan upon discharge. Accordingly, the Probate Court ordered that the respondent be committed to the institute for the treatment of his psychiatric disabilities. The respondent

[4] The findings of the appointed physicians were reported to the court on a form titled, "PHYSICIAN'S CERTIFICATE/INVOLUNTARY COMMITMENT/ANNUAL REVIEW/PERSON WITH PSYCHIATRIC DISABILITIES" (physician's certificate).

appealed to the Superior Court from the January 4, 2019 decree of the Probate Court pursuant to General Statutes § 45a-186 et seq.[5] In that appeal, the respondent raised claims identical to those presently before this court. The Superior Court agreed with the respondent's claim that the admission of the police report as evidence in the Probate Court proceeding was improper but concluded that it constituted harmless error. The court rejected the respondent's other claims and affirmed the decision of the Probate Court. This appeal followed.

We begin with the standard of review applicable to probate appeals, which is set forth in General Statutes § 45a-186b. Section 45a-186b provides in relevant part: "[T]he Superior Court shall not substitute its judgment for that of the Probate Court as to the weight of the evidence on questions of fact. The Superior Court shall affirm the decision of the Probate Court unless the Superior Court finds that substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are: (1) In violation of the federal or state constitution or the general statutes, (2) in excess of the statutory authority of the Probate Court, (3) made on unlawful procedure, (4) affected by other error of law, (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. . . ." This standard of review also applies when an appeal from the decision of a Probate Court is taken to our appellate courts. See *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 191, 128 A.3d 901 (2016); see also *Falvey* v. *Zurolo*, 130 Conn. App. 243, 256–57, 22 A.3d 682 (2011).

[5] General Statutes § 45a-186 provides in relevant part: "(b) Any person aggrieved by an order, denial or decree of a Probate Court may appeal therefrom to the Superior Court. . . . (d) An appeal from a decision rendered in any case after a recording of the proceedings is made under section 17a-498 . . . shall be on the record and shall not be a trial de novo. . . ."

I

The respondent first claims that the Probate Court exceeded its statutory authority by involuntarily committing him because the institute failed to comply with the notice requirements set forth in § 17a-498 (e). Specifically, the respondent argues that, because there is no evidence that he was offered voluntary commitment status pursuant to §§ 17a-498 (e) and 17a-506, the Probate Court exceeded its statutory authority, and lacked jurisdiction, to conduct a commitment hearing. We disagree.

In addressing this claim, we are mindful that the "Probate Court is a court of limited jurisdiction prescribed by statute, and it may exercise only such powers as are necessary to the performance of its duties. . . . As a court of limited jurisdiction, *it may act only when the facts and circumstances exist upon which the legislature has conditioned its exercise of power*. . . . Such a court is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Emphasis added; internal quotation marks omitted.) *In re Henrry P. B.-P.*, 327 Conn. 312, 324, 173 A.3d 928 (2017).

The statute at issue, § 17a-498 (e), sets forth certain rights of the respondent relating to a hearing on an involuntary commitment application, including the opportunity to elect voluntary commitment status prior to adjudication. Section 17a-498 (e) provides in relevant part: "The respondent shall be given the opportunity to elect voluntary status under section 17a-506 at any time prior to adjudication of the application, subject to the following provisions: (1) In the event that a patient is in the hospital, the patient shall be informed by a member of the hospital staff within twenty-four hours prior to the time an application is filed with the court,

that he or she may continue in the hospital on a voluntary basis under the provisions of section 17a-506, and any application for involuntary commitment by the hospital shall include a statement that such voluntary status has been offered to the respondent and refused . . . ."

We agree with the respondent that (1) there is no evidence indicating that a member of the institute staff informed the respondent that he could continue in the hospital on a voluntary basis and (2) the petition for involuntary commitment failed to include a statement that the respondent was offered voluntary commitment status and that he refused. See General Statutes § 17a-498 (e). We conclude, however, that the failure of the institute staff to comply with the notice requirements of § 17a-498 (e) does not nullify the statutory authority of the Probate Court to hold an involuntary commitment hearing because the plain language of § 17a-498 has not "conditioned [the Probate Court's] exercise of power." (Internal quotation marks omitted.) *In re Henrry P. B.-P.*, supra, 327 Conn. 324.[6] We therefore reject the respondent's claim.[7]

[6] Concomitantly, the respondent argues that the Probate Court lacked jurisdiction. We do not agree. We conclude that the institute's failure to offer the respondent voluntary commitment status did not deprive the Probate Court of jurisdiction over the involuntary commitment proceedings because the notice requirement of § 17a-498 (e) is not jurisdictional, and the respondent has not cited any legal authority to indicate otherwise. General Statutes § 17a-497 (a) addresses the Probate Court's jurisdiction over involuntary commitment proceedings, and, notably, the notice requirement of § 17a-498 (e) is not implicated: "The jurisdiction of the commitment of a person with psychiatric disabilities to a hospital for psychiatric disabilities shall be vested in the Probate Court . . . . In any case in which the person is hospitalized in accordance with the provisions of sections 17a-498, 17a-502 or 17a-506, and an application for the commitment of such person is filed in accordance with the provisions of said sections, the jurisdiction shall be vested in the Probate Court for the district in which the hospital where such person is a patient is located. . . . *The Probate Court shall exercise such jurisdiction only upon written application alleging in substance that such person has psychiatric disabilities and is dangerous to himself or herself or others or gravely disabled.*" (Emphasis added.)

[7] Although the following facts do not affect our resolution of this claim, we view them as worth noting. The respondent signed a voluntary application

II

We now turn to the respondent's evidentiary claims. As a preliminary matter, we note that the rules of evidence apply to involuntary commitment proceedings. See General Statutes § 17a-498 (h) ("[t]he rules of evidence applicable to civil matters in the Superior Court shall apply to hearings under this section").

A

The respondent claims that the Probate Court improperly admitted a police report into evidence because the report was not authenticated and did not satisfy the business record exception to the hearsay rule. We agree; however, we conclude that this error was harmless.

At the hearing, Sugarman testified that the respondent was a danger to others. Sugarman's testimony was predicated on a police report from November 28, 2018, which documented an anonymous complaint that the respondent had told someone at his mediation therapy group that he had homicidal fantasies.[8] Counsel for the petitioner proffered that police report as foundational support for Sugarman's conclusion that the respondent was a danger to others. Counsel for the respondent objected to the admission of the police report on the grounds that, inter alia, there was no one to authenticate the record and the record contained inadmissible hearsay. The Probate Court admitted the police report into evidence over the respondent's objections.

to be admitted to the institute on December 14, 2018, which was four days prior to the petitioner's filing a petition for the respondent's involuntary commitment. That voluntary application set forth the notice requirements of § 17a-506 (a). The record does not indicate whether, pursuant to § 17a-498 (e), the respondent was informed, within twenty-four hours prior to the petition for involuntary commitment being filed, that he could continue at the institute on a voluntary basis.

[8] Specifically, the police report stated that an anonymous complainant asked the respondent about his homicidal thoughts, and he stated that "he could see himself wearing all black, a mask, body armor and a rifle while walking down a hallway."

"An out-of-court statement used to prove the truth of the matter asserted is hearsay and is generally inadmissible unless an exception applies. . . . Police reports are normally admissible under the business records exception to the hearsay rule as set forth in General Statutes § 52-180.[9] . . . Witness statements contained within the reports, however, do not fall within this exception.[10] . . . To be admissible under the business record exception, the report must be based entirely upon the police officer's own observations or upon information provided by an observer with a business duty to transmit such information." (Citations omitted; footnotes in original; internal quotation marks omitted.) *Pirolo* v. *DeJesus*, 97 Conn. App. 585, 588–89, 905 A.2d 1210 (2006).

Moreover, "[a]uthentication is . . . a necessary preliminary to the introduction of most writings in evidence . . . . A proponent may authenticate a document by demonstrating proof of authorship of, or other connection with, [such] writings. . . . In general, a writing may be authenticated by a number of methods, including direct testimony, circumstantial evidence or proof of custody. . . .

[9] "The business records exception is codified in General Statutes § 52-180, which provides in relevant part: '(a) Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter. . . .' See also Conn. Code Evid. § 8-4." *Pirolo* v. *DeJesus*, 97 Conn. App. 585, 588 n.1, 905 A.2d 1210 (2006).

[10] "Statements of witnesses contained within a police report add another level of hearsay. These statements, therefore, must fall within an exception to the hearsay rule to be properly admitted. *Hutchinson* v. *Plante*, 175 Conn. 1, 5, 392 A.2d 488 (1978) ('[i]tems in a business entry not based on the entrant's personal knowledge add another level of hearsay . . . and some exception to the hearsay rule must be found to justify admission' . . .)." *Pirolo* v. *DeJesus*, 97 Conn. App. 585, 589 n.2, 905 A.2d 1210 (2006).

"The requirements for authenticating business record are identical to those for laying a foundation for its admissibility under the hearsay exception. It is generally held that business records may be authenticated by the testimony of one familiar with the books of the concern, such as a custodian or supervisor, who has not made the record or seen it made, that the offered writing is actually part of the records of the business." (Internal quotation marks omitted.) *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 811, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

The police report did not fall within the business record exception to the hearsay rule because it was not based entirely on the police officer's own observations or on information provided by an observer with a business duty to report such information. See *Pirolo* v. *DeJesus*, supra, 97 Conn. App. 589. Specifically, the police report contained statements made by numerous individuals other than the reporting police officer or an observer with a duty to report, including those of an anonymous complainant, the respondent, and the respondent's father. The police report was also improperly admitted because the petitioner failed to authenticate the report through direct testimony, circumstantial evidence, or proof of custody. See *Emigrant Mortgage Co.* v. *D'Agostino*, supra, 94 Conn. App. 811–12. We therefore conclude that the police report was improperly admitted into evidence.

In any event, we are satisfied that the admission of the police report constituted harmless error. "When a court commits an evidentiary impropriety, we will reverse the trial court's judgment only if we conclude that the trial court's improper ruling harmed [a party]. . . . In a civil case, a party proves harm by showing that the improper evidentiary ruling likely affected the outcome of the proceeding." (Citations omitted; internal quotation marks omitted.) *DeNunzio* v. *DeNunzio*, supra, 320 Conn. 204.

As stated previously, counsel for the petitioner proffered the police report in reference to Sugarman's assessment that the respondent was a danger to others. The Probate Court ultimately concluded, however, that "based on the testimony by both the treating psychiatrist . . . Sugarman, and the two [appointed physicians], the court does not find proof that the respondent is presently a danger to others. He has not repeated any threats of harm and has maintained his composure during his stay at the [institute] and during the court hearing." The Superior Court concluded on appeal that the admission of the police report was harmless because "[it] was admitted in reference to the issue of whether the [respondent] was a danger to others and the Probate Court found that he was not." The respondent did not address this conclusion by the Superior Court and failed entirely to brief the harmfulness prong of his evidentiary claim. See, e.g., *State* v. *Durdek*, 184 Conn. App. 492, 504–505, 195 A.3d 388 (to establish reversible error, appellant must prove existence of both erroneous ruling and resulting harm), cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018). We agree with the Superior Court that the admission of the police report was harmless error and therefore reject the respondent's claim.

B

The respondent's second evidentiary claim is that the Probate Court improperly admitted two physician's certificates into evidence because § 17a-498 (c) does not provide that sworn certificates by psychiatrists are evidence. We reject his claim.[11]

[11] The respondent also claims that the Probate Court improperly admitted two physician's certificates into evidence because (1) no party moved to admit the sworn certificates into evidence, and (2) even if the petitioner had proffered them as evidence, they contained inadmissible hearsay. We need not reach these claims given our determination that the Probate Court properly considered the certificates pursuant to § 17a-498 (c) (1). See Conn. Code of Evid. § 1-1 (b) ("[t]he Code and the commentary apply to all proceedings . . . except as otherwise provided by the . . . General Statutes").

The following additional facts and procedural history are relevant. On December 18, 2018, pursuant to § 17a-498 (c) (1), the Probate Court appointed Nelken and Peterson to examine the respondent and to report their findings on physician's certificates. Peterson examined the respondent and reported his findings on December 23, 2018. Nelken examined the respondent on December 20, 2018, and reported his findings on December 26, 2018. At the commitment hearing, the certificates completed by the appointed physicians were not proffered by either party to be admitted into evidence. The hearing transcript, however, reveals that the Probate Court had the two certificates in its possession and considered them.[12] Counsel for both parties questioned the appointed physicians regarding their respective certificates and, at times, had portions of those certificates read into the record. Following the hearing, the Probate Court issued a decree stating in part: "The sworn certificates of two physicians, at least one of whom is a practicing psychiatrist, have been filed in court and *were admitted into evidence pursuant to* [*§*] *17a-498* (*c*). [Counsel for] the respondent, filed a request for the two independent psychiatrists to testify at the hearing . . . . Both [appointed physicians] were present and provided testimony as witnesses at the hearing." (Emphasis added.) To resolve the respondent's claim, we must determine whether the Probate Court properly considered the two certificates as evidence, pursuant to § 17a-498, in reaching its decision.

Section 17a-498 (c) (1) provides in relevant part: "The court shall require the certificates, signed under penalty of false statement, of at least two impartial physicians

[12] Prior to hearing the testimony of the appointed physicians, the Probate Court stated: "Dr. Nelken, we'll be right with you. . . . And you've been sworn and he stated his name for the record. . . . I believe that . . . counsel for the patient, the respondent, would like to ask some questions of you in regard to . . . [two] outside psychiatrists, um, physician's certificates that are required to be . . . provided to the court along with . . . an involuntary commitment petition."

selected by the court, one of whom shall be a practicing psychiatrist . . . . Such certificates shall indicate that the physicians have personally examined the respondent not more than ten days prior to such hearing. . . . Each such physician shall make a report on a separate form provided for that purpose by the Probate Court Administrator and shall answer such questions as may be set forth on such form as fully and completely as reasonably possible. Such form shall include, but not be limited to, questions relating to the specific psychiatric disabilities alleged, whether or not the respondent is dangerous to himself or herself or others, whether or not such illness has resulted or will result in serious disruption of the respondent's mental and behavioral functioning, whether or not hospital treatment is both necessary and available, whether or not less restrictive placement is recommended and available and whether or not the respondent is incapable of understanding the need to accept the recommended treatment on a voluntary basis. Each such physician shall state upon the form the reasons for his or her opinions. Such respondent or his or her counsel shall have the right to present evidence and cross-examine witnesses who testify at any hearing on the application. If such respondent notifies the court not less than three days before the hearing that he or she wishes to cross-examine the examining physicians, the court shall order such physicians to appear."

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering

such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Citation omitted; internal quotation marks omitted.) *Small* v. *Going Forward, Inc.*, 281 Conn. 417, 421–22, 915 A.2d 298 (2007). "We will not torture the plain wording of a statute to impart a meaning not expressed by its unambiguous language." *Palosz* v. *Greenwich*, 184 Conn. App. 201, 215 n.14, 194 A.3d 885, cert. denied, 330 Conn. 930, 194 A.3d 778 (2018). "Honest disagreement about the interpretation of a statutory provision does not . . . make the statute ambiguous or vague." (Internal quotation marks omitted.) *State* v. *Dudley*, 332 Conn. 639, 646, 212 A.3d 1268 (2019).

We conclude that the plain and unambiguous meaning of § 17a-498 (c) dictates that the Probate Court must require, and therefore consider as evidence, the certificates of at least two physicians as a prerequisite to involuntarily committing the respondent. Section 17a-498 sets forth the principal components of involuntary civil commitment procedure. See *State* v. *Dyous*, 307 Conn. 299, 301 n.2, 53 A.3d 153 (2012). The statute provides that the Probate Court "*shall require the certificates*, signed under penalty of false statement, *of at least two impartial physicians* selected by the court, one of whom shall be a practicing psychiatrist . . . ." (Emphasis added.) General Statutes § 17a-498 (c). It does not make sense that the Probate Court would be prohibited from considering those *required* certificates

unless formally admitted into evidence. Our construction of the statute is supported by the fact that "[s]uch respondent or his . . . counsel *shall have the right to present evidence and cross-examine witnesses who testify* at any hearing on the application. If such respondent notifies the court not less than three days before the hearing that he or she wishes to cross-examine the examining physicians, the court shall order such physicians to appear." (Emphasis added.) General Statutes § 17a-498 (c). That is, the respondent's ability to challenge the statements contained in the certificates would serve little purpose if the court were prohibited from considering the statements therein as evidence. Accordingly, we reject the respondent's claim.

III

The respondent claims that the Probate Court's findings that he was gravely disabled and that a less restrictive placement was not available were clearly erroneous, arbitrary or capricious, characterized by an abuse of disretion, or a clearly unwarranted exercise of discretion because they were based on inadmissible evidence.[13] We disagree.

As stated previously, on appeal, we shall affirm the decision of the Probate Court unless the "substantial rights of the person appealing have been prejudiced because the findings, inferences, conclusions or decisions are . . . (5) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." General Statutes § 45a-186b. "Given that § 45a-186b was also a component of the legislature's probate reform in 2007, there is

[13] We resolve this claim consistent with our evidentiary conclusions found in part II of this opinion. In other words, we do not consider the content of the police report; however, we do consider the contents of the physician's certificates.

a lack of appellate jurisprudence regarding its application. . . . The language of § 45a-186b, however, is virtually identical to the language used in General Statutes § 4-183 (j) of the Uniform Administrative Procedure Act. Given the similarity of this statutory language, our application of § 4-183 (j) is instructive.

"As this court has previously noted, the scope of our review regarding an administrative appeal is restricted. A court must determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable. . . . Neither this court nor the trial court may retry the case or substitute its own judgment for that of the administrative agency on the weight of the evidence or questions of fact. . . . Our ultimate duty is to determine, in view of all of the evidence, whether the agency [or court], in issuing its order, acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . The substantial evidence standard is satisfied if the record provides a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . As an appellate court, we do not review the evidence to determine whether a conclusion different from the one reached could have been reached. . . . The goal of our analysis is simply to decide whether the trial court's conclusion was reasonable. . . . Using this standard as a backdrop, we will give deference to the Probate Court's determination of the credibility of witnesses and its factual determinations." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Falvey* v. *Zurolo*, supra, 130 Conn. App. 256–57.

The following additional facts are relevant to our resolution of the respondent's claim. At the commitment hearing, Sugarman, Peterson, and Nelken testified as to the respondent's condition. All three physicians testified that the respondent is gravely disabled. All three opined that the respondent's psychiatric disability

resulted in serious disruption of his mental and behavioral functioning and that his psychiatric disability will result in a serious disruption of his mental and behavioral functioning in the future. They further opined that hospital treatment is necessary for the respondent, that a less restrictive placement is not recommended, and that the respondent is not capable of understanding the need to accept treatment on a voluntary basis.

Sugarman diagnosed the respondent with "delusional disorder, rule out schizophrenia." He testified that the respondent harbors unusual beliefs despite the fact that they may not be real and that the respondent is prone to misinterpreting, such as his delusional thoughts that people are going to turn against and take control of him. Sugarman further testified that the respondent is suspicious, guarded, paranoid, and mistrustful of others. Sugarman stated that the respondent has misinterpreted innocent events in a dangerous way in the past and may do so in the future unless he is properly treated. Sugarman testified that if the respondent were released, he would not be compliant with his medication regimen, group therapy, or individual therapy. Moreover, the only place that the respondent can go is to his father's house, which Sugarman believed was unsafe because the father might encourage the respondent's thinking and does not support his treatment. Due to the respondent's mental state, Sugarman opined that the respondent would not be able to behave in an appropriate manner and to find his way in society. Sugarman further testified that the respondent was on an involuntary medication order. Sugarman had no doubt that the respondent should be involuntarily committed.

Peterson diagnosed the respondent with schizophrenia. Peterson opined that the respondent was gravely disabled because his perception of reality is impaired. He further opined that the respondent remains paranoid and delusional, with ongoing fantasies of killing others. Peterson testified that the respondent has no insight

into the nature and seriousness of his situation. Peterson testified that the respondent told his therapist that he had a fantasy of wearing a mask and walking through a school with a rifle.

Nelken diagnosed the respondent with "paranoid schizophrenia, chronic." Nelken opined that the respondent was gravely disabled because he is too fearful and agitated to manage on his own. Nelken opined that the respondent became homicidal from persecutory delusions. Nelken opined that the respondent is permanently disabled and requires a structured setting to support his treatment. Nelken testified that the respondent had an unusual self-concept and attitude toward the world. Nelken stated that it was "evident to [him] that this is a young man who is struggling with feelings that he doesn't know how to control any way except by physical rigidity and . . . very careful speech. This . . . is somebody who's in grave distress." Nelken testified that the respondent has homicidal fantasies, has threatened people at gunpoint, and was struggling to regulate his emotions. Nelken further testified that the respondent objects to the medication he was being given. Nelken also testified that the respondent was unable to discuss his difficulties while he was in the armed services: "He is unable to . . . comprehend how it was that he was separated from the service or . . . to make any account of his actions at that time. He's not able to discuss his internal processes. And I said at the outset, he gives very unusual and bizarre evidence of attempting to physically restrain himself as a way of controlling his emotions and his actions."

Following the hearing, the Probate Court found as follows: "The testimony provided by the three psychiatrists does indicate that at this time the respondent is gravely disabled. And while the [c]ourt does agree that many individuals with the respondent's present diagnosed condition are able to live in a less restrictive

environment, at this time, this does not seem to be a viable option in the present case. The testimony [of the physicians is consistent in] that the [respondent] was not participating in his treatment plans or communicating his intents for discharge with the treatment plan. He remains under an order for involuntary medication. The [c]ourt is aware that the respondent's father is seeking alternative treatment programs and believes that these should be explored as part of his discharge plan. Therefore, the court finds by clear and convincing evidence that the respondent has psychiatric disabilities and is gravely disabled. The court further finds that a less restrictive placement is not available at this time."

The respondent was thus involuntarily committed pursuant to § 17a-498 (c) (3), which provides in relevant part: "If the court finds by clear and convincing evidence that the respondent has psychiatric disabilities and is dangerous to himself . . . or others or gravely disabled, the court shall make an order for his . . . commitment, considering whether or not a less restrictive placement is available, to a hospital for psychiatric disabilities to be named in such order, there to be confined for the period of the duration of such psychiatric disabilities or until he . . . is discharged or converted to voluntary status pursuant to section 17a-506 in due course of law. . . ." "Gravely disabled" is defined pursuant to General Statutes § 17a-495 (a) as a person who, "as a result of mental or emotional impairment, is in danger of serious harm as a result of an inability or failure to provide for his or her own basic human needs such as essential food, clothing, shelter or safety and that hospital treatment is necessary and available and that such person is mentally incapable of determining whether or not to accept such treatment because his judgment is impaired by psychiatric disabilities."

We are not persuaded by the respondent's claim that the Probate Court's findings that he was gravely disabled and that a less restrictive placement was not

available were clearly erroneous, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. There is substantial evidence in the record that the respondent was indeed gravely disabled and that a less restrictive placement was not a viable option at that time. Specifically, the Probate Court reasonably could have inferred from the substantial evidence, including his homicidal fantasies, persecutory delusions, and objections to medication, that the respondent was in danger of serious harm as a result of an inability to provide for his own basic needs and that he was incapable of determining whether to accept hospital treatment because his judgment is impaired. We therefore conclude that the Probate Court's findings were not erroneous as the respondent claims.

The judgment is affirmed.

In this opinion the other judges concurred.

PIOTR BUDZISZEWSKI *v.* CONNECTICUT JUDICIAL BRANCH, COURT SUPPORT SERVICES DIVISION, ADULT PROBATION SERVICES
(AC 41867)

DiPentima, C. J., and Moll and Flynn, Js.*

Syllabus

The petitioner, a Polish national, sought a writ of habeas corpus, claiming that his criminal trial counsel, K, had provided ineffective assistance by failing to advise him adequately as to the immigration consequences of his plea of guilty to a certain offense that subjected him to deportation. After the petitioner entered the guilty plea, federal authorities detained him and initiated deportation proceedings against him. The petitioner claimed that, if he had been properly advised by K as to the immigration consequences of entering a guilty plea, he would not have accepted the

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

plea offer. The habeas court rendered judgment denying the habeas petition and granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly concluded that the petitioner was not prejudiced by the advice of his attorney, K, regarding the immigration consequences of pleading guilty: although the petitioner highlighted the actions that he took subsequent to accepting the plea offer, including the motions that he had filed contesting his conviction following his guilty plea and the amount of money he spent in avoiding deportation, the petitioner's post hoc assertions on appeal that he would not have pleaded guilty but for K's advice were insufficient to establish prejudice in light of the absence of substantial, contemporaneous evidence to support such assertions, the credibility determinations made by the habeas court regarding the concerns of the petitioner that were contemporaneous to his acceptance of the offer support the conclusion that the court credited K's testimony that the length of incarceration, not deportation, was the petitioner's main concern, and that the petitioner accepted the plea that would ensure that he would spend less than one year in jail, and the court did not credit the petitioner's testimony that he would not have taken the plea deal had he known that he would be deported.

Argued March 12—officially released August 11, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the court, *Oliver*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Adrienne Russo*, assistant state's attorney, for the appellee (respondent).

Opinion

FLYNN, J. The petitioner, Piotr Budziszewski, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims on appeal that the habeas court improperly

rejected his claim that his right to effective assistance of counsel was violated by his criminal trial counsel's failure to properly advise him of the immigration consequences of entering a guilty plea. We disagree and, accordingly, affirm the judgment of the habeas court.

At the center of this case is the effect that federal law has on aliens provided lawful permanent residence in the United States who commit an "aggravated felony." Pursuant to 8 U.S.C. § 1227 (a) (2) (A) (iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." Illicit trafficking in a controlled substance is listed in 8 U.S.C. § 1101 (a) (43) (B) as an "aggravated felony." (Internal quotation marks omitted.) The term "controlled substance" under federal law includes "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter [21 U.S.C. § 812]." (Internal quotation marks omitted.) 21 U.S.C. § 802 (6) (2018). Included in the schedules of 21 U.S.C. § 812 are opium derivatives. The petitioner was arrested for selling Roxicodone, an opium derivative, and entered a guilty plea pursuant to General Statutes (Rev. to 2011) § 21a-277 (a). In *Gousse* v. *Ashcroft*, 339 F.3d 91, 93 (2d Cir. 2003), the United States Court of Appeals for the Second Circuit held that Gousse's conviction under § 21a-277 (a) for selling a "controlled substance" to an undercover police officer constituted a conviction for "illicit trafficking in a controlled substance" under 8 U.S.C. § 1101 (a) (43) (B), which is a removable "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq. (2018). The first habeas court determined, and the second habeas court agreed, that the petitioner's conviction qualified as an aggravated felony under federal immigration law and that no exception or exclusion applied, thus making the petitioner subject to deportation.

At the outset, we note that the United States Supreme Court in "*Padilla* [v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)] held that before an alien criminal defendant pleads guilty to a criminal offense for which he is subject to deportation, his defense attorney must advise him of the deportation consequences of his plea and resulting conviction. On that score, the Supreme Court concluded that because deportation is such a great, life-altering consequence of a criminal conviction, an alien defendant's plea of guilty to a deportable offense without knowledge of that consequence cannot be considered a knowing and intelligent waiver of his right not to be convicted of that offense unless his guilt is established beyond a reasonable doubt at a full, fair adversary trial." *Guerra* v. *State*, 150 Conn. App. 68, 72–73, 89 A.3d 1028, cert. denied, 314 Conn. 903, 99 A.3d 1168 (2014).

The following facts and procedural history, as set forth by the habeas court, are relevant. "The petitioner, a Polish national who became a lawful permanent resident of the United States after emigrating here in 2001, was arrested on various drug charges after selling narcotics on two occasions to undercover police officers in January, 2011. The petitioner was charged with two counts of selling narcotics by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), and two counts of possession of a narcotic substance with intent to sell in violation of General Statutes § 21a-279 (a). The petitioner faced a minimum sentence of five years of incarceration with a maximum term of twenty years. Attorney Gerald Klein represented the petitioner at all relevant times.

"On January 24, 2012, the petitioner entered a guilty plea to one count of possession of a controlled substance with intent to sell in violation of General Statutes [Rev. to 2011] § 21a-277 (a). This offense carried no mandatory minimum period of incarceration. During

plea negotiations, the state agreed to a sentence recommendation of five years of incarceration, execution suspended after no more than one year, followed by three years of probation, with the right to argue for less. The court, *Scarpellino*, *J.*, canvassed the petitioner when he entered his guilty plea . . . .

"On May 2, 2012, the court . . . sentenced the petitioner to five years of incarceration, execution suspended after ninety days, and two years of probation. The petitioner was released from custody after serving forty-five days of incarceration. Thereafter, federal authorities detained the petitioner and began proceedings to remove him from the country. A final order of deportation has been entered against the petitioner, and he has exhausted all appeals from that order.

"The petitioner initiated the present habeas petition on September 11, 2013. In his amended petition, filed on October 28, 2013, the petitioner set forth ineffective assistance of counsel claims as to trial counsel's failure to advocate for the petitioner's admission into a drug treatment program, and failure to adequately research and advise the petitioner of the immigration consequences of his guilty plea as required by *Padilla* v. *Kentucky*, [supra, 559 U.S. 356]. . . . The habeas court, *Newson*, *J.*, granted the petitioner's petition and ordered that his conviction be vacated. The respondent [the Commissioner of Correction] appealed the decision, and [our] Supreme Court [in *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 518, 142 A.3d 243 (2016)], reversed the habeas court's judgment and remanded the case back to the habeas court for a new trial in which the habeas court must make findings of fact about what [Attorney] Klein actually told the petitioner and then assess whether, based on those findings, the petitioner has proven that [Attorney] Klein's advice violated the requirements of *Padilla*, as clarified by our [Supreme Court's] decision in [*Budziszewski* v.

Commissioner of Correction, supra, 504]." (Footnote omitted; internal quotation marks omitted.)

On remand, the habeas court denied the petition and concluded both that the petitioner had failed to establish that Klein's advice constituted deficient performance and had failed to prove that he was prejudiced by Klein's advice. The court granted the petitioner's petition for certification to appeal. This appeal followed.

We begin with the applicable legal principles. "The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 885–86, 173 A.3d 525 (2017).

"In *Strickland* v. *Washington*, 466 U.S. 668, [687], 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court enunciated the two requirements that must be met before a petitioner is entitled to reversal of a conviction due to ineffective assistance of counsel.

First, the [petitioner] must show that counsel's performance was deficient. . . . Second, the [petitioner] must show that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversarial process that renders the result unreliable." (Internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 424–25, 876 A.2d 1277, cert. denied, 275 Conn. 930, 883 A.2d 1246 (2005), cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006).

"To satisfy the prejudice prong, the petitioner had the burden to show that, absent counsel's alleged failure to advise him in accordance with *Padilla*, he would have rejected the state's plea offer and elected to go to trial. See *Hill* v. *Lockhart*, [474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)]. In evaluating whether the petitioner had met this burden and evaluating the credibility of the petitioner's assertions that he would have gone to trial, it was appropriate for the court to consider whether a decision to reject the plea bargain would have been rational under the circumstances." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 279–80, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

On appeal, the petitioner claims that the habeas court improperly concluded that he had not proven either prong of *Strickland*. Because we conclude that the petitioner cannot prevail on his claim that the court improperly concluded that he was not prejudiced by Klein's advice regarding the immigration consequences of pleading guilty, we need not address his claim regarding *Strickland*'s deficiency prong. "It is well settled that [a] reviewing court can find against a petitioner on either ground . . . . [A] court need not determine

whether counsel's performance was deficient before examining the prejudice suffered by the defendant." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 713, 946 A.2d 1203, cert denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

We begin our analysis of the petitioner's claim with an overview of *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017). In *Echeverria* v. *Commissioner of Correction*, 193 Conn. App. 1, 218 A.3d 1116, cert. denied, 333 Conn. 947, 219 A.3d 376 (2019), this court summarized *Lee* as follows: "In *Lee*, the defendant, a lawful permanent resident from South Korea, appealed from the denial of his motion to vacate his conviction, claiming that he had received ineffective assistance of counsel due to his defense counsel's failure to advise him of the immigration consequences of his guilty plea pursuant to *Padilla*. . . . It was undisputed that defense counsel deficiently performed because the defendant was erroneously advised that he would not be deported as a result of pleading guilty to possession of ecstasy with intent to distribute, an aggravated felony. . . . As a result, the sole issue on appeal was whether the defendant had been prejudiced by his defense counsel's deficient performance. . . .

"The court recognized that a criminal defendant who faces deportation as a consequence of his or her guilty plea may instead insist on proceeding to trial even if the chances of success are remote because there remains a possibility at trial that the defendant will be acquitted and will not face the onerous punishment of deportation. . . . Nevertheless, the court emphasized that a post hoc assertion that an individual would not have pleaded guilty but for his or her attorney's deficient performance was not enough to establish prejudice

absent contemporaneous evidence to support such an assertion. . . .

"The court determined that the defendant's claim that he would not have accepted the plea agreement had he known that it would lead to deportation was 'backed by substantial and uncontroverted evidence.' [*Lee* v. *United States*, supra, 1969]. The court further explained that '[i]n the unusual circumstances of this case,' the defendant adequately demonstrated a reasonable probability that he would not have pleaded guilty had he known that it would lead to mandatory deportation and that he instead would have proceeded to trial. . . . To support its conclusion, the court stated that there was 'no question' that deportation was the determinative issue in the defendant's decision to enter a guilty plea. . . . The court noted that the defendant repeatedly asked his attorney if there was any risk of deportation, both the defendant and his attorney testified at a hearing on his motion to vacate his conviction that the defendant would have gone to trial had he known about the deportation consequences associated with his guilty plea, and that the defendant, when asked during his plea canvass if the possibility that he could be deported affected his decision to plead guilty, answered in the affirmative and only proceeded to plead guilty once his defense counsel assured him that the judge's question was a 'standard warning. . . .'

"Additionally, the court recognized that the defendant had strong connections to the United States since he had lived in the country for three decades and was caring for his elderly parents, and that the consequences of taking a chance at trial to avoid deportation were not significantly harsher than pleading guilty and facing certain deportation because the defendant faced only a year or two of additional prison time if he went to trial as opposed to pleading guilty. . . .

"The court concluded '[w]e cannot agree that it would be irrational for a defendant in [the defendant's] position to reject the plea offer in favor of trial. But for his attorney's incompetence, [the defendant] would have known that accepting the plea agreement would certainly lead to deportation. Going to trial? Almost certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for [the defendant]; if that individual had strong connections to this country and no other, as did [the defendant]; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that [almost certainty of being deported] could make all the difference.' " (Citations omitted; emphasis omitted.) *Echeverria* v. *Commissioner of Correction*, supra, 193 Conn. App. 12–14. We see a critical factual distinction in the petitioner's case from that presented in *Lee*. Unlike in *Lee*, in the present case, the petitioner's trial counsel did not concede that he had improperly advised the petitioner, but did testify that the petitioner was more concerned about going to jail than with deportation. Furthermore, the habeas court found that the petitioner failed to demonstrate that he would have rejected the plea agreement and that he had been prejudiced by Klein's advice.

The petitioner argues that there was a reasonable probability that he would not have accepted the plea offer if he had been properly advised. He contends that he had compelling reasons to avoid deportation because his entire family lives in the United States, he has no family or friends in Poland who would help him rebuild his life there, and he and his mother are the only caregivers for his elderly grandmother. He also contends that the following actions demonstrate his preference to avoid deportation: filing a motion to vacate his guilty plea, filing a petition for a writ of habeas corpus, and

spending more than $60,000 to vacate his conviction or otherwise avoid removal.

Although the petitioner highlights the actions that that he took subsequent to his acceptance of the plea offer, the credibility determinations made by the habeas court regarding the concerns of the petitioner that were contemporaneous to his acceptance of the offer support the conclusion that the petitioner has not prevailed under *Strickland*'s prejudice prong. The habeas court made the following relevant credibility determinations. "The record in the present case . . . does not support a finding that deportation was the determinative factor in the petitioner's decision to plead guilty. Attorney Klein testified credibly that length of incarceration was the petitioner's main concern, and that counsel seemed more concerned with potential immigration consequences than the petitioner. Attorney Klein further testified that the petitioner had never been to jail, and the mandatory five year minimum sentence he faced weighed heavily in his decision to accept the plea offer. Attorney Klein further testified that he discussed with the petitioner that the state had a strong case involving the petitioner's sale of narcotics on more than one occasion to undercover police officers. Moreover, the petitioner's own mother testified at the habeas trial that her son was very concerned and stressed about the possibility of going to jail, and that the two discussed it nearly every day.

"The court does not credit the petitioner's testimony that he would have not taken the plea deal had he known he would be deported. The record demonstrates that the petitioner's primary concern was length of incarceration, not deportation. The petitioner accepted a plea deal guaranteeing that he would serve no more than a year in jail when he was facing a mandatory minimum sentence of five years with a maximum exposure of twenty years of incarceration. There was no

evidence presented of an available offer to the petitioner that would have avoided or mitigated the immigration consequences. In light of the foregoing, the decision to reject the plea bargain would not have been rational under the circumstances. The court finds that the petitioner failed to adequately demonstrate a reasonable probability that he would have rejected the plea, and therefore failed to establish that he was prejudiced by counsel's advice."

The habeas court credited Klein's testimony that the length of incarceration, not deportation, was the petitioner's main concern and that he accepted the plea that would ensure that he would spend less than one year in prison.[1] The court did not credit the petitioner's

[1] In addition to the time in jail that the petitioner was facing for the multiple drug charges, some of which were dropped as part of the plea bargain, he was also exposed to additional jail time for larceny in the first degree by virtue of his conviction of the drug felony. As part of the record before the court, Klein testified at the hearing on remand that the petitioner had been charged with larceny in the first degree. The petitioner was granted accelerated rehabilitation for this offense on January 13, 2011, for a period of two years until January 8, 2013. As part of his accelerated rehabilitation, the defendant paid more than $17,000 in restitution. Klein further testified that the petitioner was arrested on the present charges in February, 2011, only a short time after receiving accelerated rehabilitation. Pursuant to General Statutes § 54-56e (f), a defendant who receives accelerated rehabilitation and who satisfactorily completes the period of probation is entitled to a dismissal of the criminal charges. See *State* v. *Jerzy G.*, 183 Conn. App. 757, 767, 193 A.3d 1215, cert. denied, 330 Conn. 932, 194 A.3d 1195 (2018).

Accordingly, a petitioner who commits another felony after having received accelerated rehabilitation risks violating his probation, prosecution being recommenced, and the dismissal of the felony charge for which he was granted accelerated rehabilitation being denied for failure to satisfactorily complete probation pursuant to § 54-56e (f). According to General Statutes § 53a-122 (c), "[l]arceny in the first degree is a class B felony." General Statutes § 53a-35a provides in relevant part that "the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court as follows . . . (6) For a class B felony other than manslaughter in the first degree with a firearm under section 53a-55a, a term not less than one year nor more than twenty years. . . ." According to 8 U.S.C. § 1227 (a) (2) (A) (iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is

testimony that he would have taken the plea deal had he known he would be deported. We cannot overturn the court's credibility determinations on appeal. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Appellate courts do not second-guess the trier of fact with respect to credibility." (Citation omitted; internal quotation marks omitted.) *Necaise* v. *Commissioner of Correction*, 112 Conn. App. 817, 825–26, 964 A.2d 562, cert. denied, 292 Conn. 911, 973 A.2d 660 (2009). "It is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 280–81.

The petitioner argues in his brief that he has ties to the United States. That, however, is only one factor and is not in itself dispositive. See *Echeverria* v. *Commissioner of Correction*, supra, 193 Conn. App. 17 n.9. The petitioner highlights the motions he filed contesting his conviction following his guilty plea and the amount of money that he spent in avoiding deportation. Because the petitioner's primary concern was prison time, and not deportation, then, according to the rationale of *Lee*, the petitioner's post hoc assertions on appeal that he would not have pleaded guilty but for Klein's advice are insufficient to establish prejudice in light of the absence of substantial, contemporaneous evidence to support such assertions.

The petitioner further argues that the court's analysis of whether he would have pleaded guilty was based largely on its conclusion that Klein's performance in advising the petitioner was not deficient. He contends that if we conclude that the court failed to properly

deportable." According to 8 U.S.C. § 1101 (a) (43) (G), the definition of "aggravated felony" includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year. . . ." (Footnote omitted; internal quotation marks omitted.)

advise the petitioner concerning the immigration consequences of entering a guilty plea, we should remand the case for the habeas court to make a determination on prejudice. We find no merit in this argument. When a habeas court determines that neither prong of *Strickland* is satisfied, that does not necessarily mean that the analysis of the prejudice prong is intertwined with the analysis regarding deficient performance. Rather, *Strickland* is clear that there are two prongs to an analysis of an ineffective assistance of counsel claim, and subsequent case law, such as *Hill* and *Lee*, set forth the parameters of a prejudice analysis under the circumstances in the present case. The court's prejudice analysis was based properly on this correct law. Furthermore, our case law permits us to decide a case by affirming a court's decision on prejudice without examining the deficiency prong. See, e.g., *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713. "It is well settled that [a] reviewing court can find against a petitioner on either ground, whichever is easier." (Emphasis omitted; internal quotation marks omitted.) Id. "Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112 (2017). Accordingly, because we determined that the habeas court properly concluded that the petitioner has not satisfied *Strickland*'s prejudice prong, our analysis properly may end there.

For the foregoing reasons, we conclude that the habeas court on remand properly determined that the petitioner had not established prejudice. Accordingly, we conclude that the court properly denied the petitioner's petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

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NOTICES

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Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Hartford JD (PCN 4857) and must be postmarked no later than **August 20, 2020**. In addition, an electronic copy (pdf) of application materials should be sent to DCJ.HR@ct.gov. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.