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CONNECTICUT REPORTS

Vol. 336

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

MARY FAY ET AL. *v.* DENISE W. MERRILL, SECRETARY OF THE STATE (SC 20477)

Syllabus

Pursuant to statute (§ 9-323), any elector or candidate who claims that he is aggrieved by any ruling of any election official in connection with any election for, among other public offices, a representative in Congress, may bring his complaint to any justice of this court.

The plaintiffs, candidates in the August, 2020 primary election for the Republican Party's nomination for the office of United States representative for Connecticut's First and Second Congressional Districts, filed the present action with this court, pursuant to § 9-323, seeking certain relief in connection with the issuance by the defendant, the secretary of the state, of an application for absentee ballots that added "COVID-19" as a category for absentee voting. The defendant had issued the application pursuant to an executive order issued by the governor, in response to the ongoing coronavirus disease 2019 (COVID-19) global pandemic, which, inter alia, modified the statute (§ 9-135) setting forth the reasons an eligible voter may vote by absentee ballot by adding COVID-19 as a reason why a voter may be unable to appear at his or her polling place on the day of the election. The plaintiffs sought a judgment declaring that the application was unconstitutional and based on an erroneous interpretation of the governor's executive order and § 9-135. The plaintiffs also sought a prohibitive injunction precluding the defendant from mailing or distributing copies of the application to any Connecticut voters and a mandatory injunction directing the defendant to recall any copies already mailed or distributed. The defendant filed a motion to dismiss the action on the ground that this court lacked subject matter jurisdiction, claiming that a primary is not an election for purposes of § 9-323 and that the plaintiffs should have brought this action in the Superior Court pursuant to the statute (§ 9-329a) governing disputes concerning primaries. Thereafter, the plaintiffs filed a motion for an order enjoining the defendant from, inter alia, distributing the applications until this court had an opportunity to decide the matter. *Held* that this court lacked subject matter jurisdiction over the plaintiffs' action because a primary is not an election for purposes of § 9-323 and that the proper vehicle for the plaintiffs' challenge to the application for absentee ballots was to bring this case in the Superior Court pursuant to § 9-329a, and, accordingly, this court granted the defendant's motion to dismiss: the language of § 9-323, which applies only to elections for federal officials, along with that statute's relationship to the other election contest statutes, including § 9-323a, which expressly governs primaries, strongly supported the conclusion that a federal congressional

primary is not an election for purposes of § 9-323, as "election" is statutorily (§ 9-1 (d)) defined as "any elector's meeting at which the electors choose public officials," whereas the meaning of the term "primary," as gleaned from dictionaries because it is not defined by statute, focuses on choosing a candidate for office; moreover, § 9-329a, by its own plain and unambiguous terms, furnishes a remedy for disputes arising from federal congressional primaries, and allowing the plaintiffs to bypass the Superior Court and to proceed directly to this court by filing their action therein would render § 9-329a superfluous; furthermore, this court declined the plaintiffs' request to transfer this case to the Superior Court pursuant to the applicable rule of practice (§ 65-4) because that rule is applicable only to matters within the jurisdiction of the Supreme and Appellate Courts, and contains no language about cases that belong in the Superior Court in the first instance, and no action was necessary on the plaintiffs' motion for an order in light of this court's dismissal of the action for lack of subject matter jurisdiction.

Heard July 20—officially released August 3, 2020*

Procedural History

Action seeking, inter alia, an order rescinding the application for absentee ballot for the August, 2020 primary elections prepared by the Secretary of the State, and for other relief, brought, pursuant to General Statutes § 9-323, to *Richard A. Robinson*, Chief Justice of the Supreme Court, who conducted a hearing on the plaintiffs' motion for an order and the defendant's motion to dismiss the complaint. *Dismissed.*

Proloy K. Das, with whom, on the brief, was *Matthew A. Ciarleglio*, for the appellants (plaintiffs).

William Tong, attorney general, with whom, on the brief, were *Clare Kindall*, solicitor general, and *Michael K. Skold*, *Maura Murphy Osborne*, and *Alma R. Nunley*, assistant attorneys general, for the appellee (defendant).

William M. Bloss filed a brief for the Connecticut Democratic Party as amicus curiae.

Andrew S. Knott filed a brief for the Public Interest Legal Foundation as amicus curiae.

* July 20, 2020, the date that the order of dismissal was issued, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. The four plaintiffs, who are candidates in the August 11, 2020 primary election (August primary) for the Republican Party's nomination for the office of United States representative for Connecticut's First and Second Congressional Districts,[1] brought this original jurisdiction proceeding pursuant to General Statutes § 9-323[2] against the defendant, Denise W. Merrill, in her official capacity as the Secretary of the State. The plaintiffs sought declaratory and injunctive relief challenging the defendant's "ruling of an election official," which added a seventh category for absentee

[1] The plaintiffs are Mary Fay, an elector and candidate for United States representative for the First Congressional District, Thomas Gilmer, an elector and candidate for United States representative for the Second Congressional District, Justin Anderson, an elector and candidate for United States representative for the Second Congressional District, and James Griffin, an elector and candidate for United States representative for the First Congressional District. The plaintiffs became candidates for the nomination in the August primary by receiving either their party's endorsement or the support of 15 percent of the delegates at the Republican Party conventions held in May, 2020.

[2] General Statutes § 9-323 provides in relevant part: "Any elector or candidate who claims that he is aggrieved by any ruling of any election official in connection with any election for presidential electors and for a senator in Congress and for representative in Congress or any of them, held in his town, or that there was a mistake in the count of the votes cast at such election for candidates for such electors, senator in Congress and representative in Congress, or any of them, at any voting district in his town, or any candidate for such an office who claims that he is aggrieved by a violation of any provision of section 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of absentee ballots at such election, may bring his complaint to any judge of the Supreme Court, in which he shall set out the claimed errors of such election official, the claimed errors in the count or the claimed violations of said sections. . . . If such complaint is made prior to such election, such judge shall proceed expeditiously to render judgment on the complaint and shall cause notice of the hearing to be given to the Secretary of the State and the State Elections Enforcement Commission. . . ." See also General Statutes § 51-199 (b) (5) ("any election or primary dispute brought to the Supreme Court pursuant to section 9-323 or 9-325" shall be "taken directly to the Supreme Court"); *In re Election of the United States Representative for the Second Congressional District*, 231 Conn. 602, 608–12, 653 A.2d 79 (1994) (describing procedure under § 9-323 for postelection complaints, including appointment of panel of three Supreme Court justices to try case).

voting, "COVID-19," to the application for absentee ballots (application) for the August primary in contemplation of the ongoing coronavirus disease 2019 (COVID-19) global pandemic. The plaintiffs claimed that the defendant's change to the application violates article sixth, § 7, of the Connecticut constitution[3] because (1) she acted pursuant to Governor Ned Lamont's Executive Order No. 7QQ,[4] which itself violates article sixth, § 7, of the Connecticut constitution, and (2) it expanded the application beyond the existing limitations set forth

[3] Article sixth, § 7, of the Connecticut constitution provides: "The general assembly may provide by law for voting in the choice of any officer to be elected or upon any question to be voted on at an election by qualified voters of the state who are unable to appear at the polling place on the day of election because of absence from the city or town of which they are inhabitants or because of sickness or physical disability or because the tenets of their religion forbid secular activity."

[4] Executive Order No. 7QQ provides in relevant part: "1. Absentee Voting Eligibility During COVID-19 Pandemic. Section 9-135 . . . is modified to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the [August primary] if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19. For purposes of this modification, a person shall be permitted to lawfully state [that] he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the [August primary], there is no federally approved and widely available vaccine for prevention of COVID-19. It shall not constitute a misrepresentation under subsection (b) of [§] 9-135 . . . for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant.

"2. Notice of Modification Required on Inner Envelope. [General Statutes §] 9-137 . . . is modified to provide that it shall not constitute a false statement for an elector to represent his or her eligibility to vote by absentee ballot pursuant to the modifications of [§] 9-135 in [§] 1 of this order, and the inner envelope described in [§] 9-137 shall contain a notice describing the modification in [§] 1 of this order.

"3. Authority for Secretary of the State to Modify Absentee Ballot Applications, Envelopes, and Printed Materials Regarding Eligibility. Notwithstanding any provision of [t]itle 9 of the . . . General Statutes or any other law or regulation to the contrary, the [defendant] shall be authorized to modify any required notice, statement, or description of the eligibility requirements for voting by absentee ballot on any printed, recorded, or electronic material in order to provide accurate information to voters about the modifications to absentee voter eligibility and related requirements of this order. . . ."

by General Statutes § 9-135.[5] The plaintiffs also claimed that the application is inconsistent with the terms of Executive Order No. 7QQ. The defendant moved to dismiss the complaint, contending, inter alia, that the court lacked jurisdiction under § 9-323 because that election contest statute does not apply to primaries, and, in any event, the plaintiffs' constitutional challenge is not one that is cognizable under the election contest statutes. After a hearing held on July 20, 2020, this court granted the motion to dismiss for lack of subject matter jurisdiction under § 9-323.[6] This written opinion followed.

The pleadings and the record reveal the following undisputed facts and procedural history. On March 10, 2020, Governor Lamont declared a public health and civil preparedness emergency "throughout the [s]tate . . . as a result of the [COVID-19] outbreak in the United States and Connecticut . . . ."[7] Connecticut's

[5] General Statutes § 9-135 provides: "(a) Any elector eligible to vote at a primary or an election and any person eligible to vote at a referendum may vote by absentee ballot if he or she is unable to appear at his or her polling place during the hours of voting for any of the following reasons: (1) His or her active service with the armed forces of the United States; (2) his or her absence from the town of his or her voting residence during all of the hours of voting; (3) his or her illness; (4) his or her physical disability; (5) the tenets of his or her religion forbid secular activity on the day of the primary, election or referendum; or (6) the required performance of his or her duties as a primary, election or referendum official, including as a town clerk or registrar of voters or as staff of the clerk or registrar, at a polling place other than his or her own during all of the hours of voting at such primary, election or referendum.

"(b) No person shall misrepresent the eligibility requirements for voting by absentee ballot prescribed in subsection (a) of this section, to any elector or prospective absentee ballot applicant."

[6] As previously stated at the conclusion of the July 20, 2020 hearing, the court is grateful to all counsel for their professionalism in providing a very high quality of briefing and argument on an expedited basis.

[7] In issuing the executive order, Governor Lamont stated that "COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death" and that "public health experts have indicated that persons infected with COVID-19 may not show symptoms, and transmission or 'shedding' of the coronavirus that causes COVID-19 may be most virulent before a person shows any symptoms . . . ." The United States Centers for Disease Control and Prevention "has recommended that people with mild symptoms consistent with COVID-19 be

congressional and presidential preference primary was rescheduled to August 11, 2020, from its originally scheduled date of April 28, 2020, because of the COVID-19 pandemic. Given the public health risk posed by in person voting during the ongoing pandemic, particularly with respect to the "significant portion of poll workers and volunteers [who] are [sixty years old] or older," Governor Lamont determined that "providing an alternative to [in person] voting could be particularly helpful in reducing the risk of transmission during voting among this population . . . ."[8] Accordingly, on May 20, 2020, he issued Executive Order No. 7QQ pursuant to his powers under General Statutes § 28-9 (b) (1).[9]

assumed to be infected with the disease," and "public health experts have recommended that, to prevent transmission of COVID-19, and in light of the risk of asymptomatic transmission and a significant rate of false negative [test results], everyone should assume they can be carrying COVID-19 even when [they] have received a negative test result or do not have symptoms . . . ."

[8] On May 6, 2020, the defendant's office issued a legal opinion explaining that the definition of "illness" under § 9-135 (a) is not "limited to some affliction that leaves an individual debilitated or bedridden." Given the increased risk from COVID-19 to individuals with conditions such as diabetes, chronic lung disease, or cancer, the defendant defined the term "illness" to include (1) "any registered voter who has a [preexisting] illness . . . because that voter's illness would prevent them from appearing at their [designated] polling place safely because of the [COVID-19] virus"; (emphasis omitted); and (2) "individuals who may have been in contact with a COVID-19 infected individual such as healthcare workers, first responders, individuals who are caring for someone at increased risk, as well as those [who] feel ill or think they are ill because of the possibility of contact with the COVID-19 virus . . . ."

[9] General Statutes § 28-9 (b) (1) provides in relevant part: "Following the Governor's proclamation of a civil preparedness emergency pursuant to subsection (a) of this section or declaration of a public health emergency pursuant to section 19a-131a, *the Governor may modify or suspend in whole or in part, by order as hereinafter provided, any statute, regulation or requirement or part thereof whenever the Governor finds such statute, regulation or requirement, or part thereof, is in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health.* The Governor shall specify in such order the reason or reasons therefor and any statute, regulation or requirement or part thereof to be modified or suspended and the period, not exceeding six months unless sooner revoked, during which such order shall be enforced. Any such order shall have the full force and effect of law upon the filing of the full

To provide that alternative to in person voting, Executive Order No. 7QQ, inter alia, "modified [§ 9-135] to provide that, in addition to the enumerated eligibility criteria set forth in subsection (a) of that statute, an eligible elector may vote by absentee ballot for the [August primary] if he or she is unable to appear at his or her polling place during the hours of voting because of the sickness of COVID-19. *For purposes of this modification, a person shall be permitted to lawfully state* [*that*] *he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the* [*August primary*], *there is no federally approved and widely available vaccine for prevention of COVID-19*. It shall not constitute a misrepresentation under subsection (b) of [§] 9-135 . . . for any person to communicate the provisions of this modification to any elector or prospective absentee ballot applicant." (Emphasis added.)

In late June, 2020, the defendant, acting in her capacity as Commissioner of Elections with general supervisory authority over elections in Connecticut, issued the application for the August primary. The application added "COVID-19" as a new, seventh reason for requesting an absentee ballot; it is listed first among the reasons for "expect[ing] to be unable to appear at the polling place during the hours of voting,"[10] with an adjacent bold notation that "[a]ll voters are able to check this box, pursuant to Executive Order [No.]

text of such order in the office of the Secretary of the State. . . . *Any statute, regulation or requirement, or part thereof, inconsistent with such order shall be inoperative for the effective period of such order*. Any such order shall be communicated by the Governor at the earliest date to both houses of the General Assembly." (Emphasis added.)

[10] The other six reasons provided on the application are (1) "[m]y active service in the Armed Forces of the United States," (2) "[m]y absence from the town during all of the hours of voting," (3) "[m]y illness," (4) "[m]y religious tenets forbid secular activity on the day of the election, primary or referendum," (5) "[m]y duties as a primary, election or referendum official at a polling place other than my own during all of the hours of voting," and (6) "physical disability."

7QQ." (Emphasis omitted.) The "special instructions" at the bottom of the application provide in relevant part: "The [s]tate . . . via Executive Order [No.] 7QQ, as interpreted by the [defendant] pursuant to [General Statutes § 9-3], has determined [that] (1) . . . having a [preexisting] illness allows you to vote by absentee ballot because your [preexisting] *illness* would prevent you from appearing at your [designated] polling place or (2) . . . absent a widely available vaccine, the existence of the COVID-19 virus allows you to vote by absentee ballot if you so choose for your own safety. To receive your absentee ballot please complete and sign this application (be sure to check 'Illness' for reason (1) or 'COVID-19' for reason (2) above) and return it to your [t]own [c]lerk using the enclosed postage prepaid envelope. . . ." (Emphasis in original.)

The defendant anticipates a significant increase in the use of absentee ballots this year and, working with a third-party mailing vendor (vendor), has mailed 1,274,414 applications to active registered voters between June 26 and July 1, 2020.[11] As of July 15, 2020, more than 100,000 voters have completed and returned their applications to local election officials for processing; 107,743 applications have been processed as of that date. The information contained in each application is then downloaded by the defendant's office onto a computer file, which was provided to the vendor approximately every other day beginning on July 17, 2020. The vendor was scheduled to mail the appropriate absentee ballots to the approved voters once those ballots were finalized on July 21, 2020.

On July 1, 2020, the plaintiffs brought this petition and complaint pursuant to General Statutes §§ 9-323,

[11] Ordinarily, 3 to 5 percent of voters vote by absentee ballot; the experience of similar jurisdictions indicates that between 50 and 80 percent of Connecticut voters will apply for, and likely use, absentee ballots for the August primary. The printing and mailing of the applications cost the state approximately $850,000.

52-29, and 52-471, claiming that the defendant's preparation and issuance of the application pursuant to Executive Order No. 7QQ constituted a "ruling of an election official" for purposes of § 9-323. The plaintiffs first claimed that Executive Order No. 7QQ violates article sixth, § 7, of the Connecticut constitution because (1) that constitutional provision "expressly commits the prescription of absentee voting procedure to the General Assembly—not to the [g]overnor," and (2) the executive order "broadens the use of absentee ballots, in contravention of the strict reasons for which absentee ballots may be used in Connecticut elections as set forth in article sixth, § 7."[12] See footnote 3 of this opinion. Second, the plaintiffs claimed that the defendant's "decision to expand absentee voting based on Executive Order No. 7QQ, rather than limit absentee voting in accordance with the restrictions set forth by the legislature in . . . § 9-135, was a ruling of an election official" that violated the Connecticut constitution because (1) the defendant "lacks the constitutional authority to alter the parameters of who is entitled to vote by absentee ballot," (2) "[t]he reasons that electors may vote by absentee ballot are strictly limited by the Connecticut constitution and can . . . be expanded [only] by the electorate," and (3) the application "expands the use of absentee ballots for reasons beyond those specifically prescribed in article sixth, § 7, of the state constitution." See footnote 3 of this opinion. Finally, the plaintiffs claimed that the defendant's "decision to add a new category called 'COVID-19' and her failure to include the restrictions contained in Executive Order No. 7QQ concerning that reason—i.e., the voter being unable to appear and the unavailability of a vaccine—[constitute] a ruling of an election official" that "ignored the important qualification" to that effect in Executive Order No. 7QQ. Claiming to be aggrieved

[12] The plaintiffs also alleged in their petition and complaint that "[t]here is no COVID-19 exception in the Connecticut constitution."

as candidates and electors by these various violations, the plaintiffs sought a judgment declaring that the application is both unconstitutional and based on an erroneous interpretation of Executive Order No. 7QQ and § 9-135. The plaintiffs also sought a prohibitory injunction precluding the defendant from mailing or distributing copies of the application to any Connecticut voters and a mandatory injunction directing her to recall any copies already mailed or distributed to any Connecticut voters.

On July 7, 2020, this court issued a case management order directing the parties to file briefs by July 17, 2020, with oral argument initially scheduled for July 22, 2020.[13] That same day, the defendant moved to dismiss this case. Subsequently, on July 16, 2020, the plaintiffs moved for an order "(1) enjoining the defendant . . . from issuing absentee ballots for COVID-19 reasons on July 21, 2020, until this court has had the opportunity to issue a decision in this matter, or (2) alternatively, rescheduling the hearing currently scheduled for July 22, 2020, for July 20, 2020." This court then sua sponte scheduled a hearing for July 20, 2020, limited to the issues raised in the defendant's motion to dismiss and the plaintiffs' motion for an order.

[13] On July 6, 2020, the Connecticut Democratic Party moved to intervene in this proceeding "as a third-party plaintiff in order to present arguments that this court lacks original jurisdiction over this proceeding or, if it has jurisdiction, [that] it should uphold the actions of Governor Lamont and [the defendant] in allowing expanded absentee ballot access for the [August primary]." The plaintiffs opposed this motion. On July 8, 2020, this court denied the motion to intervene, noting the "unique nature of the statutory proceeding under . . . § 9-323, [the] language [of which] does not contemplate the participation therein of political parties as parties to the proceeding," and emphasizing "the vigorous defense being provided to the defendant by the Office of the Attorney General . . . ."

This court determined, however, that the "significant interest of the Connecticut Democratic Party in the outcome of this proceeding will be accommodated by the provision of amicus curiae status" and granted it permission to file an expanded amicus curiae brief. Subsequently, on July 17, 2020, this court also granted the motion of the Public Interest Legal Foundation to appear as amicus curiae and to file a brief in support of the plaintiffs.

After the July 20, 2020 hearing, this court granted the defendant's motion to dismiss for lack of jurisdiction under § 9-323 and took no action on the plaintiffs' motion for an order.[14] The court indicated that a written decision would be forthcoming. This is that decision.

In the motion to dismiss, the defendant contended, inter alia, that this court lacks subject matter jurisdiction under § 9-323. First, the defendant claims that the plaintiffs "cannot sue under the statute they have chosen or in this forum" because § 9-323, "by its terms . . . applies [only] to elections, not primaries," as the term "primary" is defined by General Statutes § 9-372

[14] After this court issued its decision on July 20, 2020, the plaintiffs filed separate motions for reconsideration and for reconsideration en banc. On July 22, 2020, the plaintiffs subsequently moved to consolidate the motion for reconsideration en banc with a petition brought to Chief Justice Robinson pursuant to General Statutes § 52-265a challenging the Superior Court's judgment for the defendant in *Fay* v. *Merrill*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-20-6130532-S (July 22, 2020), which was filed on the evening of July 20, 2020, and decided on the morning of July 22, 2020. Chief Justice Robinson granted that § 52-265a petition on July 23, 2020; that appeal is pending under docket number SC 20486.

On July 23, 2020, this court granted the motion for reconsideration but denied the relief requested therein. That same day, the other nonrecused members of the Supreme Court joined with this court in dismissing the motion for reconsideration en banc and in taking no action on the motion to consolidate. The motion for reconsideration en banc was not cognizable under the plain language of § 9-323, which contemplates review by more than one justice of the Supreme Court only in postelection matters. See General Statutes § 9-323 ("[i]f such complaint is made subsequent to the election . . . [s]uch judge, with two other judges of the Supreme Court . . . shall . . . proceed to hear the parties"); see also *In re Election of the United States Representative for the Second Congressional District*, 231 Conn. 602, 608–12, 653 A.2d 79 (1994). In contrast to the express provisions of the other election contest statutes; see General Statutes §§ 9-324, 9-328, and 9-329a; which govern elections for state offices, municipal offices, and primaries, respectively, § 9-323 does not provide for further review by the Supreme Court pursuant to General Statutes § 9-325. Although the availability of review en banc may well be desirable as a policy matter in cases decided by an individual Supreme Court justice under § 9-323, it is not this court's province to add a remedy that the plain and unambiguous statutory language of the election contest statutory scheme, read as a whole, indicates that the legislature obviously elected to omit. See, e.g., *Mayer* v. *Historic District Commission*, 325 Conn. 765, 780 and n.10, 160 A.3d 333 (2017).

(11).[15] To this end, the defendant argues that this case should have been brought in the Superior Court under General Statutes § 9-329a,[16] which governs disputes aris-

[15] General Statutes § 9-372 (11) provides: " 'Primary' means a meeting of the enrolled members of a political party and, when applicable under section 9-431, unaffiliated electors, held during consecutive hours at which such members or electors may, without assembling at the same hour, vote by secret ballot for candidates for nomination to office or for town committee members . . . ."

[16] General Statutes § 9-329a provides: "(a) Any (1) elector or candidate aggrieved by a ruling of an election official in connection with any primary held pursuant to (A) section 9-423, 9-425 or 9-464, or (B) a special act, (2) elector or candidate who alleges that there has been a mistake in the count of the votes cast at such primary, or (3) candidate in such a primary who alleges that he is aggrieved by a violation of any provision of sections 9-355, 9-357 to 9-361, inclusive, 9-364, 9-364a or 9-365 in the casting of absentee ballots at such primary, may bring his complaint to any judge of the Superior Court for appropriate action. In any action brought pursuant to the provisions of this section, the complainant shall file a certification attached to the complaint indicating that a copy of the complaint has been sent by first-class mail or delivered to the State Elections Enforcement Commission. If such complaint is made prior to such primary such judge shall proceed expeditiously to render judgment on the complaint and shall cause notice of the hearing to be given to the Secretary of the State and the State Elections Enforcement Commission. If such complaint is made subsequent to such primary it shall be brought, not later than fourteen days after such primary, or if such complaint is brought in response to the manual tabulation of paper ballots, described in section 9-320f, such complaint shall be brought, not later than seven days after the close of any such manual tabulation, to any judge of the Superior Court.

"(b) Such judge shall forthwith order a hearing to be held upon such complaint upon a day not more than five nor less than three days after the making of such order, and shall cause notice of not less than three days to be given to any candidate or candidates in any way directly affected by the decision upon such hearing, to such election official, to the Secretary of the State, the State Elections Enforcement Commission and to any other person or persons, whom such judge deems proper parties thereto, of the time and place of the hearing upon such complaint. Such judge shall, on the day fixed for such hearing, and without delay, proceed to hear the parties and determine the result. If, after hearing, sufficient reason is shown, such judge may order any voting tabulators to be unlocked or any ballot boxes to be opened and a recount of the votes cast, including absentee ballots, to be made. Such judge shall thereupon, if he finds any error in the ruling of the election official, any mistake in the count of the votes or any violation of said sections, certify the result of his finding or decision to the Secretary of the State before the tenth day following the conclusion of the hearing. Such judge may (1) determine the result of such primary; (2) order a change in the existing primary schedule; or (3) order a new primary if he finds that

ing during or out of primaries. In response, the plaintiffs rely on *Price* v. *Independent Party of CT—State Central*, 323 Conn. 529, 147 A.3d 1032 (2016), and the plain language of both §§ 9-323 and 9-329a in support of the proposition that § 9-323 applies to federal congressional primary elections because § 9-329a is expressly limited to primaries for state, district or municipal office, primaries for town committees, and the presidential preference primary, and does not include federal congressional primaries. They also rely on General Statutes § 9-381a,[17] which governs the procedure applicable in primary elections, to argue that § 9-323 governs federal primary elections because § 9-323 does not specifically *exclude* primary elections from its ambit. The plaintiffs further argue that a "primary" is commonly understood to be an "election" to nominate candidates for office. They further contend that the defendant incorrectly relies on the definition of "primary" in § 9-372 (11) because this court's decisions in *Feehan* v. *Marcone*, 331 Conn. 436, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019), and *Republican Party of Connecticut* v. *Merrill*, 307 Conn. 470, 55 A.3d 251 (2012), establish that particular definition is inap-

but for the error in the ruling of the election official, any mistake in the count of the votes or any violation of said sections, the result of such primary might have been different and he is unable to determine the result of such primary.

"(c) The certification by the judge of his finding or decision shall be final and conclusive upon all questions relating to errors in the ruling of such election official, to the correctness of such count, and, for the purposes of this section only, such alleged violations, and shall operate to correct any returns or certificates filed by the election officials, unless the same is appealed from as provided in section 9-325. In the event a new primary is held pursuant to such Superior Court order, the result of such new primary shall be final and conclusive unless a complaint is brought pursuant to this section. The clerk of the court shall forthwith transmit a copy of such findings and order to the Secretary of the State."

[17] General Statutes § 9-381a provides: "Except as otherwise provided by statute, the provisions of the general statutes concerning procedures relating to regular elections shall apply as nearly as may be, in the manner prescribed by the Secretary of the State, to primaries held under the provisions of this chapter."

plicable to the election contest statutes. The court, however, agrees with the defendant and concludes that it lacks jurisdiction because § 9-323 does not apply to primaries; instead, § 9-329a provides the proper vehicle for the plaintiffs' challenge in the Superior Court because a federal congressional primary is one for "district office" under that statute.

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A determination regarding a . . . court's subject matter jurisdiction is a question of law, particularly when it presents questions of constitutional and statutory interpretation. . . .

"Depending on the record before it, a . . . court ruling on a motion to dismiss for lack of subject matter jurisdiction . . . may decide that motion on the basis of: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. . . . Different rules and procedures will apply, depending on the state of the record at the time the motion is filed." (Citations omitted; internal quotation marks omitted.) *Feehan* v. *Marcone*, supra, 331 Conn. 446. In the present case, the court relies on the complaint supplemented by undisputed facts, as evinced in the stipulation filed by the parties.

Whether § 9-323 applies to federal congressional primaries "presents a question of statutory construction over which we exercise plenary review. . . . 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. . . . Previous case law interpreting the statute remains instructive, because we do not write on a clean slate when this court previously has interpreted a statute . . . .'' (Internal quotation marks omitted.) Id., 470–71.

Beginning with the previous case law, the court first looks to *Price* v. *Independent Party of CT—State Central*, supra, 323 Conn. 531–32, in which Justice Richard N. Palmer considered a challenge brought under § 9-323 to the Independent Party's caucus for purposes of choosing its candidates for the United States Senate. The plaintiffs posit that, in *Price*, the Secretary of the State challenged the applicability of § 9-323 to the minor party caucus and that the court ''did not find that argument dispositive'' because it concluded instead that the minor party ''caucus officials'' whose rulings were challenged were not '' 'election official[s]' '' for purposes of the statute. Id., 543. *Price* does not *directly* support the plaintiffs, however, because the decision does not acknowledge, let alone address, an argument that § 9-323 does not apply to federal congressional primary elections.

Accordingly, the court turns to the text of § 9-323, which provides in relevant part that "[a]ny elector or candidate who claims that he is aggrieved by any ruling of any election official in connection with *any election* . . . for a senator in Congress and for representative in Congress or any of them . . . may bring his complaint to any judge of the Supreme Court . . . ." (Emphasis added.) Accordingly, the court must determine whether a primary is an "election" within the contemplation of § 9-323. The term "election," as used in § 9-323, is defined by General Statutes § 9-1 (d), which is the broadly applicable definitions provision that applies to the election contest statutes. See *Feehan* v. *Marcone*, supra, 331 Conn. 473. Section 9-1 (d) defines "election" as "any electors' meeting at which the *electors choose public officials* by use of voting tabulators or by paper ballots as provided in section 9-272 . . . ." (Emphasis added.) Because "primary" is not a statutorily defined term for purposes of the election contest statutes, the court looks to the common understanding of that term, as expressed in the dictionary, to determine whether it is an "election" as defined by § 9-323.[18] See, e.g., *Kuchta* v. *Arisian*, 329 Conn. 530, 537, 187 A.3d 408 (2018). In contrast to § 9-1 (d), the online dictionaries relied on by the plaintiffs define the word "primary" as "an election in which qualified voters *nominate or express a preference for a particular candidate or group*

[18] The court agrees with the plaintiffs that the definition of "primary" used in § 9-372 (11), on which the defendant relies, is inapplicable to the election contest statutes, including § 9-323. See *Feehan* v. *Marcone*, supra, 331 Conn. 472–73 (concluding that definition of "municipal election" in § 9-372 (7) did not render General Statutes § 9-328, which governs municipal election contests, applicable to state legislative election because § 9-372 expressly does not apply to election contest statutes in chapter 149, requiring court instead to follow definitions of "municipal office" and "state election" as set forth in § 9-1 (h), (i) and (s)); *Republican Party of Connecticut* v. *Merrill*, supra, 307 Conn. 492 (concluding that "[t]he definitions in § 9-372 . . . do not, by their own terms, apply to the ballot ordering statute" because General Statutes § 9-249a "is conspicuously absent from the list of statutes to which the definitions in § 9-372 apply").

of candidates for political office, choose party officials, or select delegates for a party convention." (Emphasis added.) Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/primary (last visited July 31, 2020); see also Dictionary.com, available at http://www.dictionary.com/browse/primary (last visited July 31, 2020) (defining "primary" as "a *preliminary election in which voters of each party nominate candidates* for office, party officers, etc.," or "a meeting of the voters of a political party in an election district for nominating candidates for office, choosing delegates for a convention, etc.; caucus"). The focus on the choice of "candidates" in a primary, as opposed to the choice of "public officials" in an election, as defined by § 9-1 (d), strongly suggests that a primary is not an "election" for purposes of § 9-323, particularly given the existence of a related statute to govern primary contests, namely, § 9-329a.

The plaintiffs contend, however, that this reading of § 9-323 leaves them without a remedy because § 9-329a is limited to primaries for "state, district or municipal office," primaries for town committees, and the presidential preference primary, with federal congressional primary elections being "[n]oticeably absent" from § 9-329a. This argument is belied by the plain language of § 9-329a (a), which provides that "[a]ny . . . elector or candidate aggrieved by a ruling of an election official in connection with *any primary held pursuant to (A) section 9-423, 9-425 or 9-464* . . . may bring his complaint to any judge of the Superior Court for appropriate action." (Emphasis added.) General Statutes § 9-423, which is contained in chapter 153 and governs primaries for "state, district or municipal office," is expressly cross-referenced in § 9-329a. The definitions in § 9-372, which apply to § 9-423; see *Feehan* v. *Marcone*, supra, 331 Conn. 472–73; clearly and unambiguously establish that federal congressional seats, be they for the House of Representatives or the Senate, are "state" or "dis-

trict" offices within the meaning of that primary statute. Section 9-372 defines "state office" as "any office for which all the electors of the state may vote and includes the office of Governor, Lieutenant Governor, Secretary, Treasurer, Comptroller, Attorney General and *senator in Congress*, but does not include the office of elector of President and Vice-President of the United States . . . ." (Emphasis added.) General Statutes § 9-372 (14). Similarly, a seat in the United States House of Representatives would be a " '[d]istrict office,' " which is "an elective office for which only the electors in a district, as defined in subdivision (3) of this section, may vote . . . ." General Statutes § 9-372 (4); see General Statutes § 9-372 (3) (" '[d]istrict' means any geographic portion of the state which crosses the boundary or boundaries between two or more towns"). Thus, § 9-329a plainly and unambiguously furnishes a remedy for disputes arising from federal congressional primaries. To allow the plaintiffs the extraordinary relief of bypassing the Superior Court and proceeding directly to this court under § 9-323 would render § 9-329a superfluous, which is not a permissible reading of the statutory scheme. See, e.g., *State* v. *Davalloo*, 320 Conn. 123, 140–41, 128 A.3d 492 (2016). Accordingly, the court concludes that, under the plain and unambiguous language of the election contest statutes, § 9-329a, which required the plaintiffs to initiate this action in the Superior Court, governs challenges in the primary context, and this court lacks jurisdiction under § 9-323, which applies only to general elections for federal officials.[19]

[19] The court briefly addresses the defendant's argument that, under *Wrotnowski* v. *Bysiewicz*, 289 Conn. 522, 958 A.2d 709 (2008), and *Scheyd* v. *Bezrucik*, 205 Conn. 495, 535 A.2d 793 (1987), even if it is assumed that § 9-323 is applicable to federal congressional primaries, this case "fundamentally is a challenge to the constitutionality of Executive Order [No.] 7QQ, and this court lacks jurisdiction to consider such claims under § 9-323." Whether the plaintiff is aggrieved by a ruling of an elections official implicates the court's subject matter jurisdiction under the election contest statutes. *Arciniega* v. *Feliciano*, 329 Conn. 293, 300–301 n.4, 184 A.3d 1202 (2018); see id., 302–303 (defining term "ruling of an election official").

The plaintiffs contend, however, that, should this court determine that jurisdiction over this case lies under § 9-329a rather than § 9-323,[20] it should have transferred the case to the Superior Court pursuant to Practice Book § 65-4[21] and then decided the case "as a matter of judicial economy" while sitting in its capacity as a

It is well established that our election contest statutes "may not [be] use[d] . . . to challenge a law or regulation under which the election or primary election is held by claiming aggrievement in the election official's obedience to the law. In such a case the plaintiff may well be aggrieved by the law or regulation, but he or she is not aggrieved by the election official's rulings which are in conformity with the law." *Wrinn* v. *Dunleavy*, 186 Conn. 125, 134 n.10, 440 A.2d 261 (1982). This court has followed this footnote from *Wrinn* in concluding that courts lack jurisdiction under the election contest statutes to consider constitutional challenges to underlying election laws, reasoning that "[c]onstitutional adjudication . . . requires study and reflection and may therefore, as a general matter, be deemed less appropriate for accelerated disposition." (Internal quotation marks omitted.) *Wrotnowski* v. *Bysiewicz*, supra, 289 Conn. 527–28; see id., 528–29 (Chief Justice Chase T. Rogers dismissed complaint filed under § 9-323 challenging Secretary of State's failure to verify natural born citizenship of presidential candidate as "claim[ing] only that the existing election laws governing presidential elections are not adequate to ensure compliance with article two, § 1, of the federal constitution"); *Scheyd* v. *Bezrucik*, supra, 205 Conn. 502–503 (concluding that challenge to constitutionality of minority representation statute, General Statutes § 9-167a, was not cognizable under General Statutes § 9-328, which governs municipal election contests).

Having considered these authorities, the court concludes that the election contest statutes, including § 9-323, do not confer jurisdiction over the plaintiffs' fundamental constitutional challenges to Executive Order No. 7QQ, which the defendant—acting as an elections official—implemented via the application. If § 9-323 had conferred jurisdiction in this case, the court would, however, have had jurisdiction over the plaintiffs' claim that the application is not itself faithful to Executive Order No. 7QQ.

[20] The plaintiffs correctly note that their failure to plead the correct statute did not render their complaint defective, given that the defendant has been "sufficiently apprised of the nature of the action . . . ." (Emphasis omitted; internal quotation marks omitted.) *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 302, 94 A.3d 553 (2014); see also *Spears* v. *Garcia*, 66 Conn. App. 669, 675–76, 785 A.2d 1181 (2001), aff'd, 263 Conn. 22, 818 A.2d 37 (2003). But cf. Practice Book § 10-3 (a).

[21] Practice Book § 65-4 provides in relevant part: "Any appeal or cause brought to the Supreme Court or the Appellate Court which is not properly within the jurisdiction of the court to which it is brought shall not be dismissed for the reason that it was brought to the wrong court but shall be transferred by the appellate clerk to the court with jurisdiction and entered on its docket. . . ."

Superior Court judge. See General Statutes § 51-198 (a) (Supreme Court justices are also Superior Court judges). The court declines to do so because Practice Book § 65-4 is a ministerial rule that, by its plain language, is applicable only to matters within the jurisdiction of the Supreme and Appellate Courts; it says nothing about cases that belong in the Superior Court in the first instance.[22] See E. Prescott, Connecticut Appellate Practice & Procedure (6th Ed. 2019) § 4-5:1, p. 296. Accordingly, this court concludes that not only jurisdiction, but assignment to the proper judicial authority, lies in the Superior Court in the judicial district of Hartford.[23]

[22] Moreover, even if Practice Book § 65-4 allowed the transfer envisioned by the plaintiffs, it have would been highly imprudent for this court, as an appellate jurist, to have acted as a Superior Court judge in this particular matter. Unlike § 9-323, § 9-329a (c) provides an expedited appellate remedy with the Supreme Court pursuant to General Statutes § 9-325. See footnote 16 of this opinion. Were this court to try this case while sitting as a Superior Court judge, it would have disqualified itself from participating in its final resolution, rendering that practice highly inadvisable in a case of such import. See Practice Book § 1-22 (a) ("nor may the judicial authority sit in appellate review of a judgment or order originally rendered by such authority"); cf. Practice Book § 60-6 ("[w]ithout the permission of the chief justice, the justices of the Supreme Court . . . will not, as judges of the Superior Court . . . pass orders which may be the subject of an appeal, unless it appears that there is a necessity for prompt action, and that no other judges having jurisdiction over the matter can conveniently act").

[23] Given the court's conclusion that it lacks jurisdiction under § 9-323 and that this matter should not have proceeded further before this court under § 9-329a, it declines to consider the defendant's argument that, under, for example, *Lazar* v. *Ganim*, 334 Conn. 73, 87, 220 A.3d 18 (2019), the plaintiffs are not aggrieved because "they have not articulated a specific, personal and legal interest that has been injured by the defendant's conduct" other than "their general and abstract interests in having a fair and honest election and not having their votes diluted by what they believe are illegal absentee voting procedures." (Internal quotation marks omitted.) Because this issue will be litigated in the public interest appeal challenging the Superior Court's judgment for the defendant in *Fay* v. *Merrill*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-20-6130532-S (July 22, 2020); see footnote 14 of this opinion; this court refrains from considering the issue of aggrievement at this point.

Because it is a special defense that does not implicate this court's subject matter jurisdiction, the court also need not address at this time the defendant's claim that the doctrine of laches bars this action. See, e.g., *Price* v.

The defendant's motion to dismiss is granted; no action is necessary on the plaintiffs' motion for an order.

Independent Party of CT—State Central, supra, 323 Conn. 544 ("[t]his court has held that (1) [l]aches consists of an inexcusable delay [that unduly] prejudices the defendant, and (2) [t]he burden is on the party alleging laches to establish that defense" (internal quotation marks omitted)). But see id., 544–47 (addressing laches claims in dictum). Similarly, the court need not consider the defendant's argument that it should abstain from exercising jurisdiction over this case, which involves an impending election, under the principle announced in *Purcell* v. *Gonzalez*, 549 U.S. 1, 4–5, 127 S. Ct. 5, 166 L. Ed. 2d 1 (2006).

ORDERS

CONNECTICUT REPORTS

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DEBRA COHEN *v.* PATRICIA A. KING

The plaintiff's petition for certification to appeal from the Appellate Court 189 Conn. App. 85 (AC 40834), is denied.

ROBINSON, C. J., and KAHN and KELLER, Js., did not participate in the consideration of or decision on this petition.

Debra Cohen, self-represented, in support of the petition.

Philip Miller, assistant attorney general, in opposition.

Decided March 23, 2021

GEORGE FIGUEROA *v.* COMMISSIONER OF CORRECTION

The petitioner George Figueroa's petition for certification to appeal from the Appellate Court, 202 Conn. App. 54 (AC 42140), is denied.

Michael W. Brown, assigned counsel, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided March 23, 2021

JOSE CORDERO *v.* COMMISSIONER OF CORRECTION

The petitioner Jose Cordero's petition for certification to appeal from the Appellate Court, 202 Conn. App. 908 (AC 43722), is denied.

Jose Cordero, self-represented, in support of the petition.

Jonathan M. Sousa, deputy assistant state's attorney, in opposition.

Decided March 23, 2021

IN RE KAMERON N.

The petition by the respondent mother and the respondent father for certification to appeal from the Appellate Court, 202 Conn. App. 628 (AC 44079), is denied.

Karen Oliver Damboise, assigned counsel, and *Joshua D. Michtom*, assistant public defender, in support of the petition.

Carolyn A. Signorelli, assistant attorney general, in opposition.

Decided March 23, 2021

IN RE KAMERON N.

The petition by the respondent mother and the respondent father for certification to appeal from the Appellate Court, 202 Conn. App. 637 (AC 44086), is denied.

Karen Oliver Damboise, assigned counsel, and *Joshua D. Michtom*, assistant public defender, in support of the petition.

Carolyn A. Signorelli, assistant attorney general, in opposition.

Decided March 23, 2021

GLORIA RISPOLI *v.* TOWN OF EAST HAVEN

The plaintiff's petition for certification to appeal from the Appellate Court (AC 42535) is denied.

Bernard Pellegrino, in support of the petition.

Alfred J. Zullo, in opposition.

Decided March 23, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 203

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE KIARA LIZ V.*
(AC 44264)

Alvord, Elgo and Alexander, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to the minor child, K. The court conducted a trial on the termination of parental rights petition and the father was not present on the last day of trial. Counsel for the father requested a continuance on the basis of the father's absence, which the court denied. *Held*:

1. This court declined to review the respondent father's unpreserved claim that his right to due process was violated when the trial court denied his request for a continuance, as the record of his claim was inadequate for review under *State* v. *Golding* (213 Conn. 233); the father's reasons for his failure to attend the final day of the trial were vague and unclear, and speculation and conjecture have no place in appellate review.

2. The trial court did not err in its determination that the termination of the respondent father's parental rights was in K's best interest, as its conclusion was based on its findings related to the seven statutory (§ 17a-112 (k)) factors, which have not been challenged in this appeal, including the father's difficulty accepting and understanding his mental illness, his inability to comply with mental health treatment, and his failure to make progress in his parenting abilities; moreover, the existence of a bond between the father and K, although relevant, was not dispositive of a best interest determination, and the father's claims that

* 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.

he had been appropriate with K and that she responded to him, did not provide grounds to reverse the trial court's judgment.

Argued February 17—officially released March 30, 2021**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to the minor child, brought to the Superior Court in the judicial district of Waterbury, Juvenile Matters, where the matter was transferred to the judicial district of Middlesex, Child Protection Session, and tried to the court, *Crawford, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent father).

Carolyn A. Signorelli, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Opinion

ALEXANDER, J. The respondent father, Luis V., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families (commissioner), terminating his parental rights as to his minor child, Kiara Liz V. (Kiara), pursuant to General Statutes § 17a-112. On appeal, the respondent claims that the court (1) improperly denied his request for a continuance and (2) erred in determining that the termination of his parental rights was in the best interests of Kiara. We disagree, and, accordingly, affirm the judgment of the trial court.

** March 30, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

The following facts and procedural history are relevant to our consideration of the respondent's appeal. Kiara was born in October, 2016, and the commissioner took custody of her shortly thereafter. On December 5, 2017, the court found Kiara to be neglected. On June 22, 2018, the commissioner moved to terminate the parental rights of the respondent and Kiara's mother.[1]

The court, *Crawford, J.*, conducted a four day trial in December, 2019.[2] The court noted that the respondent's parental rights had been terminated with respect to three other children on the basis of his failure to rehabilitate. See General Statutes § 17a-112 (j) (3) (E).[3] It also

[1] Kiara's mother did not appear at trial. The court concluded that the Department of Children and Families had made reasonable efforts at reunification and had proved, by clear and convincing evidence, the statutory grounds of failure to rehabilitate pursuant to § 17a-112 (j) (3) (E) and abandonment pursuant to § 17a-117 (j) (3) (A). The court then determined that it was in Kiara's best interests to terminate her mother's parental rights. Kiara's mother is not a party to the present appeal.

[2] "A hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. In the dispositional phase, the trial court determines whether termination is in the best interest of the child. . . . In the adjudicatory phase of the proceeding, the court must make separate determinations as to reasonable efforts and the statutory grounds for termination. In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights. . . . In the adjudicatory phase, the court may rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *In re Kyara H.*, 147 Conn. App. 855, 865, 83 A.3d 1264, cert. denied, 311 Conn. 923, 86 A.3d 468 (2014); see also *In re Phoenix A.*, 202 Conn. App. 827, 837–38, A.3d (2021).

[3] General Statutes § 17a-112 (j) (3) (E) provides: "[T]he parent of a child under the age of seven years who is neglected, abused or uncared for, has failed, is unable or is unwilling to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of the child, such parent could

observed that there had been two prior determinations that the Department of Children and Families (department) had made reasonable efforts at reunification.

The court then addressed the statutory ground of failure to rehabilitate alleged in the petition to terminate the respondent's parental rights. See General Statutes § 17a-112 (j) (3) (E).[4] It noted that the department "has been involved with [the respondent] because of his extensive criminal history, including gang related activities, a history of violence including accusations of being involved in two murder charges which resulted in convictions for assault in the first degree, the physical and sexual abuse of his four older children, the sale and distribution of illegal drugs, and violation of probation. One of the [respondent's] daughters has a permanent disfigurement on her hand, the result of [the respondent] submerging her hand in boiling water after she denied him sexual intercourse."

The court also detailed the respondent's mental health issues. Prior to an evaluation that occurred in October, 2016, "[the respondent] had been treated . . .

assume a responsible position in the life of the child and such parent's parental rights of another child were previously terminated pursuant to a petition filed by the [commissioner] . . . ."

[4] "During the adjudicatory phase [of a proceeding to terminate parental rights], the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re November H.*, 202 Conn. App. 106, 116–17, 243 A.3d 839 (2020); see *In re Cameron W.*, 194 Conn. App. 633, 660, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020); see also *In re Gabriel C.*, 196 Conn. App. 333, 359, 229 A.3d 1073 (failure of parent to achieve sufficient personal rehabilitation is one of statutory grounds on which court may terminate parental rights pursuant to § 17a-112), cert. denied, 335 Conn. 938, A.3d (2020).

for schizoaffective disorder, polysubstance abuse, and personality disorder not otherwise specified. . . . The underlying issues included inhaling glue as a child and abuse of [V]alium as an adult, and purchasing [X]anax on the street. He has had at least twelve suicide attempts, and admitted to being suicidal, self-injurious, fire setting, and having homicidal thoughts or behaviors and hear ing voices since age seventeen."

In 2015, the respondent's clinician expressed concern for his untreated mental health issues and his unaddressed sexual and physical abuse of his older daughters. The respondent indicated that he was receiving mental health treatment, but the clinician was unable to verify his compliance with such treatment or medication. He also refused referrals for further treatment. In January, 2016, he did resume treatment following referrals from the department.

On November 30, 2016, approximately one month after Kiara's birth, Ines Schroeder, a clinical and forensic psychologist, performed a psychological examination of the respondent. Schroeder opined that the respondent demonstrated cognitive deficits and difficulty in processing information. She further noted that his blunted mood and affect was consistent with his prior diagnosis of schizophrenia or schizoaffective disorder. The respondent reported regular hallucinations that occurred twice per day, as well as homicidal and suicidal ideation. Schroeder indicated that, in her opinion, the respondent failed to recognize safety concerns and was unable to maintain his mental health, which made it unlikely that he was capable of caring for Kiara. Schroeder stated that the respondent would need to demonstrate engagement in long-term treatment and demonstrate mental health stability for at least one year in order to demonstrate the ability to parent.The department continued to arrange mental health treatment for the respondent, but his inconsistent attendance and

sporadic compliance with his medication regimen resulted in little progress by July 29, 2019. The respondent's failure to be compliant with the offered mental health services prevented the department from providing him with a referral for parenting education. Ultimately, the court concluded: "Many of [the respondent's] service providers worked to assist him with addressing the issues that impede his ability to parent [Kiara]. [Two of the providers] also identified the efforts [the respondent] would have to make to be a parent to [Kiara], and [the respondent] has failed to make those efforts."

The court then proceeded to the dispositional phase and the best interests of the child analysis.[5] In considering the relevant statutory factors, the court first determined that the respondent had "difficulty accepting and understanding his mental illness. He has not complied with treatment and failed to be consistent in order to make progress in his ability to be a parent." The court found that the respondent never prepared a home for Kiara and failed to change his lifestyle so that he could gain custody of her. The court observed that the respondent had not been prevented from having a meaningful relationship with Kiara and that his inability to "get [himself] to a place to parent [Kiara]" was the result of his actions or failures to act. The court found that Kiara, who never had been in the care and custody of the respondent, did not recognize the respondent as her father. The court then concluded, on the basis of clear and convincing evidence, that termination of the respondent's par-

[5] "If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the [parent's] parental rights is not in the best interests of the child. In arriving at that decision, the court is mandated to consider and make written findings regarding seven factors delineated in . . . § [17a-112 (k)]." (Internal quotation marks omitted.) *In re Phoenix A.*, supra, 202 Conn. App. 838.

ental rights was in the best interests of Kiara. This appeal followed.[6]

I

The respondent first claims that the court improperly denied his request for a continuance. He claims that the court's denial of a request for a continuance on the last day of trial prevented him from testifying and constituted a denial of his due process rights. The petitioner counters, inter alia, that the respondent failed to preserve this claim and cannot satisfy the first prong of *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). We agree with the petitioner.

The following additional facts are necessary for our discussion. The respondent attended the first three days of the trial.[7] At the outset of the proceedings on December 30, 2019, the respondent's counsel informed the court of the respondent's absence. Specifically, the respondent's counsel stated: "Your Honor, if I may just, briefly—address—my client's [absence] today, that he had—had indicated that he was not able to secure transportation to court this morning. Given . . . that the length of time this case had been pending, I—I indicated to him I didn't think the court would grant a continuance. I—I did tell him I would, at least, raise that issue

[6] On December 11, 2020, the attorney for the child filed a letter with the court, pursuant to Practice Book § 67-13, adopting the brief of the petitioner.

[7] The termination of parental rights trial took place on the following dates: December 9, 11, 13 and 30, 2019. On December 11, 2019, the second day of the trial, the parties discussed with the court the possibility of taking witnesses out of order. The court indicated it would consider permitting the respondent to testify before the petitioner's case had concluded. After consulting with the respondent, the respondent's counsel stated: "So, Your Honor, [the respondent] would like the opportunity to hear the state's testimony, all their witnesses before getting on the stand to testify. At—at one point, I thought we could do that but—if we had other witnesses. But, given that his testimony is critical so . . . ." The court then confirmed with the respondent's counsel that he would not call any witnesses until the petitioner's case had concluded.

for the court to consider, so I'm doing that right now." The court confirmed on the record with the respondent's counsel that the respondent had been present for the previous court date. The following colloquy then occurred between the court and the parties:

"The Court: And, so, he was aware of this date and did he make any contact with you?

"[The Respondent's Counsel]: He did not. He did not. I believe he may have made some phone calls to me this morning, but on my way to court I don't—

"The Court: What do you mean you believe he may have—

"[The Respondent's Counsel]: He indicated on the phone that he tried—

"The Court: —because did he have any contact—

"[The Respondent's Counsel]: —to contact me this morning—

"The Court: —to you?

"[The Respondent's Counsel]: —probably, right before court. I had contact [with] him as well before court. That's when I learned of his transportation issues. But he was aware of this court date. We had spoken about it and I had provided him the date and, over the holiday we had—well, he was aware, so—

"The Court: Okay. All right. Then it appears he did not make the necessary arrangements to be present and may I inquire—because I believe the department will provide transportation when necessary—did either the [assistant attorney general] or social worker receive any contact from [the respondent] concerning the need for transportation to court?

"[Assistant Attorney General]: No, Your Honor.

"[Social Worker]: No, Your Honor.

"The Court: Ok. All right. Sit down and we'll proceed."

Shortly thereafter, the parties rested. At no point during the final day's proceedings did the respondent's counsel make any further comments or arguments regarding the respondent's absence nor did the respondent's counsel file any posttrial motions requesting to open the hearing in order to present further evidence or testimony regarding the respondent's absence.

On appeal, the respondent argues, for the first time, that "[t]he failure to grant trial counsel's continuance request or make alternative arrangements for the [respondent] to be present for the last day of trial, deprived the [respondent] of his fundamental due process rights in trying to have a fair trial to protect his parental rights. Accordingly, the trial court erred in denying [the respondent's] trial counsel's request for a continuance so that the [respondent] could appear and testify and participate in the last day of trial."

Although the respondent noted in his appellate brief that his trial counsel had requested a continuance,[8] he requests review pursuant to *State* v. *Golding*, supra, 213 Conn. 233.[9] "The test set forth in *Golding* applies

[8] To the extent that the respondent contends that this issue was preserved before the trial court, we disagree. As stated previously, his counsel requested a continuance, which the trial court denied. We iterate that the respondent never raised the due process claim he now presents to this court, nor did the trial court consider it as such. Under these circumstances, "it is evident that the . . . [constitutional claim does not fit] within the parameters of this court's holding that it will hear a claim only if it appears on the record that the question was distinctly raised at trial and was ruled upon and decided by the court adversely to the appellant's claim. *In re Candids E.*, 111 Conn. App. 210, 215 n.7, 958 A.2d 229 (2008)." (Internal quotation marks omitted.) *In re Lukas K.*, 120 Conn. App. 465, 471, 992 A.2d 1142 (2010), aff'd, 300 Conn. 463, 14 A.3d 990 (2011).

[9] The respondent also asserts that we may "consider" plain error review, "utilize" our supervisory authority or consider the issue of "judicial integrity as well as maintaining the public's confidence in judicial proceedings in termination of parental rights cases." We decline to do so in the absence of any analysis of why these methods of review should be employed in the present case. See *In re Omar I.*, 197 Conn. App. 499, 587 n.28, 231 A.3d 1196 (analysis, rather than abstract assertion, is required to avoid abandoning issue), cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom.

in civil as well as criminal cases." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 402 n.10, 125 A.3d 920 (2015); *In re Tremaine C.*, 117 Conn. App. 521, 528 n.9, 980 A.2d 317, cert. denied, 294 Conn. 920, 984 A.2d 69 (2009). Pursuant to the *Golding* doctrine, we may review an unpreserved claim "only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Castro*, 200 Conn. App. 450, 456–57, 238 A.3d 813, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020); see also *In re Miyuki M.*, 202 Conn. App. 851, 858–59, A.3d (2021).

In *State* v. *Brunetti*, 279 Conn. 39, 54, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007), our Supreme Court observed that, "unless the defendant has satisfied the first *Golding* prong, that is, unless the defendant has demonstrated that the record is adequate for appellate review, the appellate tribunal will not consider the merits of the defendant's claim." It further explained that "[t]he reason for this requirement demands no great elaboration:

Ammar I. v. *Connecticut*, U.S. , 141 S. Ct. 956, L. Ed. 2d (2020); see, e.g., *State* v. *Monahan*, 125 Conn. App. 113, 124–25, 7 A.3d 404 (2010) (Appellate Court will not engage in plain error analysis on basis of inadequate brief), cert. denied, 299 Conn. 926, 11 A.3d 152 (2011). Additionally, we note that these doctrines are reserved for extraordinary circumstances that are not implicated by the present case. See, e.g., *In re Miyuki M.*, 202 Conn. App. 851, 858, A.3d (2021).

in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred." Id., 55. More recently, in *In re Azareon Y.*, 309 Conn. 626, 635, 72 A.3d 1074 (2013), our Supreme Court noted that our appellate courts "will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Internal quotation marks omitted.); see also *In re Anthony L.*, 194 Conn. App. 111, 114, 219 A.3d 979 (2019) (respondent bears burden of providing sufficient record for *Golding* review and appellate courts will not attempt to supplement or reconstruct record to make factual determinations in order to decide claim), cert. denied, 334 Conn. 914, 221 A.3d 447 (2020).

The record in the present case contains scant details regarding the respondent's absence from the final day of trial. The respondent's attorney informed the court that the respondent was not able to attend the court proceedings because of a transportation issue and acknowledged that the respondent was aware of the trial date. Both the petitioner's counsel and a social worker indicated that they were not aware of any request made by the respondent for assistance with transportation. Additionally, we note that the trial concluded on December 30, 2019, and the court issued its memorandum of decision on August 7, 2020. In the intervening seven months, the respondent never moved to open the evidence with an offer of proof regarding the reasons for his absence and the evidence he would have presented. See, e.g., *In re Lukas K.*, 300 Conn. 463, 473–74, 14 A.3d 990 (2011) (respondent father gave no indication to trial court by offer of proof or otherwise as to additional evidence he would have presented or attempted to elicit from commissioner's witnesses had he been given copy of transcript and continuance to respond to evidence).

We are mindful that "[t[he right of a parent to raise his or her children has been recognized as a basic constitutional right." (Internal quotation marks omitted.) *In re Tremaine C.*, supra, 117 Conn. App. 529; see also *In re Natalie S.*, 325 Conn. 833, 846–47, 160 A.3d 1056 (2017); *In re Adrian K.*, 191 Conn. App. 397, 411, 215 A.3d 1271 (2019). However, just as a defendant in a criminal trial may waive his or her constitutional rights by a voluntary and deliberate absence from the trial, "a respondent in a parental rights termination proceeding may waive [his] right . . . by deliberate absence." *In re Jason M.*, 140 Conn. App. 708, 718, 59 A.3d 902, cert. denied, 308 Conn. 931, 64 A.3d 330, cert. denied sub nom. *Charline P.* v. *Connecticut Dept. of Children & Families*, 571 U.S. 1079, 134 S. Ct. 701, 187 L. Ed. 2d 564 (2013).

Given this record, the respondent's reason or reasons for his failure to attend the final day of the trial are vague and unclear. See, e.g., *In re Anthony L.*, supra, 194 Conn. App. 119–20. We frequently have stated that "speculation and conjecture have no place in appellate review." *In re Samantha S.*, 120 Conn. App. 755, 759, 994 A.2d 259 (2010), appeal dismissed, 300 Conn. 586, 15 A.3d 1062 (2011); see also *Magsig* v. *Magsig*, 183 Conn. App. 182, 196, 191 A.3d 1053 (2018). Given the evidentiary lacuna regarding the respondent's absence from the last day of trial, there is an inadequate record to review this appellate claim. We conclude, therefore, that the respondent failed to satisfy the first prong of *Golding*, and, we must decline to review this claim.

II

The respondent next claims that the court's finding that termination of his parental rights was in Kiara's best interests was clearly erroneous.[10] He argues that

[10] On appeal, the respondent does not challenge the trial court's determination that a statutory ground, namely, the failure to rehabilitate, existed for the termination of his parental rights.

the evidence at trial showed that he "was affectionate toward his daughter, that he expressed concern for her health and well-being by feeding her and changing her diapers, and that he would bring clothing and gifts for her, and although his child was not in his care and custody, he did engage appropriately with her" and, therefore, the court erred in concluding that termination of his parental rights was in Kiara's best interests. We disagree.

"If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . . In the dispositional phase . . . the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citations omitted; footnote omitted; internal quotation marks omitted.) *In re Malachi E.*, 188 Conn. App. 426, 434–36, 204 A.3d 810 (2019); see also *In re Anaishaly C.*, 190 Conn. App. 667, 689–90, 213 A.3d 12 (2019).

This court will overturn a determination that termination of parental rights is in the best interests of a child only if the court's findings are clearly erroneous. See *In re Walker C.*, 195 Conn. App. 604, 610–11, 226 A.3d 175 (2020). "It is axiomatic that a trial court's factual findings are accorded great deference. . . . A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . [Additionally] [o]n appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) Id., 612; see also *In re Malachi E.*, supra, 188 Conn. App. 443.

This court has observed that the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination. See *In re Anaishaly C.*, supra, 190 Conn. App. 693. After our careful review of the evidence and the memorandum of decision, we cannot conclude that the trial court's findings in the determination of Kiara's best interests were clearly erroneous. The court's conclusion was based on its findings related to the seven statutory factors, which have not been challenged on appeal, including the respondent's difficulty accepting and understanding his mental illness, his inability to comply with mental health treatment, and his failure to make progress in his parenting abilities. The facts highlighted in the respondent's brief, including that he has "always been

appropriate" with Kiara and that she "has been responsive to him" do not provide grounds to reverse the trial court. "We decline the respondent's invitation to place more emphasis on certain of the court's findings so that we might reach a conclusion on appeal that differs from that of the trial court." *In re Malachi E.*, supra, 188 Conn. App. 446.

The judgment is affirmed.

In this opinion the other judges concurred.

IN RE RILEY B.*
(AC 43959)

Alvord, Moll and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights as to her minor child. After the petitioner, the Commissioner of Children and Families, filed the petition to terminate the mother's parental rights, the mother filed a motion to transfer guardianship to a maternal relative in New Jersey. The motion was consolidated for trial with the termination of parental rights petition. The court terminated the mother's parental rights and denied her motion to transfer guardianship. On appeal, the mother claimed that the court deprived her of her right to substantive due process because there was no compelling reason to sever her liberty interest in the integrity of her family while the parties waited to learn whether guardianship of the child could be transferred, which was a less restrictive alternative to the termination of her parental rights. *Held* that this court declined to review the respondent mother's unpreserved constitutional claim because it failed to satisfy the first prong of *State* v. *Golding* (213 Conn. 233), as the record was devoid of any evidence that the maternal relative was amenable to guardianship, the primary factual predicate to the respondent's claim.

Argued November 10, 2020—officially released March 31, 2021**

* 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.

** March 31, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the respondent mother filed a motion to transfer guardianship; thereafter, the matter was tried to the court, *Marcus*, *J.*; judgment denying the motion to transfer guardianship and terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed*.

Albert J. Oneto IV, assigned counsel, for the appellant (respondent mother).

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

Opinion

PER CURIAM. The respondent mother, Jacquanita B., appeals from the judgment of the trial court rendered in favor of the petitioner, the Commissioner of Children and Families, terminating her parental rights with respect to her minor daughter, Riley B. On appeal, the respondent[1] argues that the court deprived her of substantive due process as guaranteed by the fourteenth amendment to the United States constitution because there was no compelling reason, as required under the strict scrutiny standard, to sever the respondent's liberty interest in the integrity of her family while the parties waited to learn whether guardianship of the child could be transferred to a maternal relative in New Jersey. We conclude that the record is inadequate to review the respondent's

[1] The trial court also rendered judgment terminating the parental rights of Riley's father, Kevin M. Kevin M. has not appealed from the judgment terminating his parental rights, and, therefore, we refer in this opinion to Jacquanita B. as the respondent.

unpreserved constitutional claim. Accordingly, we affirm the judgment of the trial court.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The respondent is the mother of Riley, who was born in 2016, and two older daughters, Nyasia and Corrynn. The Department of Children and Families (department) has been involved with the respondent and her family since 2009, as a result of issues of physical neglect, physical abuse, and emotional neglect. On March 29, 2018, the department received a referral from Corrynn's school after Corrynn visited the school nurse with a blood blister on her finger, as well as extensive bruising and red welts on both of her inner forearms. Corrynn stated that the respondent had hit her with a belt that morning because she had forgotten to do her homework and that she was afraid to go home for fear of being hit again. The respondent denied the allegations, did not show concern for Corrynn, and was arrested for risk of injury to a child and assault in the second degree.

On April 4, 2018, the department held a considered removal meeting, which resulted in a safety plan that allowed the children to stay with a maternal great-aunt until the Intensive Family Preservation (IFP) program could begin working with the respondent and the children at home. On April 6, 2018, the children were allowed to return to the respondent's care on the condition that she agree to work with the department and IFP and continue counseling for Corrynn. The respondent refused to engage with the department, but she worked with IFP in the home. A department social worker attempted to visit the home to assess the safety of the children on numerous occasions but was unsuccessful in gaining access to the home. The social worker additionally attempted to join the respondent in an IFP session but was unsuccessful. From May to June, 2018, the social

worker was able to speak to the respondent on only one occasion, on the telephone.

Between May and June, 2018, the respondent was informed that neglect petitions would be filed, the department would be requesting protective supervision of the children, and she would have to comply with court-ordered specific steps to facilitate reunification. The steps included, but were not limited to, keeping all appointments set by or with the department, cooperating with the department's home visits, and taking part in individual counseling. The respondent failed to adhere to the required steps and, as a result, the petitioner filed neglect petitions on behalf of Corrynn and Riley on June 7, 2018. While the neglect petitions were pending, the department received a referral on June 19, 2018, wherein it was reported by multiple individuals that the respondent was physically and verbally abusing Corrynn on a regular basis. The department immediately commenced an investigation.

A department investigator and social worker attempted an unannounced visit to the home on June 20, 2018, with a New Haven police officer, but they were unsuccessful in gaining access to the home or seeing the children. However, the investigator and social worker were able to meet with the police officer, who informed them of an incident involving an assault by the respondent on a neighbor, which also had occurred on June 19, 2018, for which a warrant would be sought for the charge of assault in the second degree.

Also on June 20, 2018, a department supervisor was able to make telephone contact with the respondent. The respondent was extremely agitated and defensive and refused to meet with the department supervisor. The department supervisor then made another visit to the home, but nobody was present. The department notified the New Haven police, who agreed to assist in searching for the respondent's car. The department investigator and social worker attempted to visit the home on

June 21, 2018, but were unsuccessful in gaining entry, even though it was apparent, on the basis of the loud music heard inside, that people were present.

That same day, the department investigator received a telephone call from the respondent's criminal defense attorney, during which she impressed upon the attorney the urgency for the respondent to contact her and for her to assess the safety of the children. The respondent contacted the social worker and, after initially refusing to meet, agreed to schedule a meeting for the next day, June 22, 2018, with the children only. In a text message sent later that day, however, the respondent refused to make the children available the following day. Nevertheless, on June 22, 2018, the respondent made the children available at the maternal great-aunt's home. The department social worker conducted a short meeting with the children; the respondent was not present. Almost daily communication between the respondent and the department followed the June 22, 2018 meeting with the children in an attempt to schedule a home visit, but the respondent refused to cooperate.

A home visit was eventually scheduled for July 11, 2018, at 2 p.m. That morning, the respondent sent a text message to the department investigator, asking her to arrive at 3 p.m. instead. When the investigator arrived at the home at 3 p.m., no one answered the door. The investigator waited until 3:30 p.m., but the respondent never appeared.

On July 12, 2018, the department received a telephone call from the New Haven Police Department informing it that the respondent had been taken into custody after being arrested for assault in the second degree and disorderly conduct regarding the June 19, 2018 assault by the respondent on her neighbor and that the children were in need of a caretaker. The respondent identified

some family resources, but they were either not available or deemed not appropriate. The department then invoked a ninety-six hour administrative hold on behalf of both Corrynn and Riley. As a result of the foregoing, the petitioner applied for ex parte orders of temporary custody on behalf of Corrynn and Riley, which were granted on July 16, 2018. The children were placed in a nonrelative foster home, where they remained as of January, 2020.

The respondent appeared at her plea date on the neglect petitions on July 10, 2018, was advised of her rights, was appointed counsel, and entered pro forma denials. She additionally appeared at the preliminary hearing for the orders of temporary custody, choosing to contest them, and a hearing was scheduled for July 27, 2018. The respondent left the hearing early on July 27, 2018, without permission of the court, during the testimony of the department social worker. The hearing did not conclude until August 2, 2018, at which time the court sustained the orders of temporary custody. The respondent failed to appear on August 2, 2018, as well. In addition, the department established a visitation schedule for the respondent, Riley, and Corrynn between August and December, 2018. The respondent's compliance with the visitation schedule was sporadic.

The respondent failed to appear at the case status conference on September 18, 2018. The same day, Riley was adjudicated neglected and was committed to the custody of the petitioner, subject to review in April, 2019. Final specific steps were ordered for the respondent as well. A permanency plan of termination of parental rights and adoption was approved by the court on June 5, 2019, with respect to Riley.

On June 11, 2019, a maternal relative,[2] who is a resident of New Jersey, contacted the department, offering

[2] We note that the record contains inconsistent references to this individual as a maternal cousin or a maternal aunt. The discrepancy has no impact on our analysis.

to be an adoptive resource for Riley. In June, 2019, the petitioner attempted to submit a request for action, pursuant to the Interstate Compact on the Placement of Children (ICPC), to the state of New Jersey; see General Statutes § 17a-175; but, as a result of a delay in obtaining Riley's social security card, the ICPC package was not submitted until one week before December 5, 2019, the date of the trial conducted in the present case. The ICPC results were pending at the time of trial.

On August 1, 2019, the petitioner filed a petition to terminate the respondent's parental rights as to Riley, alleging, as the sole ground for termination, that the respondent had failed to achieve a sufficient degree of personal rehabilitation under General Statutes § 17a-112 (j) (3) (B) (i).[3] Following a judicial pretrial on October 1, 2019, the respondent filed a motion to transfer guardianship to the maternal relative in New Jersey. The motion was consolidated for trial with the termination of parental rights petition.

A trial on the petition was held on December 5, 2019. The respondent appeared at trial by writ of habeas

[3] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the commissioner for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

corpus, as she was serving a two year term of incarceration that had commenced on October 28, 2019. Prior to the evidentiary portion of trial, the petitioner urged the denial of the respondent's motion to transfer guardianship because the ICPC process had not yet been completed. In response, the respondent orally requested that the court stay the proceedings until the ICPC process was completed. The court reserved its decision on the respondent's request for stay until after the conclusion of trial. Thereafter, several witnesses, including the respondent, testified.

On January 14, 2020, the court, *Marcus*, *J.*, issued a memorandum of decision rendering judgment terminating the respondent's parental rights as to Riley and appointing the petitioner as Riley's statutory parent. In support of its judgment, the court determined, inter alia, that (1) the department had made reasonable efforts to locate the respondent and the respondent was unable or unwilling to benefit from reunification services offered by the department, (2) the petitioner had demonstrated, by clear and convincing evidence, that the respondent had failed to sufficiently rehabilitate under § 17a-112 (j) (3) (B) (i), and (3) terminating the respondent's parental rights was in Riley's best interest. Additionally, the court denied the respondent's motion to transfer guardianship and request to stay the proceedings. The court observed that the ICPC process was not yet completed and correctly stated that, as a matter of law, it could not "transfer guardianship of a child to an out-of-state relative without the completion of an ICPC," citing *In re Yarisha F.*, 121 Conn. App. 150, 164–65, 994 A.2d 296 (2010). This appeal followed.[4] Additional facts and procedural history will be set forth as necessary.

Before turning to the respondent's claim, we briefly review a trial court's statutory obligations when consid-

[4] The attorney for Riley has adopted the petitioner's brief.

ering a petition for the termination of parental rights. "Pursuant to § 17a-112 (j), the trial court must make certain required findings after a hearing before it may terminate a party's parental rights. It is well established that, [u]nder § 17a-112, a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3) exist] by clear and convincing evidence. . . . In contrast to custody proceedings, in which the best interests of the child are always the paramount consideration and in fact usually dictate the outcome, in termination proceedings, the statutory criteria must be met before termination can be accomplished and adoption proceedings begun. . . . Section [17a-112 (j) (3)] carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . Also, as part of the adjudicatory phase, the department is required to prove, by clear and convincing evidence, that it has made reasonable efforts . . . to reunify the child with the parent, unless the court finds . . . that the parent is unable or unwilling to benefit from reunification . . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citations omitted; internal quotation marks omitted.) *In re Elijah C.*, 326 Conn. 480, 499–500, 165 A.3d 1149 (2017).

In the present appeal, the respondent does not challenge the court's adjudicatory findings. Instead, the respondent claims that the judgment terminating her parental rights violated her right to substantive due process as guaranteed by the fourteenth amendment to the United States constitution because the petitioner was without a compelling reason to sever her liberty interest in the integrity of her family. Specifically, the respondent argues that a transfer of guardianship to Riley's maternal relative in New Jersey would have served as a less restrictive means to achieve the state's dual goals of protecting Riley from harm and affording her permanency. The respondent acknowledges that her claim of constitutional error was not preserved. Accordingly, she seeks review under *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). The petitioner responds that, among other things, the record is inadequate for review, and, therefore, the respondent's claim fails under the first prong of *Golding*. We agree with the petitioner.

"Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the [party] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Adelina A.*, 169 Conn. App. 111, 119, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

Our Supreme Court repeatedly has emphasized that "*Golding* is a *narrow exception* to the general rule that an appellate court will not entertain a claim that has not been raised in the trial court. The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party. . . . Nevertheless, because constitutional claims implicate fundamental rights, it also would be unfair automatically and categorically to bar a defendant from raising a meritorious constitutional claim that warrants a new trial solely because the defendant failed to identify the violation at trial. *Golding* strikes an appropriate balance between these competing interests: the [respondent] may raise such a constitutional claim on appeal, and the appellate tribunal will review it, but only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred . . . ." (Emphasis added; internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 580–81, 916 A.2d 767 (2007).

"In assessing whether the first prong of *Golding* has been satisfied, it is well recognized that [t]he [respondent] bears the responsibility for providing a record that is adequate for review of [her] claim of constitutional error. If the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make fac-

tual determinations, in order to decide the [respondent's] claim. . . . The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred." (Citations omitted; internal quotation marks omitted.) *In re Anthony L.*, 194 Conn. App. 111, 114–15, 219 A.3d 979 (2019), cert. denied, 334 Conn. 914, 221 A.3d 447 (2020).

"To determine whether the record is adequate to ascertain whether a constitutional violation occurred, we must consider the respondent's alleged claim of impropriety and whether it requires any factual predicates." *In re Azareon Y.*, 309 Conn. 626, 636, 72 A.3d 1074 (2013).

As stated previously in this opinion, the crux of the respondent's claim is that her substantive due process rights were violated because there was a less restrictive alternative to the termination of her parental rights in the form of a transfer of Riley's guardianship to the respondent's relative in New Jersey. The primary factual predicate to that claim required an evidentiary showing that Riley's maternal relative was in fact amenable to guardianship of Riley. It is undisputed, however, that the record is devoid of any evidence that the maternal relative was amenable to guardianship.[5] In the absence of this basic factual predicate, there is an insufficient record to permit us to review the respondent's substantive due process claim. See *In re Brayden E.-H.*, 309 Conn. 642, 656–57, 72 A.3d 1083 (2013) (reserving for another day questions of whether substantive due process requires determination that termination is least restrictive means to protect child's best interest and, if so, whether § 17a-112 violates that

[5] Indeed, during oral argument before this court, when asked on what evidence he relied for the proposition that a maternal relative was interested in guardianship of the child, the respondent's counsel answered: "There was no evidence."

requirement). "Our role is not to guess at possibilities, but to review claims based on a complete factual record developed by the trial court. . . . Without the necessary factual and legal conclusions furnished by the trial court . . . any decision made by us respecting [the respondent's claim] would be entirely speculative." (Internal quotation marks omitted.) *In re Anthony L.*, supra, 194 Conn. App. 119–20.

Accordingly, we decline to review the respondent's unpreserved constitutional claim because it fails to satisfy the first prong of *Golding*. See, e.g., *In re Azareon Y.*, supra, 309 Conn. 636–41 (affirming this court's determination that respondent's unpreserved substantive due process claim was not reviewable in light of inadequate record on issue of valid alternative permanency plan); *In re Madison C.*, 201 Conn. App. 184, 189–96, 241 A.3d 756 (concluding that respondent's substantive due process claim was unreviewable because record contained no factual predicates to permit review of claim that lesser restrictive means, other than termination of her parental rights, were available to protect best interests of children), cert. denied, 335 Conn. 985, 242 A.3d 480 (2020); *In re Adelina A.*, supra, 169 Conn. App. 114, 125–27 (concluding that respondent's claim was unreviewable because there was no evidence presented concerning alternative permanency plan).

The judgment is affirmed.

WENDY GEORGES *v.* COMMISSIONER OF CORRECTION (AC 43145)

Elgo, Alexander and DiPentima, Js.

Syllabus

The petitioner, a Haitian national who had been convicted of reckless manslaughter in the first degree in violation of statute (§ 53a-55 (a) (3)), sought a writ of habeas corpus, claiming that the habeas court improperly concluded that he had not established that his trial counsel rendered

ineffective assistance in advising him of the immigration consequences of his plea of nolo contendere. The petitioner asserted that his counsel failed to advise him that his plea would result in certain deportation because a conviction pursuant to § 53a-55 (a) (3) constituted a crime of moral turpitude under federal law. The court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, the petitioner having failed to satisfy his burden of demonstrating deficient performance on the part of his trial counsel: contrary to the petitioner's claim that the crime of which he was convicted was one of moral turpitude that would result in definite deportation, there was no federal or Connecticut authority holding that reckless manslaughter in the first degree constituted a crime of moral turpitude, and, although the petitioner's deportation was extremely likely as a result his plea, it was not a certainty, as a practice guide that was available to his counsel at the time of the plea advised that crimes of moral turpitude did not render noncitizens removable in every case and that federal law permitted the waiver of that ground for removal; moreover, the petitioner's testimony that he would not have entered his plea had he known that there was a very real risk of deportation was found to be not credible by the court, which credited trial counsel's testimony that he had advised the petitioner that his plea could very likely result in his deportation and that he should expect the worst.

Argued December 7, 2020—officially released April 6, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Bhatt*, *J.*; thereafter, the petition was withdrawn in part; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (petitioner).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Stephen M. Carney*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Wendy Georges, appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. In rejecting his ineffective assistance of counsel claim, the court concluded that the petitioner had not established deficient performance on the part of his trial counsel in advising him of the immigration consequences of his nolo contendere plea to a charge of reckless manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (3). The petitioner now challenges the propriety of that determination. We affirm the judgment of the habeas court.

The petitioner is a Haitian national who moved to Connecticut in 2008. At all relevant times, the petitioner was a green card[1] holder and, hence, a lawful permanent resident who could be removed from the United States for committing a serious crime. See *Barton* v. *Barr*, U.S. , 140 S. Ct. 1442, 1445, 206 L. Ed. 2d 682 (2020). In 2010, the petitioner was involved in a homicide in Norwich.[2] He thereafter was arrested and charged with reckless manslaughter in the first degree in violation of § 53a-55 (a) (3).[3]

[1] "A 'green card' is a document which evidences an alien's permanent residence status in the United States." *Singh* v. *Singh*, 213 Conn. 637, 640 n.3, 569 A.2d 1112 (1990).

[2] As the prosecutor recounted at the petitioner's plea hearing: "This [altercation] occurred . . . on the 14th of December, 2010. Shortly after midnight, police officers responded to a 911 call . . . . When they [arrived], they located a person identified as the victim . . . who was ultimately pronounced dead at the [hospital]. It was determined that he had been stabbed, which was the cause . . . of his death. Police officers spoke to witnesses who were at the scene. They said that [the petitioner] and the victim had been playing cards, that there had been an accusation of cheating, and, at one point, the [petitioner] grabbed the victim by the throat, the victim pulled out a knife, people restrained both parties, and then . . . [the petitioner] broke free and stabbed the victim in the back, ultimately killing him . . . ."

[3] General Statutes § 53a-55 (a) provides in relevant part: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

As the habeas court noted in its memorandum of decision, the petitioner's case "was discussed over the course of numerous [pretrial conferences]. . . . The matter was continued several times so that the petitioner could think about the plea offer." The petitioner ultimately entered into a plea agreement with the state, and a hearing was held on February 8, 2012. During the plea canvass conducted by the trial court, the petitioner affirmatively indicated that he had discussed his plea with his trial counsel, Attorney Bruce Sturman; that he was entering the plea voluntarily and of his own volition; and that he understood that, by pleading nolo contendere, he was forfeiting his right to require the state to prove his guilt beyond a reasonable doubt at a trial. The court explained to the petitioner that he faced a maximum sentence of twenty years of incarceration, and the petitioner acknowledged that, in exchange for his plea, a sentence of twelve years and six months of incarceration with seven years of special parole would be imposed.

The court also informed the petitioner that his plea "can have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization" if he was not a citizen of the United States. The petitioner indicated that he understood that admonition and that he had discussed the issue with Sturman.

At that time, Sturman addressed the court and confirmed that he had apprised the petitioner of the possible immigration consequences of his plea. He stated in relevant part: "[W]e have discussed at length the immigration ramifications of this plea. I have been in touch with a . . . pro bono group out of Hartford that assists folks who have immigration issues, and I have alerted them to [the petitioner's] plight. I will be giving that information both to my client and to his wife, and I am confident that when he gets close to the end of his sentence . . . they will get involved and represent him with regard to future immigration proceedings." The

following colloquy between the court and Sturman then ensued:

"The Court: . . . I am far from an expert on immigration . . . but I would imagine that, with a conviction of manslaughter in the first degree, [the petitioner] runs a very serious risk . . . of being deported.

"[Sturman]: That's my concern. [The petitioner and I have] discussed that. I mean, immigration is deporting folks with [driving under the influence] convictions.

"The Court: I know. . . . I'm not allowed to ask him whether he has [citizenship] issues, but obviously . . . I would assume that if somebody has citizenship issues . . . this would be the type of conviction that you'd be deported on.

"[Sturman]: That's our concern."

The court then accepted the petitioner's plea of nolo contendere to one count of reckless manslaughter in the first degree, finding that it was predicated on an adequate factual basis and that it was "voluntarily and understandably made with the assistance of competent counsel."

The petitioner's sentencing hearing was held on April 12, 2012. After reciting the factual basis for the plea and the terms of the sentence, the prosecutor stated: "[M]y best understanding is that, at the end of this total sentence, [the petitioner] would be deported." In its remarks, the court likewise noted that the petitioner "is going to be going to prison for years and, most likely, with immigration issues, will then be deported . . . ." The court then sentenced the petitioner in accordance with the terms of his plea.

On August 15, 2013, the petitioner filed a pro se petition for a writ of habeas corpus; an amended petition was filed by the petitioner's habeas counsel, James E. Mortimer, on November 7, 2018. The amended petition

alleged that Sturman's representation was ineffective in that, inter alia, he "failed to advise the petitioner of the likelihood of deportation following a plea of guilty . . . ."[4] Following a trial, the habeas court concluded that the petitioner had failed to demonstrate that Sturman rendered deficient performance in that regard. Accordingly, the court denied the petition for a writ of habeas corpus. The court thereafter granted certification to appeal from the judgment denying the habeas corpus petition, and this appeal followed.

On appeal, the petitioner claims that the court improperly concluded that he had not established ineffective assistance on the part of Sturman in advising him of the immigration consequences of his nolo contendere plea. We do not agree.

At the outset, we note that the "standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. Although a habeas court's findings of fact are reviewed under the clearly erroneous standard of review . . . [w]hether the representation a [petitioner] received at trial was constitutionally inadequate is a mixed question of law and fact. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . . In order to prevail on an ineffective assistance of counsel claim, the [petitioner] must show: (1) that counsel's representation fell below an objective standard of reasonableness . . . and (2) that defense counsel's deficient performance prejudiced the [petitioner]." (Citation omitted; internal quotation marks omitted.) *Gray* v. *Commissioner of Correction*, 99 Conn.

[4] In his amended petition, the petitioner raised six additional grounds for his ineffective assistance of counsel claim, two of which he withdrew at his habeas trial. With respect to the four other grounds, the habeas court concluded that the petitioner had not established deficient performance on the part of Sturman. In this appeal, the plaintiff does not challenge that determination.

App. 444, 447–48, 914 A.2d 1046, cert. denied, 282 Conn. 925, 926 A.2d 666 (2007). As our Supreme Court has observed, "[a] reviewing court can find against a petitioner on either [prong], whichever is easier." (Emphasis omitted; internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 606, 103 A.3d 954 (2014).

In the present case, the court's decision was predicated on the deficient performance prong. "In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient attorney performance, a defendant must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms. . . .

"Furthermore, our review of counsel's performance is highly deferential. . . . [A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (Citations omitted; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019); see also *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 517 n.2, 142 A.3d 243 (2016) (burden is on petitioner to prove that counsel failed to properly advise on immigration consequences of plea).

At the habeas trial, Sturman testified that, as a public defender, he received training on the collateral consequences of criminal convictions and routinely advised clients "about the deportation ramifications . . . ." Because the petitioner "was not an American citizen," Sturman testified, he had advised the petitioner that "a

guilty plea could very well likely result in his deportation . . . .'' Sturman also testified that, prior to the plea hearing, he consulted with a pro bono organization with immigration expertise regarding the petitioner's case, which cautioned Sturman that the petitioner should ''expect the worst.'' As a result, Sturman testified, he informed the petitioner that ''he would probably get deported; that he should, you know, hope for the best but expect the worst'' and that ''the chances were very good that [he would be] deported . . . .''

The petitioner, by contrast, testified at the habeas trial that Sturman had not advised him of the immigration consequences of his plea. As a result, the petitioner testified that he did not understand what effect his plea would have on his immigration status. The petitioner claimed that, had he known that there was a ''very real risk of deportation,'' he would not have accepted the nolo contendere plea.

It is well established that an appellate court cannot ''evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . 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.'' (Internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, supra, 314 Conn. 604; see also *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017) (''a pure credibility determination . . . is unassailable''). In the present case, the court expressly credited Sturman's testimony that he had advised the petitioner that he very likely would be deported as a result of his plea. The court also found that the petitioner's testimony to the contrary was not credible. This court cannot disturb those credibility determinations. See *Bowens* v. *Commissioner of Correction*, 333 Conn. 502, 523, 217 A.3d 609 (2019).

The petitioner nevertheless contends that Sturman rendered deficient performance by failing to advise him that his plea would result in *certain* deportation. He claims that, at the time of his plea hearing in 2012, a conviction of reckless manslaughter in the first degree under § 53a-55 (a) (3) constituted a crime of moral turpitude that would result in "definite deportation."

In *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the United States Supreme Court held that the right to effective assistance of counsel mandated by the sixth amendment to the United States constitution requires a criminal defense attorney to advise a defendant "whether [a guilty] plea carries a risk of deportation." Id., 374. "[T]he precise advice counsel must give depends on the clarity of the consequences specified by federal immigration law." *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 511. In *Padilla*, the high court recognized that "[i]mmigration law can be complex, and it is a legal specialty of its own." *Padilla* v. *Kentucky*, supra, 369. For that reason, the court explained that, "[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." (Footnote omitted.) Id.

In the present case, the law on the immigration consequences of the petitioner's plea is not succinct and straightforward. Although federal law mandates deportation for persons convicted of certain categories of offenses, such as aggravated felonies and controlled

substance offenses; see 8 U.S.C. § 1227 (a) (2) (A) (iii) and (2) (B) (2018); the petitioner concedes that his plea involved neither an aggravated felony nor a controlled substance offense. Rather, he argues that his plea to one count of reckless manslaughter in the first degree under § 53a-55 (a) (3) constituted a crime of moral turpitude, as defined in 8 U.S.C. § 1101 (a) (13) (C) (v) of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.[5]

As the United States Court of Appeals for the Seventh Circuit has noted, "the phrase 'crime involving moral turpitude' is notoriously baffling . . . ." *Garcia-Meza* v. *Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008); see also *People* v. *Valdez*, 37 N.E.3d 837, 843 (Ill. App. 2015) ("[m]oral turpitude is a notoriously difficult phrase to define"), rev'd on other grounds, 67 N.E.3d 233 (Ill. 2016), cert. denied, U.S. , 137 S. Ct. 1386, 197 L. Ed. 2d 563 (2017). The United States Court of Appeals for the Ninth Circuit similarly has observed that " 'moral turpitude' is perhaps the quintessential example of an ambiguous phrase." *Marmolejo-Campos* v. *Holder*, 558

[5] Section 1101 (a) (13) (C) of title 8 of the United States Code provides in relevant part: "An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . .

"(v) has committed an offense identified in section 1182 (a) (2) of this title, unless since such offense the alien has been granted relief under section 1182 (h) or 1229b (a) of this title . . . ."

Section 1182 (a) of title 8 of the United States Code provides in relevant part: "Classes of aliens ineligible for visas or admission

"Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States . . .

"(2) Criminal and related grounds

"(A) Conviction of certain crimes

"(i) In general

"Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

"(I) *a crime involving moral turpitude* (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . ." (Emphasis added.)

F.3d 903, 909 (9th Cir.), cert. denied, 558 U.S. 1092, 130 S. Ct. 1011, 175 L. Ed. 2d 620 (2009). That phrase is not defined by statute or federal regulation. See *Alonzo* v. *Lynch*, 821 F.3d 951, 958 (8th Cir. 2016) ("[a]lthough the immigration laws have directed the exclusion of persons convicted of crimes involving moral turpitude since 1891, Congress has never defined the term" (internal quotation marks omitted)); *State* v. *Ortiz-Mondragon*, 364 Wis. 2d 1, 24, 26, 866 N.W.2d 717 (2015) (noting that "the amorphous term 'crime involving moral turpitude' is not defined" by either federal Immigration and Nationality Act or Code of Federal Regulations). As Justice Alito noted in his concurring opinion in *Padilla*, "determining whether a particular crime is . . . a 'crime involving moral turpitude' . . . is not an easy task." *Padilla* v. *Kentucky*, supra, 559 U.S. 378 (Alito, J., concurring in the judgment); accord *Rohit* v. *Holder*, 336 Fed. Appx. 672, 673 (9th Cir. 2009) (question of whether particular offense constitutes crime involving moral turpitude "is a complex one").

There is no Connecticut or federal authority holding that a conviction of reckless manslaughter in the first degree under § 53a-55 (a) (3) constitutes a crime of moral turpitude. Nor did any such authority exist at the time that Sturman represented the petitioner in 2012. In his appellate brief, the petitioner concedes that "not all reckless crimes" are ones involving moral turpitude. Relying on the United States Board of Immigration Appeals decision in *Matter of Medina*, 15 I. & N. Dec. 611 (B.I.A. 1976), the petitioner nonetheless submits that crimes "involving recklessness and a deadly weapon do implicate moral turpitude." *Matter of Medina* involved a conviction of aggravated assault under an Illinois statute that included the use of a deadly weapon as an element of the offense. The petitioner thus reasons that, because he used a knife to stab the victim in the present case, his conviction under § 53a-55 (a) (3) necessarily is

one involving moral turpitude. The petitioner overlooks the fact that our Supreme Court has instructed that, in determining whether a crime is one involving moral turpitude, "we look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime, not the particular circumstances of the defendant's conduct." (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198, 210, 177 A.3d 1144 (2018). The use of a deadly weapon is not an element of § 53a-55 (a) (3). See footnote 3 of this opinion.

As the United States Court of Appeals for the Second Circuit has observed, the Board of Immigration Appeals "has explained that the term moral turpitude generally encompasses . . . conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general." (Internal quotation marks omitted.) *Rodriguez* v. *Gonzales*, 451 F.3d 60, 63 (2d Cir. 2006). It may well be that the offense of reckless manslaughter in the first degree under § 53a-55 (a) (3) involves conduct that satisfies that standard. See *Matter of Wojtkow*, 18 I. & N. Dec. 111, 113 (B.I.A. 1981) (concluding that conviction under New York reckless manslaughter statute "[did] involve moral turpitude"); cf. *St. Juste* v. *Commissioner of Correction*, supra, 328 Conn. 214 (concluding that conviction of reckless threatening in violation of General Statutes § 53a-62 (a) (3) "is not . . . a crime of moral turpitude because it lacks the requisite aggravating factor"). In this case, we are not called on to resolve that question. Rather, the issue in this case is simply whether, at the time of the petitioner's plea hearing in 2012, the law was "succinct and straightforward" and "truly clear"; *Padilla* v. *Kentucky*, supra, 559 U.S. 369; that a violation of § 53a-55 (a) (3) constituted a crime of moral turpitude that would result in the petitioner's certain deportation.

Although deportation may have been very likely, we do not agree with the petitioner's contention that "his deportation was inevitable" as a result of his plea. (Emphasis omitted.) In *Padilla*, the court emphasized the importance of consulting practice guides for advice on how to proceed when considering immigration consequences of a plea. *Padilla* v. *Kentucky*, supra, 559 U.S. 368. One such guide that was available to Sturman at the time of the petitioner's plea hearing advised that, unlike aggravated felonies, crimes involving moral turpitude "do not render a noncitizen removable in every case—[it] will depend on the immigration status, prior criminal record, and actual and potential sentence for the offense." J. Baron, A Brief Guide to Representing Noncitizen Criminal Defendants in Connecticut (Rev. 2010). That guide also advised that, "even if removable," noncitizens convicted of a crime involving moral turpitude "may still be eligible for discretionary relief from deportation . . . ." (Emphasis omitted.) Id. For example, under federal law, the United States Attorney General is permitted to waive certain grounds of inadmissibility, including conviction of a crime of moral turpitude, if the alien's removal would result in "extreme hardship" to a lawful resident family member.[6] 8 U.S.C. § 1182 (h) (1) (B) (2018); see also *Palma-Martinez* v. *Lynch*, 785 F.3d 1147, 1149 (7th Cir. 2015).

In light of the foregoing, we conclude that, although the petitioner's deportation was extremely likely as a result of his plea in 2012, it was not a certainty. For that reason, we agree with the habeas court that Sturman "adequately conveyed the near certainty of deportation to the petitioner." The court credited Sturman's testimony that he advised the petitioner that his plea "could very well likely result in his deportation," that the peti-

[6] At the habeas trial, the petitioner testified that he moved to the United States to join his wife in 2008, explaining that she had completed "the [immigration] paperwork for me to move here with her after two years."

tioner "would probably get deported" and that the petitioner should "expect the worst."

As the United States Supreme Court emphasized in *Padilla*, surmounting the high bar necessary to establish ineffective assistance of counsel "is never an easy task"; *Padilla* v. *Kentucky*, supra, 559 U.S. 371; and, in the absence of evidence to the contrary, a reviewing court "should . . . presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty." Id., 372; see also *Budziszewski* v. *Commissioner of Correction*, supra, 322 Conn. 517 n.2 ("the habeas court must presume that counsel acted competently and the burden lies with the petitioner . . . to overcome this presumption and prove that [counsel] failed" to properly advise on immigration consequences). In the present case, the habeas court properly determined that the petitioner has not satisfied his burden of demonstrating deficient performance on the part of Sturman.

The judgment is affirmed.

In this opinion the other judges concurred.

RENEE GIORDANO *v.* CARL V. GIORDANO
(AC 42737)

Prescott, Moll and Suarez, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's motion for contempt and awarding her appellate attorney's fees. *Held*:

1. The trial court did not err in granting the plaintiff's motion for contempt; contrary to the defendant's argument of a good faith misunderstanding, the court did not err in concluding that the defendant wilfully violated a clear and unambiguous court order that provided that he was required to make weekly payments to the plaintiff until a lump sum alimony award was paid in full, which he failed to do, as the court credited evidence from the plaintiff showing that the defendant owed her an

outstanding balance, and the court found that the defendant had the ability to pay and did not present credible testimony or evidence that he had a good faith belief that he had paid the lump sum alimony obligation in full.

2. The trial court did not abuse its discretion in awarding appellate attorney's fees to the plaintiff; the court found that the defendant was not credible with respect to his purported inability to pay and that, pursuant to statute (§ 46b-62), the award of attorney's fees was necessary to avoid undermining the judgment of contempt and the court's orders regarding the defendant's obligation to pay the outstanding balance of the lump sum alimony owed to the plaintiff, regardless of the plaintiff's ability to pay the fees.

Argued January 7—officially released April 6, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Solomon, J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Margaret Murphy, J.*, granted the plaintiff's motion for contempt, and the defendant appealed to this court; subsequently, the court, *Margaret Murphy, J.*, granted the plaintiff's motion for appellate attorney's fees, and the defendant filed an amended appeal. *Affirmed.*

Carl V. Giordano, self-represented, the appellant (defendant).

Steven R. Dembo, with whom were *Caitlin E. Kozloski*, and, on the brief, *P. Jo Anne Burgh*, for the appellee (plaintiff).

Opinion

MOLL, J. In this dissolution matter, the defendant, Carl V. Giordano, appeals from the judgment of the trial court granting two postjudgment motions filed by the plaintiff, Renee Giordano. On appeal, the defendant claims that the court improperly granted the plaintiff's (1) motion for contempt and (2) motion for appellate attorney's fees.

We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married in 1992. In 2004, the plaintiff commenced the present dissolution action against the defendant. In October, 2005, the trial court, *Solomon*, *J.*, rendered a judgment of dissolution, which incorporated a separation agreement executed by the parties. Under article VI of the separation agreement, titled "Property Settlement," the defendant was required to pay the plaintiff $425,000, in various installments, in exchange for retaining his ownership interests in certain commercial properties. In addition, article VI provided that, "[i]f the [defendant] sells, transfers or otherwise divests himself of any of his interest in [the commercial properties], he shall immediately pay the [plaintiff] any funds due her at that time so that she is paid in full."

In 2009, the plaintiff filed a postjudgment amended motion for contempt, asserting that the defendant had sold the commercial properties in a "like-kind" exchange; see generally 26 U.S.C. § 1031 (2018); and, as a result, he was obligated to make immediate payment of the sums owed to the plaintiff in accordance with article VI of the separation agreement. The trial court, *Frazzini*, *J.*, granted the motion for contempt, and this court affirmed the judgment of contempt on appeal. See *Giordano* v. *Giordano*, 127 Conn. App. 498, 499, 14 A.3d 1058 (2011).

Following this court's decision in *Giordano* v. *Giordano*, supra, 127 Conn. App. 498, the parties entered into an agreement, dated May 5, 2011, for the purpose of "settling all of the claims and demands which each may have against the other arising from the [j]udgment dissolving their marriage and all subsequent court matters as it relates to the property settlement." The agreement was entered as a court order on June 1, 2011

(June, 2011 order). Pursuant to the June, 2011 order, the defendant was required to "satisfy his obligations to pay to the [p]laintiff a property settlement per [a]rticle IV of the [j]udgment of [d]issolution, by payments to the [p]laintiff as outlined herein, totaling $350,000." The June, 2011 order provided that $175,000 of the $350,000 owed to the plaintiff would be paid from the sale of the defendant's interest in certain real estate in East Windsor. That particular payment is not at issue in this appeal. The June, 2011 order further provided that the remaining $175,000 would be paid to the plaintiff as lump sum alimony. Such alimony was ordered to be paid at a rate of $200 per week for one year commencing upon the termination of the periodic alimony orders in place at the time, which was expected to occur in April, 2012, and, thereafter, at a rate of $300 per week until the sum was paid in full. The defendant was also required to make payments toward the foregoing lump sum alimony obligation in the event he received certain monies described in the June, 2011 order.

On February 8, 2019, the plaintiff, representing herself, filed the postjudgment motion for contempt at issue in this appeal.[1] The plaintiff contended that the defendant (1) owed her a balance of $62,510 in lump sum alimony and (2) had failed to remit to her the prior three $300 weekly payments owed under the June, 2011 order. On March 12, 2019, following an evidentiary hearing at which both parties were self-represented, the court orally granted the motion for contempt. The same day, the court issued a written order setting forth its decision. As relief, the court ordered the defendant to pay the plaintiff (1) $2745 on or before March 15, 2019,

[1] In 2012, the plaintiff filed a postjudgment motion for contempt, asserting that the defendant had failed to comply with a portion of the June, 2011 order that is not at issue in this appeal. The trial court, *Westbrook*, *J.*, granted the motion for contempt, and this court affirmed the judgment of contempt on appeal. See *Giordano* v. *Giordano*, 153 Conn. App. 343, 344, 101 A.3d 327 (2014).

and (2) $1300 per month starting on April 1, 2019, continuing until the outstanding lump sum alimony due to the plaintiff was paid off on February 1, 2023. On March 26, 2019, the defendant filed this appeal from the judgment of contempt.

On April 3, 2019, the plaintiff, represented by counsel, filed a motion for appellate attorney's fees. On April 4, 2019, the defendant, representing himself, filed an objection. On May 1, 2019, following an evidentiary hearing, the court orally granted the motion, awarding the plaintiff $10,000 in attorney's fees to be paid by the defendant at a rate of $100 per week.[2] On May 9, 2019, the defendant amended this appeal to encompass the court's award of attorney's fees. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that the trial court improperly granted the plaintiff's postjudgment motion for contempt. We disagree.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . Our review of a trial court's judgment of civil contempt involves a two part inquiry. [W]e first consider the threshold question of whether the underlying order constituted a court order that was sufficiently clear and unambiguous so as to support a judgment of contempt. . . . Second, if we conclude that the underlying court order was sufficiently clear and unambiguous, we must then determine whether the trial court abused its discretion in issuing, or refusing to issue, a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunder-

[2] The trial court submitted a signed transcript of its oral decision. See Practice Book § 64-1 (a).

standing. . . . Whether a party's violation was wilful depends on the circumstances of the particular case and, ultimately, is a factual question committed to the sound discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *Hall* v. *Hall*, 335 Conn. 377, 391–92, 238 A.3d 687 (2020). "[T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference." (Internal quotation marks omitted.) *Casiraghi* v. *Casiraghi*, 200 Conn. App. 771, 787, 241 A.3d 717 (2020).

The following additional facts are relevant to our resolution of the defendant's claim. During the evidentiary hearing on the plaintiff's motion for contempt, the court heard testimony from the parties. In addition, the court admitted into evidence an accounting offered and prepared by the plaintiff, which reflected payments made by the defendant against the $175,000 in lump sum alimony owed to the plaintiff under the June, 2011 order (plaintiff's accounting). The plaintiff's accounting indicated that the defendant (1) made a $12,090 payment to her in 2013, and (2) made payments to her from April, 2012, through 2018, in either $200 or $300 weekly increments in accordance with the June, 2011 order, but paid her only $900 in 2019, leaving an outstanding balance of $62,510 in lump sum alimony.

The court also admitted into evidence several exhibits offered by the defendant, including (1) two letters, dated January 24, 2019, and February 5, 2019, respectively, which the defendant had mailed to the plaintiff,

and (2) an accounting prepared by the defendant (defendant's accounting). In the January 24, 2019 letter, the defendant wrote, inter alia, that he was "about 95 [percent] certain" that he had overpaid the plaintiff by approximately $22,190, and he asked the plaintiff to review an attached accounting that he had prepared that purportedly supported his calculations. He further wrote that "[o]f course it is also possible that I am wrong and if that is the case of course I would resume paying you what I owe you . . . but I do not plan to pay you if indeed I have already overpaid as I have stated herein." In the February 5, 2019 letter, the defendant wrote, inter alia, that he was "98 [percent] sure" of the data he had provided to the plaintiff in the prior letter, and he asked the plaintiff to respond indicating whether she agreed with his claim. It is undisputed that the plaintiff received, but did not reply to, the letters.

The defendant's accounting[3] reflected various payments made by the defendant, including some that predated the June, 2011 order, which he credited against the lump sum alimony owed to the plaintiff. According to his calculations, the defendant either overpaid the plaintiff by $22,190 or owed her $2810, depending on whether a certain $25,000 payment could be credited against the lump sum alimony award.

In granting the plaintiff's motion for contempt, the court determined that (1) the June, 2011 order was clear and unambiguous in requiring the defendant, starting in April, 2013, to pay the plaintiff $300 per week until the $175,000 lump sum alimony award was paid in full, and (2) the defendant wilfully violated the order. In addition, the court found that (1) the defendant was

[3] During the evidentiary hearing on the plaintiff's motion for contempt, both parties represented that the defendant's accounting, which was admitted into evidence, was not identical to the accounting that the defendant had mailed to the plaintiff as an attachment to the January 24, 2019 letter. The defendant's accounting contained an entry indicating that it had been revised on March 9, 2019.

not credible, (2) the defendant had the ability to pay, and (3) the plaintiff was credible and the plaintiff's accounting was correct.

The defendant does not challenge the court's conclusion that the June, 2011 order was clear and unambiguous, but he claims that the court improperly determined that his noncompliance with the June, 2011 order was wilful. Specifically, the defendant asserts that the court failed to consider the two letters and the defendant's accounting, which, he contends, demonstrated that he had a good faith belief that he had paid the lump sum alimony obligation in full. He further asserts that the court ignored the undisputed fact that the plaintiff did not reply to his letters, which, he posits, established that a good faith disagreement existed as to whether he had satisfied his payment obligations under the June, 2011 order. We are not persuaded.

During the hearing on the plaintiff's motion for contempt, before granting the motion, the court stated that it had reviewed the parties' respective exhibits and testimony. As the court expressly stated on the record and in its written order, however, it found that the defendant was not credible. It is reasonable to infer that the court's finding regarding the defendant's lack of credibility extended to the contents of the defendant's letters mailed to the plaintiff and to the defendant's accounting, which were all crafted by the defendant.[4] Put simply, the court did not ignore the defendant's letters and the defendant's accounting; rather, the court discredited them. "We will not disturb credibility determinations made by the court. See *Greco* v. *Greco*, [275 Conn. 348, 359, 880 A.2d 872 (2005)] (on appeal, '[w]e cannot retry the facts or pass on the credibility of the witnesses' . . .)." *Fronsaglia* v. *Fronsaglia*, 202 Conn. App. 769,

[4] Moreover, the court expressly credited the plaintiff's accounting. It logically follows that the court discredited the defendant's accounting.

779, A.3d (2021); see also *Talbot* v. *Talbot*, 148 Conn. App. 279, 293, 85 A.3d 40 (stating that trial court was not required to credit new financial affidavit submitted by plaintiff), cert. denied, 311 Conn. 954, 97 A.3d 984 (2014). Accordingly, we reject the defendant's claim that the court erred in determining that he had wilfully violated the June, 2011 order, and, thus, we conclude that the court did not commit error in granting the plaintiff's motion for contempt.

II

The defendant's next claim is that the trial court improperly granted the plaintiff's motion for appellate attorney's fees. This claim is unavailing.

"When making an order for the payment of attorney's fees, the court must consider factors that are essentially the same as those that must be considered when awarding alimony. . . . [General Statutes §] 46b-62[5] governs the award of attorney's fees in dissolution proceedings and provides that the court may order either spouse . . . to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in [General Statutes §] 46b-82[6]. . . . This reasonableness requirement balances

[5] General Statutes § 46b-62 provides in relevant part: "(a) In any proceeding seeking relief under the provisions of this chapter . . . the court may order either spouse or, if such proceeding concerns the custody, care, education, visitation or support of a minor child, either parent to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the criteria set forth in section 46b-82. . . ."

[6] General Statutes § 46b-82 provides in relevant part: "(a) At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. . . . In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall consider the evidence presented by each party and shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability and feasibility of such parent's securing employment. . . ."

the needs of the obligee spouse with the obligor spouse's right to be protected from excessive fee awards. . . .

"Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders. . . . Whether to allow counsel fees [under §§ 46b-62 and 46b-82], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Citations omitted; footnotes added; internal quotation marks omitted.) *Lynch* v. *Lynch*, 153 Conn. App. 208, 246–47, 100 A.3d 968 (2014), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, 577 U.S. 839, 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015).

The following additional facts are relevant to our disposition of the defendant's claim. Both parties filed updated financial affidavits with the court in connection with the plaintiff's motion for appellate attorney's fees. During the evidentiary hearing on the motion, the defendant provided testimony regarding his financial circumstances and argued that he did not have the ability to pay the plaintiff's attorney's fees. The plaintiff testified that she had paid her attorney a $10,000 retainer via credit card and that the payment of that charge would have to come from the monies remitted to her by the defendant under the June, 2011 order.

In orally granting the plaintiff's motion for appellate attorney's fees, the court found that (1) the defendant was not credible regarding his purported inability to

pay the plaintiff's attorney's fees, (2) the defendant had the ability to pay, and (3) awarding the plaintiff attorney's fees was "necessary to prevent undermining by the defendant of prior court orders, which included finding him liable for a contempt and ordering him to pay what he owes the plaintiff." In a subsequent written articulation,[7] the court further stated in relevant part that it had "granted the plaintiff's request for attorney's fees for the appeal . . . pursuant to § 46b-62 and the relevant case law because the failure to award attorney's fees would undermine the court's other financial orders after finding the defendant in contempt."

The defendant claims that the court improperly granted the plaintiff's motion for appellate attorney's fees for two reasons. First, he contends that his financial affidavit and testimony during the evidentiary hearing on the motion demonstrated that he did not have the ability to pay the attorney's fees award. This contention is unavailing because the court, in finding that the defendant had the ability to pay, expressly found that the defendant was not credible with respect to his purported inability to pay. We will not second-guess the court's credibility determination or retry the facts on appeal. See *Fronsaglia* v. *Fronsaglia*, supra, 202 Conn. App. 779.

Second, the defendant contends that the record established that the plaintiff had the ability to pay her own attorney's fees, which the court failed to consider, in effect punishing the defendant for filing this appeal. We are not persuaded. As our Supreme Court has explained, "ample liquid funds [are] not an absolute litmus test for an award of counsel fees. . . . [To] award counsel fees to a spouse who had sufficient liquid assets would be justified, if the failure to do so would

[7] On May 22, 2019, the plaintiff filed a motion for articulation of the court's decision granting her motion for appellate attorney's fees. On June 10, 2019, the court granted the motion and issued an articulation.

substantially undermine the other financial awards." (Citation omitted; internal quotation marks omitted.) *Maguire* v. *Maguire*, 222 Conn. 32, 44, 608 A.2d 79 (1992); see also *Ramin* v. *Ramin*, 281 Conn. 324, 352, 915 A.2d 790 (2007) ("the general rule under *Maguire* is that an award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders"). In the present case, the court found that awarding the plaintiff $10,000 in appellate attorney's fees was necessary to avoid undermining the judgment of contempt and its attendant orders regarding the defendant's obligation to pay the plaintiff $62,510, the outstanding balance of lump sum alimony owed to the plaintiff. On the basis of the record, we conclude that the foregoing finding justified the court's award of attorney's fees to the plaintiff.[8]

[8] In his objection to the plaintiff's motion for appellate attorney's fees, the defendant argued that paragraph 10 of the June, 2011 order, which provided in relevant part that "[e]ach party shall be responsible for his or her own past, present or future counsel fees," prohibited the court from awarding the attorney's fees requested by the plaintiff. The defendant also raised this argument during the evidentiary hearing on the motion. In its June 10, 2019 articulation, the court rejected this argument, concluding that paragraph 10 of the June, 2011 order did not preclude it from granting the plaintiff's motion.

As the plaintiff observes in her appellate brief, although the defendant preserved the issue concerning paragraph 10 of the June, 2011 order in the trial court, he did not raise this issue in his appellate brief. "[A]n appellant who fails to brief a claim abandons it." (Emphasis omitted; internal quotation marks omitted.) *Harris* v. *Bradley Memorial Hospital & Health Center, Inc.*, 306 Conn. 304, 319, 50 A.3d 841 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1809, 185 L. Ed. 2d 812 (2013). We are mindful that the defendant is self-represented; however, "[t]he solicitous treatment we afford a self-represented party does not allow us to address a claim on his behalf when he has failed to brief that claim." *Traylor* v. *State*, 332 Conn. 789, 807, 213 A.3d 467 (2019). Thus, notwithstanding that the defendant raised the argument regarding paragraph 10 of the June, 2011 order before the trial court and during oral argument before this court, we decline to address the merits thereof as a result of his failure to brief it in his appellate brief.

In sum, we conclude that the court did not abuse its discretion in granting the plaintiff's motion for appellate attorney's fees.

The judgment is affirmed.

In this opinion the other judges concurred.

JENNIFER BOYD-MULLINEAUX *v.* DANIEL MULLINEAUX (AC 43509)

Bright, C. J., and Alvord and DiPentima, Js.

Syllabus

The plaintiff, whose marriage to the defendant had previously been dissolved, appealed to this court from the decision of the trial court denying her postdissolution motion for contempt as to a claimed arrearage for unallocated alimony and child support, claiming that the court incorrectly determined that she was not entitled to receive a percentage of profit distributions received by the defendant from his purchased membership interest in a company, P Co. The trial court found that the defendant received income from two sources: commission income as an employee of C Co., and distributions as a member of P Co. The court denied the plaintiff's motion for contempt, concluding that the distributions that the defendant received from P Co. were not included in the defendant's gross annual earned income from employment, as defined in the parties' separation agreement. *Held* that the trial court properly denied the plaintiff's motion for contempt because the distributions received by the defendant as a member of P Co. were not included in the definition of gross annual earned income from employment as defined in the parties' separation agreement: the evidence supported the court's conclusion that the distributions were not derived from the defendant's employment with C Co., including expert testimony that the defendant had paid for an equity interest in P Co., and that the income he received derived from that interest; moreover, there was no provision in the members' agreement, which concerned distributions from P Co., that required members of P Co. to be employed by C Co., the defendant purchased his membership interest in P Co. postdissolution, and he receives distributions on that investment, and the separation agreement provides that all income received by the defendant due to his investment of certain assets shall not be considered in the definition of gross annual earned income from employment.

Argued January 19—officially released April 6, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Emons*, *J.*, rendered judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *M. Moore*, *J.*, denied the plaintiff's motion for contempt, and the plaintiff appealed to this court. *Affirmed.*

Gary I. Cohen, for the appellant (plaintiff).

Olivia M. Eucalitto, with whom, on the brief, was *Gaetano Ferro*, for the appellee (defendant).

Opinion

DiPENTIMA, J. The plaintiff, Jennifer Boyd-Mullineaux, appeals from the decision of the trial court denying her postjudgment motion for contempt as to a claimed arrearage for unallocated alimony and child support. She claims that the court incorrectly determined that, according to the parties' separation agreement, she was not entitled to receive as unallocated alimony and child support a percentage of profit distributions received by the defendant, Daniel Mullineaux, from his purchased membership interest in a company. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. The marriage of the parties was dissolved by the court, *Emons*, *J.*, in 2013, and the dissolution judgment incorporated by reference the parties' separation agreement. Article III of the separation agreement provides in relevant part that the defendant shall pay the plaintiff unallocated alimony and child support based on percentages of his "Gross Annual Earned Income from Employment" (earned income from employment). (Internal quotation marks omitted.)

Throughout the relevant time period, the defendant was employed as a managing director by an investment company, Liquidity Finance, LLC (LLC). In 2014, the defendant accepted an appointment to become a member of Liquidity Finance, LLP (LLP), and, over time, he paid approximately $624,000 for his interest in the LLP. He received distributions as a member of the LLP and continued to earn commission income as an employee of the LLC. The defendant did not include the distributions he received as a member in his earned income from employment when calculating his support obligations. In June, 2018, the plaintiff filed a postjudgment motion for contempt seeking an order of arrearage. In this motion, she argued that she was entitled to an arrearage because the distributions were related to the defendant's employment, and, therefore, were included in the definition of earned income from employment contained in the parties' separation agreement. The defendant filed an objection in which he argued that the income in dispute was not earnings "related to [his] employment," and, therefore, was properly excluded from his earned income from employment. (Internal quotation marks omitted.)

Following an evidentiary hearing, the court, *M. Moore, J.*, denied the motion for contempt. The court concluded that the distributions that the defendant received as a result of his membership in the LLP, which he had expended significant funds to purchase, were not included in the definition of earned income from employment as defined by the parties' separation agreement. The plaintiff filed a motion for "reconsideration, correction, and/or clarification . . . ." In response, the court clarified that it had ruled on the plaintiff's June, 2018 motion for contempt, and it denied the plaintiff's request to reconsider its order. This appeal followed.

The plaintiff claims that the court incorrectly concluded that the distributions, which the defendant

received as a result of his purchased interest in the company that employed him as a manager, were not included within the definition of earned income from employment in the separation agreement.[1] She contends that the distributions paid to the defendant as a result of his membership interest in the LLP must be included in his earned income from employment because the distributions arise from a source related to the services rendered by the defendant by way of past, current, or future employment. The defendant argues that the distributions were not derived from his employment with the LLC, and, therefore, the court correctly determined that they were excluded from his earned income from employment. We agree with the defendant.

The following principles guide our analysis. "Our interpretation of a separation agreement that is incorporated into a dissolution decree is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate

[1] The plaintiff does not challenge the court's conclusion that the defendant was not in wilful contempt of any court order.

a conclusion that the language is ambiguous." (Citations omitted; internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008).

In the present case, both parties agree that the separation agreement is clear and unambiguous as to the definition of earned income from employment contained in paragraph 3.5, but disagree as to whether the distributions are included within that clear definition. "If the language of a contract is clear and unambiguous, the intent of the parties is a question of law, subject to plenary review." Id.

We agree that the separation agreement clearly and unambiguously defines earned income from employment as "any and all earnings of any nature whatsoever actually received by the [defendant] in the form of cash or cash equivalents, or which the [defendant] is entitled to receive, from any and all sources relating to the services rendered by the [defendant] by way of his past, current or future employment . . . ." The separation agreement specifies that earned income from employment includes but is not limited to: "[S]alary and bonus, contract payments, commission payments, severance payments, and voluntary payments made to qualified and [nonqualified] retirement plans for his benefit, and if applicable, disability benefits. All deferred compensation including, but not limited to, deferred cash compensation, stock grants, stock units, and stock options shall be deemed [earned income from employment] in the year in which the [defendant] receives such items." The separation agreement expressly excludes from earned income from employment "[c]apital [g]ains, interest and dividends, and all other income earned by the [defendant] due to his investment of assets distributed to him in connection with this dissolution proceeding . . . ."

As found by the trial court, the defendant received income from two sources: commission income as an

employee of the LLC, and distributions as a member of the LLP. These moneys were received by the defendant pursuant to the terms of two separate agreements, both of which were admitted into evidence at the hearing on the motion for contempt as full exhibits, specifically, a service agreement, which governed the defendant's employment with the LLC, and a members' agreement, which concerned the distributions from the LLP. The parameters of the defendant's employment with the LLC, as managing director, were set forth in the service agreement, which provided a method of calculation of the defendant's compensation for his services. The members' agreement, which identified the defendant as an initial member of the LLP, defined "[m]embers" as "any persons who are from time to time admitted as members of the LLP in accordance with the terms of this [a]greement and the [United Kingdom Limited Liability Partnerships Act 2000])." The members' agreement required members, also referred to as initial members, to have made a specified capital contribution to the LLP, and it provided that residual profits were to be shared among the members in their "[r]elevant [p]roportion . . . ."

The evidence presented at the hearing supported the court's conclusion that the distributions received by the defendant from the LLP were not included in earned income from employment because they were not properly included as "any and all earnings of any nature whatsoever actually received by the [defendant] . . . or which [the defendant] is entitled to receive, from any and all sources relating to the services rendered by the [defendant] by way of his past, current or future employment . . . ." The defendant's expert witness, Mark Harrison, a certified public accountant, testified that the formulaic calculation set forth in the service agreement of how the defendant was to be paid for his services as an employee did not change after he pur-

chased an equity interest in the LLP.[2] Harrison further testified that, pursuant to the members' agreement, the defendant paid for an equity interest and that "the income that he receives by virtue of stock ownership is solely as a result of an equity interest he acquired by deploying his own capital . . . ." Contrary to the plaintiff's contention, the defendant's testimony on cross-examination that he was receiving distributions as a result of his membership in the LLP and that no one other than employees of the LLC were receiving distributions as of the time of the hearing, does not demonstrate that his distributions are related to his employment. Rather, this testimony merely indicates the source of the income, namely, his status as a member of the LLP, and it provides details on the current composition of its members.

The plaintiff raises several arguments in support of her contention that the profit distributions received by the defendant arise from his employment, but none of these arguments demonstrates that the distributions the defendant receives as a member of the LLP are related to his employment as a manager of the LLC. The plaintiff contends that the defendant's obligations as a member pursuant to schedules 2 and 3 of the members' agreement are substantially the same as his obligations as a manager pursuant to paragraph 2 of his service agreement. These two agreements, she claims, are intended to enhance the defendant's cash income from the services he renders to the LLC and the LLP as both an employee and a partnership member. The claimed similarity between the documents does not exist.[3] There

[2] The plaintiff does not claim that the defendant manipulated his salary and member distributions to reduce his support obligation.

[3] The plaintiff cites to schedules 2 and 3 of the members' agreement and quotes language purportedly from those provisions regarding the responsibilities and duties of new members. Schedules 2 and 3 of the members' agreement do not contain language regarding the duties and responsibilities of new members; rather, those sections pertain to "[d]etails of the LLP" and "[v]aluation of [u]nits," respectively. The language relied on by the plaintiff

is no provision in the members' agreement requiring members to be *employed* by the LLC, and the plaintiff does not refer to any provision purporting to establish such a requirement. Specifically, paragraph 16.1 of the members' agreement, which pertains to the admission of new members, does not require employment by the LLC as a prerequisite for becoming a member, but, rather, it provides that "[a]ny person may at any time be admitted as a [m]ember by agreeing to contribute such amount of [c]apital . . . ."

The defendant purchased his membership interest in the LLP postjudgment, and receives distributions as a return on that investment. Paragraph 3.5 of the separation agreement clearly provides that "all other income earned by the [defendant] due to his investment of assets distributed to him in connection with this dissolution proceeding shall not be considered in the definition of [earned income from employment] herein." The court correctly concluded that the return on the defendant's investment of the purchased membership interest in the LLP is not related to his employment with the LLC, and, therefore, is excluded from the definition of earned income from employment.

The plaintiff further argues that the members' agreement provides that, if the defendant leaves his employment with the LLC, his capital account would be paid back to him and he would no longer qualify for further profit distributions as a member of the LLP. This is a misreading of the members' agreement, as no such provision regarding employment at the LLC exists. Rather, the members' agreement provides in paragraph 22.3.2 that a *member who leaves the LLP* shall have his capital returned to him.

Finally, the plaintiff contends that the underlying facts of the present case are substantially similar to

regarding "responsibilities" and "duties" is not contained within the members' agreement.

those in *Halperin* v. *Halperin*, 196 Conn. App. 603, 230 A.3d 757 (2020). In *Halperin*, the parties' separation agreement, which was incorporated by reference into the dissolution judgment, provided that unallocated support was to be paid based on a certain percentage of, inter alia, the husband's gross base income. Id., 605 and n.1. The separation agreement in that case defined income as the parties' total income, which had been historically listed on line 22 of the parties' joint 1040 federal tax returns, and included all employment, business, partnership, consulting or real estate income whether received in cash or not. Id., 607. This court concluded that the income received by the husband as a result of an interest he acquired postjudgment in two companies was included in the unallocated support calculation, because such income or losses from S corporations and partnerships historically had been listed on line 22 of the parties' federal tax return. See id., 609–20. The facts in *Halperin* are distinguishable from those in the present case. The separation agreement in *Halperin* defined income for support purposes by reference to line 22 of the parties' federal tax return, which the separation agreement in the present case does not do. Rather, the separation agreement in the present case defines income for support purposes as "any and all earnings of any nature whatsoever actually received by the [defendant] . . . or which [the defendant] is entitled to receive, from any and all sources relating to the services rendered by the [defendant] by way of his past, current or future employment," which is markedly distinguishable from the separation agreement in *Halperin*, which defined income by referring to a specific line in the parties' federal tax return.

For the foregoing reasons, we conclude that the court properly denied the plaintiff's motion for an order finding an arrearage. The distributions received by the defendant were not included in the clear and unambiguous definition of gross annual earned income from

employment, as set forth in the parties' separation agreement.

The judgment is affirmed.

In this opinion the other judges concurred.

DIANE LUTH *v.* OEM CONTROLS, INC.
(AC 43702)

Bright, C. J., and Elgo and Alexander, Js.

Syllabus

The plaintiff sought to recover damages for gender discrimination and retaliatory discharge in violation of statute (§ 46a-51 et seq.) as a result of the termination of her employment by the defendant. The plaintiff claimed that the defendant paid her less than it paid two male employees, whose job responsibilities she recognized were different from her own. After the defendant began to experience financial difficulties, the plaintiff was laid off, and her duties were absorbed by other employees, including one of the two male employees she claimed had been paid more than her. The trial court granted the defendant's motion for summary judgment and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Held* that the judgment of the trial court was affirmed, and because the court thoroughly analyzed the legal issues in concluding that the defendant was entitled to judgment as a matter of law, this court adopted the trial court's comprehensive and well reasoned decision as a proper statement and analysis of the applicable law on the issues presented.

Argued February 8—officially released April 6, 2021

Procedural History

Action to recover damages for, inter alia, alleged gender discrimination, brought to the Superior Court in the judicial district of Ansonia-Milford, where the court, *Stevens*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Zachary T. Gain, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

Jody N. Cappello, with whom was *Sidd Sinha*, for the appellee (defendant).

Opinion

PER CURIAM. In this action, brought pursuant to the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq., the plaintiff, Diane Luth, appeals from the summary judgment, rendered by the trial court, in favor of her former employer, the defendant, OEM Controls, Inc. On appeal, the plaintiff claims that the court erred in rendering summary judgment on her two count complaint sounding in gender discrimination and retaliatory discharge. We affirm the judgment of the trial court.

The following facts and procedural history are revealed by the record. The plaintiff, who is a woman, began working for the defendant in January, 1996, as a sales administrator. At approximately the same time, Jay Monahan also began working for the defendant. According to the plaintiff, Monahan helped to establish the data delivery unit of the company; "he was the sales person going out there. And then—he's the one [who] started installing." Monahan was involved with engineering designs, had engineering ability that permitted him to assist with software and hardware issues, and he also focused on sales. The plaintiff believed that Monahan was paid more than she was paid. Monahan revealed at his deposition that he had an annual base salary of less than $100,000, which was augmented by commissions on sales.

In the years that followed, the plaintiff was promoted to various positions with the defendant, and, at some point after 2004, she was promoted to implementation manager in the data delivery department, where her annual salary increased from less than $50,000 to between $88,000 and $92,000. The plaintiff and Monahan shared certain roles, but Monahan was responsible for handling the technical aspect of the projects, including making sales, while the plaintiff handled customer

related issues but not sales. The plaintiff had wanted to move to New Hampshire and work for the defendant remotely for quite some time. The defendant, however, was reluctant to permit the plaintiff to do so and did not give her an answer. Finally, in or about 2011, the defendant approved the plaintiff's request, and she moved to New Hampshire, where she worked remotely for the defendant. She still was expected to work in Connecticut every six to ten weeks or so.[1]

In 2015, the defendant began to experience financial difficulties, of which the plaintiff was aware. The defendant implemented layoffs and a freeze on raises. In an attempt to increase sales, the defendant hired a male, Mick Lauer, a former customer, whose salary consisted of a base salary of approximately $125,000 plus commission, generally totaling approximately $160,000. The plaintiff believed Lauer's salary was $170,000. The plaintiff complained to her manager, Samuel Simons, about the compensation of Monahan and Lauer. Simons conducted a review of the salaries and determined that the employees were being paid appropriately. The plaintiff recognized that the job responsibilities of Monahan and Lauer were different from her own job responsibilities, including the fact that Monahan worked on and developed hardware, trained clients, and made sales, and that Lauer primarily worked in sales. The plaintiff often referred to Monahan and Lauer collectively as the "sales team." Although the plaintiff was not subject to the initial round of layoffs in 2015, the defendant laid off four additional people in October, 2016, including three men and the plaintiff. Many of those laid off in both rounds of layoffs had been with the defendant for more than twenty years. The plaintiff's job title was eliminated and her duties were absorbed by others, including Monahan.

[1] When asked during her deposition whether she ever had refused to attend these in-person meetings or any telephone meetings, the plaintiff stated that she could not recall.

The plaintiff initiated a complaint with the Commission on Human Rights and Opportunities, where she received a release of jurisdiction on August 31, 2017, and then commenced an action in the Superior Court. On December 3, 2018, the plaintiff filed a revised complaint against the defendant, alleging one count each of gender discrimination and retaliatory discharge. On April 15, 2019, the defendant filed a motion for summary judgment, attaching to its accompanying memorandum of law various documents in support thereof, including portions of the depositions of the plaintiff, Simons, Monahan, and Lauer. The plaintiff filed a memorandum in opposition, attaching portions of the same depositions, among other things. On July 22, 2019, the trial court heard oral argument on the motion for summary judgment.[2]

On December 6, 2019, the court, *Stevens*, *J.*, issued a memorandum of decision on the defendant's motion for summary judgment. In its decision, the court set forth the uncontested facts, the plaintiff's claims, and the relevant legal authority, followed by a thorough analysis of the legal issues presented. The court then concluded that the defendant was entitled to judgment as a matter of law. We carefully have reviewed the record, the parties' briefs, and their oral argument before this court. Applying the well established principles that govern our review of a court's decision to grant a motion for summary judgment in cases alleging violations of the act; see, e.g., *Stubbs* v. *ICare Management*, *LLC*, 198 Conn. App. 511, 520–22, 233 A.3d 1170 (2020); we conclude that the judgment of the trial court should be affirmed. We adopt the trial court's comprehensive and well reasoned decision as providing a proper statement and analysis of the applicable law on the issues presented. See *Luth* v. *OEM Controls*, *Inc.*, Superior Court,

[2] The plaintiff has not provided this court with a copy of that transcript. We conclude, however, that the transcript is not crucial to our consideration of her appeal.

judicial district of Ansonia Milford, Docket No. CV-17-6025657-S (December 6, 2019) (reprinted at 203 Conn. App. 677, A.3d). It would serve no useful purpose for us to repeat the thorough discussion contained therein. See, e.g., *State* v. *Sebben*, 201 Conn. App. 376, 380, 243 A.3d 365 (2020); *Gawlik* v. *Semple*, 197 Conn. App. 83, 86, 231 A.3d 326, cert. denied, 335 Conn. 953, 238 A.3d 730 (2020), cert. denied, U.S. , S. Ct. , L. Ed. 2d (2021); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017); *Hayes* v. *Yale-New Haven Hospital*, 82 Conn. App. 58, 60, 842 A.2d 616 (2004).

The judgment is affirmed.

APPENDIX

DIANE LUTH *v.* OEM CONTROLS, INC.*

Superior Court, Judicial District of Ansonia-Milford
File No. CV-17-6025657-S

Memorandum filed December 6, 2019

Proceedings

Memorandum of decision on defendant's motion for summary judgment. *Motion granted.*

James V. Sabatini, for the plaintiff.

Jody N. Cappello and *Sidd Sinha*, for the defendant.

Opinion

STEVENS, J.

STATEMENT OF THE CASE

The plaintiff, Diane Luth, filed a two count revised complaint against the defendant, OEM Controls, Inc., on

* Affirmed. *Luth* v. *OEM Controls, Inc.*, 203 Conn. App. 673, A.3d (2021).

December 3, 2018, alleging gender discrimination and retaliation. The complaint alleges the following facts. The defendant hired the plaintiff in January of 1996 as a sales administrator. Throughout the plaintiff's employment, she held different titles. Her most recent position was implementation manager in the data delivery department where she made $88,000 to $92,000 annually. The plaintiff is the only female in her job position. The defendant allegedly hired Mick Lauer in October, 2015, to perform the same or substantially similar job duties as the plaintiff. The defendant allegedly pays Lauer $170,000 annually in compensation. Lauer was not the plaintiff's manager, nor was he in charge of the data delivery team. The defendant also employs Jay Monahan. Monahan shares some of the same job functions as the plaintiff, and he allegedly is paid more than the plaintiff.

When the plaintiff found out about the difference in pay, she expressed her concerns to the defendant. The defendant stated that it was going to look at all the salaries of individuals on the data delivery team. The plaintiff asked about her salary again a few months later, and she was told to not take it personally and that it was not her concern. On October 6, 2016, the plaintiff's employment with the defendant was terminated.

The first count of the plaintiff's complaint alleges gender discrimination. The plaintiff alleges that the defendant discriminated against her because of her gender by paying her unequally and by constructively discharging her. In the second count, the plaintiff's complaint alleges that the defendant retaliated against the plaintiff for complaining about the gender discrimination in the workplace and the pay disparity between men and women at the company.

Pending before the court is the defendant's motion for summary judgment filed on April 15, 2019, with a

supporting memorandum of law. The plaintiff filed a memorandum in opposition to the motion for summary judgment on July 1, 2019. The defendant filed a reply memorandum to the plaintiff's opposition on July 15, 2019. The court heard oral argument on the motions on July 22, 2019. The court ordered the parties to file supplemental briefs. The plaintiff filed a supplemental opposition on July 29, 2019, and the defendant filed a reply on August 19, 2019.

DISCUSSION

"Summary judgment is a method of resolving litigation when pleadings, affidavits, and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . The motion for summary judgment is designed to eliminate the delay and expense of litigating an issue when there is no real issue to be tried." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 534–35, 51 A.3d 367 (2012). "The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case." (Internal quotation marks omitted.) *Stuart* v. *Freiberg*, 316 Conn. 809, 821, 116 A.3d 1195 (2015).

I

GENDER DISCRIMINATION

"With respect to employment discrimination claims, our Supreme Court has held that we review federal precedent concerning employment discrimination for

guidance in enforcing our own antidiscrimination statutes." (Internal quotation marks omitted.) *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, Superior Court, judicial district of Hartford, Docket No. CV-13-6042558 (January 26, 2015) (reprinted at 170 Conn. App. 82, 86, 153 A.3d 691), aff'd, 170 Conn. App. 79, 153 A.3d 687 (2017). "Under the [analysis set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802–804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)], the employee must first make a prima facie case of discrimination, The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision was actually motivated by illegal discriminatory bias." (Internal quotation marks omitted.) *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, supra, 87.

A

Prima Facie Case of Discrimination

"In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination." *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015). "The burden of establishing a prima facie case [of discrimination] is a burden of production, not a burden of proof, and therefore involves no credibility assessment by the fact finder. . . . The level of proof required to establish a prima facie case is minimal and need not reach the level required to support a jury verdict in the plaintiff's favor." (Internal quotation marks

omitted.) *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 513, 43 A.3d 69 (2012).

"In addition to proffering direct evidence of discrimination with respect to the fourth prong, a litigant may present circumstantial evidence from which an inference may be drawn that similarly situated individuals were treated more favorably than she was." (Internal quotation marks omitted.) *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, supra, 170 Conn. App. 88. "To establish the fourth element of a prima facie case, [the plaintiff] must show that she was treated differently from similarly situated [employees]. To be similarly situated, the individuals with whom [the plaintiff] attempts to compare herself must be similarly situated in all material respects." (Citation omitted; internal quotation marks omitted.) *Shumway* v. *United Parcel Service, Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). "Whether a plaintiff is similarly situated to comparators is generally a question for the jury. . . . But a court can properly grant summary judgment where it is clear that no reasonable jury could find the similarly situated prong met." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Waterbury Board of Education*, 247 F. Supp. 3d 196, 209 (D. Conn. 2017).

"That an employee's conduct need not be identical to that of another for the two to be similarly situated is also reflected in the language of *McDonnell Douglas* [*Corp.*], where the Supreme Court used the phrase 'comparable seriousness' to identify conduct that might help to support an inference of discrimination." (Internal quotation marks omitted.) *Graham* v. *Long Island Rail Road*, 230 F.3d 34, 40 (2d Cir. 2000). "[T]he standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of [the] plaintiff's and comparator's cases, rather than a showing that both cases are identical." Id. "What constitutes 'all material respects' . . . must be judged based on

(1) whether the plaintiff and those [s]he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness." Id.

"When a plaintiff attempts to satisfy the ultimate burden of proving discriminatory intent by presenting circumstantial evidence of disparate treatment, the plaintiff must show that the better-treated workers with whom the plaintiff compares herself are a representative sample of all the workers who are comparable to her. . . . She must not pick and choose [comparators]." (Internal quotation marks omitted.) *Perez-Dickson* v. *Bridgeport*, supra, 304 Conn. 524 n.45. "Employees need show only a situation sufficiently similar to [their own] to support at least a minimal inference that the difference of treatment may be attributable to discrimination." (Internal quotation marks omitted.) *United Technologies Corp.* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 212, 226, 804 A.2d 1033, cert. denied, 262 Conn. 920, 812 A.2d 863 (2002).

"Nothing in *McDonnell Douglas Corp.* . . . limits the type of circumstantial evidence that may be used to establish the fourth prong of the test for a prima facie case of . . . discrimination." (Citation omitted.) *Craine* v. *Trinity College*, 259 Conn. 625, 640–41, 791 A.2d 518 (2002). "[T]he inference of discriminatory intent could be drawn in several circumstances including, but not limited to: the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in . . . degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge." (Internal quotation marks

omitted.) *Abdu-Brisson* v. *Delta Air Lines, Inc.*, 239 F.3d 456, 468 (2d Cir.), cert. denied, 534 U.S. 993, 122 S. Ct. 460, 151 L. Ed. 2d 378 (2001).

The defendant argues that the plaintiff has failed to prove a prima facie case of discrimination. For the purposes of the motion for summary judgment, the defendant does not challenge that the plaintiff has met the first three prongs of her prima facie case of discrimination. The defendant only argues that the plaintiff has not proved the fourth prong of a prima facie case for discrimination. Specifically, the defendant argues that the plaintiff's position was not filled by an individual outside the plaintiff's protected class, and the comparators given by the plaintiff are not "similarly situated" to the plaintiff. In response, the plaintiff argues that she has presented evidence that the defendant treated similarly situated male employees more favorably than the plaintiff. The plaintiff argues that her male coworkers had similar job titles and responsibilities but were paid significantly more than the plaintiff. The court agrees with the defendant.

In the present case, the plaintiff offers two comparators, Lauer and Monahan. The key question is whether Lauer and Monahan were similarly situated to the plaintiff. Lauer and Monahan are similarly situated if their positions were "substantially equal in skill, effort, and responsibility" to the plaintiff. (Internal quotation marks omitted.) *Andrus* v. *Dooney & Bourke, Inc.*, 139 F. Supp. 3d 550, 554 (D. Conn. 2015). The undisputed facts establish that, although both men worked with the plaintiff on the data delivery team, they had different job titles and responsibilities than the plaintiff.

The plaintiff's title was implementation manager. Sam Simons, the copresident and chief operating officer for the defendant, testified at his deposition that the plaintiff's job in 2016 was to "support the customer,

primarily Kiewit, and manage implementation projects or installation and implementation." Defendant's Motion for Summary Judgment, exhibit A, Simons Deposition, 15:19–22. Simons states that some of the work [of] the plaintiff overlapped with other employees but no one else had her specific duties.

The plaintiff's testimony about her job responsibilities is generally consistent with Simons' description of these responsibilities. In her deposition, the plaintiff stated that her job duties included taking out teams to job sites and supervising and overseeing them in the field; making suggestions on how to improve the products when out in the field; troubleshooting and fixing the product; working with mechanics either in person or over the phone to walk them through how to install the products; troubleshooting the software and software uploads; and other similar tasks.

Monahan stated in his deposition that he worked at the defendant for twenty years. During the relevant time period, he had worked as a project manager for about seven years. As part of his job, Monahan stated in his deposition, he helps "direct, design, install, [and] configure the asset management side of [the] product line." Defendant's Motion for Summary Judgment, exhibit A, Monahan Deposition, 4:25–5:1. Monahan further explains that, if a customer had problems with the data, the plaintiff would work on that issue, but if a customer had a hardware problem or issues with the installation or product, he would work on that, too.

Despite the plaintiff's claims to the contrary, the undisputed facts establish that the work performed by the plaintiff and Monahan was significantly different. In the plaintiff's deposition, when she was asked whether she had a similar role to Monahan, she initially answered, "[y]es, absolutely, we both sort of . . . did the exact same thing," but then further explained that, "*except*

Jay did more—got more involved with maybe training and process and trouble—we both did troubleshooting, yeah." (Emphasis added.) Defendant's Motion for Summary Judgment, exhibit A, Plaintiff's Deposition, 39:4–8. In short, the plaintiff admits that her role and Monahan's were dissimilar, and considering this evidence fully and in a light most favorable to the plaintiff, there is no factual dispute that the job responsibilities of the plaintiff and Monahan were different because his tasks were more expansive.[1]

An identical conclusion must be reached regarding Lauer. Lauer was hired in late 2015, and his job title was account manager and sales. Lauer's job was to develop new business and to provide better services to the customers. Specifically, Simons testified that Lauer's main focus was to sell products as well as to engage account management activities, which would lead to sales. Simons Deposition, 50:10–20. There can be no real or bona fide question that Lauer's job responsibilities were dramatically different from the plaintiff's tasks.

In summary, the plaintiff has not presented any evidence indicating that similarly situated male employees were treated more favorably. The plaintiff has neither discussed nor present[ed] evidence as to employees on the data delivery team other than Lauer and Monahan, and a reasonable jury could not find that the plaintiff was similarly situated to either of them. The plaintiff was obviously displeased that these two employees were working in the same data delivery team of the company and were making more money than she was, but she cannot contest this disparate treatment on the ground that they were similarly situated and that this

[1] As another example, the plaintiff was also asked whether Luke Manney, another male sales employee who was receiving commissions for sales, had essentially the same role that she did, to which she replied, "[n]o, the same as supposedly [Lauer]." Defendant's Motion for Summary Judgment, exhibit A, Plaintiff's Deposition, 77:5–9. The answer to this question also indicates that the plaintiff had a different role than Lauer.

similarity creates an inference of gender discrimination. The plaintiff's job was dissimilar to her male counterparts; therefore, her salary may be expected to be dissimilar to these individuals. Moreover, the plaintiff's position on the data delivery team was not filled by someone outside her protected class.

B

Legitimate, Nondiscriminatory Reason

Furthermore, assuming arguendo that the plaintiff established a prima facie case of discrimination, the defendant has provided a nondiscriminatory reason for the plaintiff's termination, and the plaintiff has failed to provide any sufficient evidence indicating that these reasons were pretextual.

"Once an employee has made a prima facie case, the employer may rebut by stating a legitimate, nondiscriminatory justification for the employment decision in question." *Phadnis* v. *Great Expression Dental Centers of Connecticut, P.C.*, supra, 170 Conn. App. 90. "This, too, is a burden of production, and the defendant merely needs to state a nondiscriminatory reason. The defendant does not have to prove the absence of discrimination." *Craine* v. *Trinity College*, supra, 259 Conn. 643.

In the present case, Simons, the copresident and chief operating officer of the defendant, states that the reason for the plaintiff's termination was because the defendant's business was doing poorly, especially in the data delivery unit. The defendant has experienced layoffs and budget cuts. There were actually two sets of layoffs in 2016, one in June and one in October when the plaintiff was terminated. Simons also stated that the data delivery team was restructured. In October of 2016 when the plaintiff was laid off, four to six other people were also laid off, and they ranged from new employees to employees who worked at the defendant for just as

long as the plaintiff. The plaintiff even stated in her deposition that the company was doing poorly in 2015 and states that there were freezes on raises in 2015 and cuts in pay around the same time. Therefore, the evidence presented shows that the defendant had a legitimate, nondiscriminatory business reason for terminating the plaintiff.

C

Pretext

"[The plaintiff] now must have the opportunity to demonstrate that the [defendant's] proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination." (Internal quotation marks omitted.) *DaSilva* v. *Weik*, Superior Court, judicial district of Litchfield at Torrington, Docket No. CV-17-6014797-S (*Hon. John W. Pickard*, judge trial referee) (August 27, 2019). "[The plaintiff] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. . . . Employment discrimination therefore can be proven directly, with evidence that the employer was motivated by a discriminatory reason, or indirectly, by proving that the reason given by the employer was pretextual." (Internal quotation marks omitted.) Id. "The plaintiff, in proving pretext by a preponderance of the evidence, can rely on evidence used in setting forth her prima facie case." Id. "A showing that similarly situated employees belonging to a different . . . group received more favorable treatment can also serve as evidence that the employer's proffered legitimate, [nondiscriminatory] reason for the adverse job action was a pretext for discrimination." *Graham* v. *Long Island Rail Road*, supra, 230 F.3d 43.

The plaintiff here presents two insufficient reasons to support her claim that the defendant's reason for her termination is pretextual: (1) the plaintiff made far less than her fellow male employees; and (2) Simons' characterization of his employment relationship with the plaintiff is different in his deposition than his testimony in another civil action involving the defendant.

First, the plaintiff argues that she made far less than her male counterparts. Based on the deposition testimony, Lauer made around $125,000 in addition to commission in 2016, Monahan made between $100,000 to $115,000, and the plaintiff made between $88,000 to $92,000. As discussed above, the plaintiff was not a salesperson, nor was she a project manager; therefore, it may be both expected and reasonable that her pay would be different from these other employees. Simply because they all worked on the data delivery team does not mean, as the plaintiff insists, that their pay should be similar to her pay, particularly when their job descriptions differed, as previously discussed. Therefore, the fact that the plaintiff was paid less than these male employees does not show that the defendant's reason for the plaintiff's termination is pretextual.

Second, the plaintiff contends that the pretextual nature of the defendant's reason for her termination can be found in Simons' differing explanations for her termination. However, a careful review of his testimony, even in the light most favorable to the plaintiff, does not establish any factual basis to support this claim.

In Simons' deposition, he consistently states that the reason for the plaintiff's termination was due to the business doing poorly and a restructuring of the data delivery team. He also characterizes his relationship with the plaintiff as being good in the beginning of her employment, but [that it] then turned negative after she moved to New Hampshire in 2011. He explains that he ignored or tolerated the plaintiff's negative behavior

in the workplace because she worked hard and did an overall good job. The plaintiff contends that, in Simons' testimony in a separate civil case, he states that the reason for the termination was due to her behavior.[2] The court can find no bona fide factual basis for this contention. In his trial testimony, Simons again states that the cause of the plaintiff's termination was due to a change in business. He also testifies that his relationship with the plaintiff became negative after she moved to New Hampshire. His entire trial testimony about the plaintiff is consistent with his deposition testimony. Even on a motion for summary judgment, the plaintiff must present some factual basis to support her claims and cannot rely solely on naked claims or arguments unsupported by any actual evidence or at least some evidence from which reasonable, supportive inferences may be made. The plaintiff has failed to make this showing here and, in turn, has failed to show that there is any genuine issue of material fact regarding whether the defendant's explanation for her termination is pretextual.

II

RETALIATION

The second count of the plaintiff's complaint alleges that the defendant terminated her in retaliation for her complaining about the gender discrimination in the workplace and the pay disparity between men and women at the company. The defendant essentially argues that the plaintiff's retaliation claim fails as a matter of law because of the long period of time between her complaints and her termination. In response, the plaintiff contends that the defendant's argument raises material issues of disputed facts which cannot be resolved on motion. The court agrees with the defendant.

[2] The plaintiff attaches the full testimony of Simons at this trial to her supplemental objection to the defendant's motion for summary judgment (#130).

"Federal and state law retaliation claims are reviewed under the burden-shifting approach of *McDonnell Douglas* [*Corp.*] . . . ." *Kwan* v. *Andalex Group LLC*, 737 F.3d 834, 843 (2d Cir. 2013). The plaintiff must first establish a prima facie case of retaliation. "To establish a prima facie case of retaliation, an employee must show (1) the employee was engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action." (Internal quotation marks omitted.) *Samakaab* v. *Dept. of Social Services*, Superior Court, judicial district of Hartford, Docket No. CV-15-6056335-S (March 10, 2016) (reprinted at 170 Conn. App. 54, 62, 173 A.3d 1007), aff'd, 178 Conn. App. 52, 173 A.3d 1004 (2017).

"Once a prima facie case of retaliation is established, the burden of production shifts to the employer to demonstrate that a legitimate, [nondiscriminatory] reason existed for its action. . . . If the employer demonstrates a legitimate, nondiscriminatory reason, then [t]he burden shifts . . . back to the plaintiff to establish, through either direct or circumstantial evidence, that the employer's action was, in fact, motivated by discriminatory retaliation." (Citation omitted; internal quotation marks omitted.) *Summa* v. *Hofstra University*, 708 F.3d 115, 125 (2d Cir. 2013).

In the present case, the plaintiff's claim for retaliation is based on her asking for a pay increase after discovering that some male employees made more money than she did at the defendant. The defendant argues that the only prong of the prima facie case for retaliation that is at issue is the fourth prong where the plaintiff has to prove a causal connection between the protected activity and the adverse employment action. The following additional information is necessary for the determination of the retaliation claim.

The plaintiff first spoke to Simons about a pay raise to match her male counterparts in late 2015. Simons at that time stated that he would look at the salaries of the data delivery team to see if anything needed to be adjusted. The plaintiff later brought up raising her salary in April of 2016. The plaintiff was terminated in October of 2016. Between the last time the plaintiff spoke to Simons about her salary and her termination there was a round of layoffs in June of 2016. Six months passed between the last time the plaintiff spoke to Simons about her salary and when she was terminated, and about a year passed between when she spoke to Simons about the pay differences and her termination.

The plaintiff argues that the six months between when she spoke to Simons about her salary and when she was terminated are sufficient to establish causation and to establish a prima facie case of retaliation. "[T]he temporal proximity between [the] two events as circumstantial evidence of causation . . . standing alone, is insufficient." *Dixon* v. *International Federation of Accountants*, 416 Fed. Appx. 107, 110 (2d Cir. 2011). "Moreover, Second Circuit precedent makes clear that the relevance of temporal proximity to the question of whether there is a causal nexus between a plaintiff's protected activity and the defendant's allegedly retaliatory action will depend on the facts and circumstances of each particular case." (Internal quotation marks omitted.) *Bryant* v. *Greater New Haven Transit District*, 8 F. Supp. 3d 115, 133 (D. Conn. 2014). The United States Supreme Court has stated that the two events must be " 'very close' " and that a proximity of three months or more is insufficient where the court is solely relying on temporal proximity. *Clark County School District* v. *Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001). Therefore, on the basis of this precedent, the plaintiff has not established a prima facie case for retaliation, so the burden does not shift to the defendant. Because there is no genuine issue of material

fact on whether the plaintiff has established a prima facie case of retaliation, the defendant's motion for summary judgment as to the plaintiff's retaliation claim must be granted.

CONCLUSION

For these reasons, the defendant's motion for summary judgment is granted.

STATE OF CONNECTICUT *v.* JAMIE LOVE (AC 43484)

Moll, Alexander and Suarez, Js.

Syllabus

The defendant, who had been convicted, on a plea of guilty, of assault in the first degree and carrying a pistol without a permit, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. The defendant claimed that the trial court erred by failing to appoint counsel pursuant to statute (§ 51-296 (a)) and *State* v. *Casiano* (282 Conn. 614). *Held* that the trial court improperly denied the defendant's motion to correct an illegal sentence without appointing counsel: the central holding of *Casiano* is that, pursuant to § 51-296 (a), a self-represented defendant has the right to counsel to determine whether a sound basis exists for a motion to correct an illegal sentence, and the defendant's specific reference to *Casiano* in his motion constituted an affirmative request for counsel; accordingly, the judgment of the trial court denying the defendant's motion to correct an illegal sentence was reversed and the case was remanded in order for counsel to be appointed in accordance with *Casiano*.

Argued February 4—officially released April 6, 2021

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree, conspiracy to commit assault in the first degree, criminal use of a firearm, carrying a pistol without a permit, and unlawful discharge of a firearm, brought to the Superior Court in the judicial district of Waterbury, where the defendant was presented to the court, *Fasano*, *J.*, on a plea

of guilty to assault in the first degree and carrying a pistol without a permit; judgment of guilty in accordance with the plea; thereafter, the court, *Hon. Roland D. Fasano*, judge trial referee, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Reversed; further proceedings.*

David B. Bachman, assigned counsel, for the appellant (defendant).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, was *Maureen Platt*, state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, Jamie Love, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant claims that the court erred by failing to appoint counsel pursuant to General Statutes § 51-296 (a)[1] and *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007). We agree and, accordingly, reverse the judgment of the trial court and remand the case for further proceedings in accordance with this opinion.

The following undisputed facts and procedural history are relevant to this appeal. On November 9, 2017, the defendant pleaded guilty pursuant to the *Alford* doctrine[2] to assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and to carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On January 31, 2018, the court imposed a total

[1] General Statutes § 51-296 (a) provides in relevant part: "In any criminal action . . . the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender, assistant public defender or deputy assistant public defender to represent such indigent defendant . . . ."

[2] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

effective sentence of eight years of incarceration followed by ten years of special parole.

Thereafter, on or about June 20, 2019, the defendant, representing himself, filed a motion to correct an illegal sentence and an accompanying memorandum of law, arguing, inter alia, that the sentencing court was not provided with accurate information; that he was not given an opportunity to review the presentence investigation report and therefore was unable to correct potential mistakes contained therein; and that a conflict of interest existed between his trial counsel and the prosecutor. Significant for purposes of this appeal, the defendant stated that his motion was made "[p]ursuant to . . . *State* v. *Casiano* . . . ." On June 30, 2019, the court, without conducting a hearing, denied the defendant's motion "'[without] prejudice pending the outcome of habeas filed by petitioner."

On appeal, the defendant argues that the court improperly denied his motion to correct an illegal sentence because it did not appoint counsel pursuant to § 51-296 (a) to determine whether there was a "sound basis" for his motion as required by *State* v. *Casiano*, supra, 282 Conn. 627–28. The state argues that the right to appointed counsel under *Casiano* is not self-executing. The state contends that, because the defendant made only a cursory reference to "*State* v. *Casiano*" in his motion, this reference was not an affirmative request for counsel. Although we agree with the state that the appointment of counsel for a motion to correct an illegal sentence is not self-executing and that a request for counsel must be made before counsel is appointed,[3] we

[3] The right to counsel in connection with the filing of a motion to correct an illegal sentence is statutory in nature. See *State* v. *White*, 182 Conn. App. 656, 666, 191 A.3d 172, cert. denied, 330 Conn. 924, 194 A.3d 291 (2018). A defendant must affirmatively request the appointment of counsel in connection with his motion and the trial court must grant such request for the initial inquiry of determining whether a sound basis exists for the motion. See *State* v. *Francis*, 322 Conn. 247, 267, 140 A.3d 927 (2016); *State* v. *Casiano*, supra, 282 Conn. 627–28; see also Practice Book § 44-2 ("[i]n any

determine that the defendant's reference to *Casiano* in his motion constituted an affirmative request for counsel.

Our analysis is guided by the following legal principles. "[I]t is axiomatic that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner. . . . A motion to correct an illegal sentence constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates. . . . Indeed, [i]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack. . . . Therefore, the motion is directed to the sentencing court, which can entertain and resolve the challenge most expediently." (Citation omitted; internal quotation marks omitted.) *State* v. *Francis*, 322 Conn. 247, 259–60, 140 A.3d 927 (2016).

A review of *State* v. *Casiano*, supra, 282 Conn. 614, and its progeny will facilitate the resolution of this appeal. In *Casiano*, our Supreme Court analyzed whether the term "any criminal action" in § 51-296 (a) encompassed a motion to correct an illegal sentence and, thus, whether the appointment of counsel was required for indigent defendants with respect to such motions. Our Supreme Court determined that, in connection with a motion to correct an illegal sentence filed pursuant to Practice Book § 43-22, "a defendant has a right to the appointment of counsel for the purpose of determining whether a defendant who wishes to file such a motion has a sound basis for doing so.

other situation in which a defendant is unable to obtain counsel by reason of indigency, and is . . . statutorily entitled to the assistance of counsel, such defendant may *request* the judicial authority to appoint a public defender in accordance with Section 44-1" (emphasis added)).

If appointed counsel determines that such a basis exists, the defendant also has the right to the assistance of such counsel for the purpose of preparing and filing such a motion and, thereafter, for the purpose of any direct appeal from the denial of that motion." *State* v. *Casiano*, supra, 627–28.

In *State* v. *Francis*, supra, 322 Conn. 259, our Supreme Court concluded that it was harmful error for a trial court to fail to appoint counsel to represent the defendant "even for the limited purpose of determining whether a sound basis existed for him to file his motion [to correct illegal sentence]." In that case, the trial court did not appoint a public defender for the purposes of sound basis review after the defendant had filed his third motion to correct an illegal sentence.[4] Id., 268. Instead, the court clerk's office alerted a public defender, who reported to the court that it was his opinion that the defendant's motion "does not have sufficient merit." Id., 252–53. The defendant objected and requested that the public defender state the specific grounds and reasoning on which he had formed his conclusion. Id., 255. The trial court denied the request and subsequently denied the defendant's motion. Id.

Consistent with the holding of *Casiano*, our Supreme Court in *Francis* outlined the following procedure to be used in a motion to correct an illegal sentence: "[W]hen an indigent defendant requests that counsel be appointed to represent him in connection with the filing of a motion to correct an illegal sentence, the trial court must grant that request for the purpose of determining whether a sound basis exists for the motion. . . . If, after consulting with the defendant and examining the record and relevant law, counsel determines that

[4] In *Francis*, the defendant himself did not request counsel under *Casiano*. Instead, the court, sua sponte, inquired as to whether the defendant understood that he had the right to counsel under *State* v. *Casiano*, supra, 282 Conn. 627–28. See *State* v. *Francis*, supra, 322 Conn. 252.

no sound basis exists for the defendant to file such a motion, he or she must inform the court and the defendant of the reasons for that conclusion, which can be done either in writing or orally. If the court is persuaded by counsel's reasoning, it should permit counsel to withdraw and advise the defendant of the option of proceeding as a self-represented party." (Citation omitted; footnote omitted.) Id., 267–68. The court concluded that the trial court's denial of counsel to represent the defendant constituted harmful error and remanded the case for further proceedings. Id., 268–70.

In *State* v. *White*, 182 Conn. App. 656, 670, 191 A.3d 172, cert. denied, 330 Conn. 924, 194 A.3d 291 (2018), this court further outlined the role of appointed counsel in a motion to correct an illegal sentence under *Casiano*, and noted the dual roles of counsel in such circumstance. This court stated: "Perhaps the role can best be described by requiring traditional standards of advocacy in the preparatory stage, including thorough legal and factual review of the record with an eye to developing a plausible favorable position, but also requiring objective candor in presenting the client's best claims to the court and his client. A client may well not be pleased by his attorney's presentation of a negative appraisal, but this tension results from the dual nature of the role required by *Casiano* and *Francis* . . . ." Id.

With this background in mind, we turn to the specific facts at issue in the present case. The limited question on appeal is whether the defendant's reference to "*State* v. *Casiano*" in his motion to correct an illegal sentence constituted a request for counsel under § 51-296 (a) and *State* v. *Casiano*, supra, 282 Conn. 614. We conclude that it did.

In his motion to correct an illegal sentence the defendant stated that his motion was made "[p]ursuant to . . . *State* v. *Casiano* . . . ." The state argues that this

cursory reference to *Casiano* did not constitute a request for counsel and could be read as supporting only a general reference to the filing of a motion to correct an illegal sentence. We disagree.

The central holding of *Casiano* is that, pursuant to § 51-296 (a), a self-represented defendant has the right to counsel to determine whether a sound basis exists for a motion to correct an illegal sentence. *State* v. *Casiano*, supra, 282 Conn. 627; see also *State* v. *Francis*, supra, 322 Conn. 261. When a self-represented defendant specifically refers to "*State* v. *Casiano*" in a motion to correct an illegal sentence, we conclude that this reference is sufficient to constitute an affirmative request for counsel.[5]

In the present case, the court made no inquiry of the defendant as to his invocation of *Casiano* in his motion to correct an illegal sentence and instead summarily disposed of the motion without holding a hearing.[6] In

[5] The state contends that the defendant did not properly cite *Casiano* because he provided no citation to the reported decision, stating only "*State* v. *Casiano*," and that this incomplete citation could not have put the court on notice that the defendant was actually referring to *State* v. *Casiano*, supra, 282 Conn. 614. We find this argument unavailing given our "established policy . . . to be solicitous of [self-represented] litigants"; (internal quotation marks omitted) *State* v. *Cotto*, 111 Conn. App. 818, 820, 960 A.2d 1113 (2008); and the fact that "*Casiano*" has become a well-known shorthand for a self-represented defendant's right to counsel to determine whether a sound basis exists for a motion to correct an illegal sentence.

The state additionally argues that, because the defendant did not file an application for appointment of counsel with his motion, the court could not have known that the defendant intended to invoke his right to counsel. The state contends that the "application [for appointment of counsel], or its functional equivalent, is the only avenue by which a court can determine . . . whether a defendant seeks to avail himself of his statutory right to counsel . . . ." We disagree. An application for appointment of counsel is not required to be attached to a motion to correct an illegal sentence to properly notify the court that the defendant may wish to invoke his right to counsel.

[6] In *State* v. *Miller*, 186 Conn. App. 654, 659, 200 A.3d 735 (2018), this court held that a trial court "is not authorized to dispose summarily of a motion to correct an illegal sentence," and concluded that a hearing is necessary before disposing of the motion. In that case, the defendant also

light of the case law set forth herein, we conclude that the court improperly denied the motion without appointing counsel and we remand the case so that counsel may be appointed to represent the defendant in accordance with *Casiano*.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

JOE BALTAS *v.* COMMISSIONER OF CORRECTION (AC 43836)

Prescott, Cradle and DiPentima, Js.

Syllabus

The petitioner, who had been sentenced to ninety-five years of incarceration, sought a writ of habeas corpus, claiming that his constitutional rights were violated when he was placed in administrative segregation. Pursuant to the applicable rule of practice (§ 23-29 (4)), the habeas court rendered judgment dismissing the petitioner's appeal as moot because the petitioner was no longer in administrative segregation. Thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that because the petitioner failed to address the threshold question of whether the habeas court abused its discretion in denying his petition for certification to appeal, he was not entitled to appellate review and this court declined to review his claims on appeal.

Argued February 16—officially released April 6, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Chaplin*, *J.*, denied the respondent's motion to dismiss; thereafter, the case was tried to the court; judgment dismissing the petition; subsequently, the court

raised the claim that the trial court failed to protect his right to counsel under *Casiano*. Id., 655 n.1. This court did not address that claim, however, noting that "on remand the defendant will have an opportunity to obtain counsel from the trial court in accordance with *Casiano*." Id., 656 n.1.

denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Joe Baltas, self-represented, the appellant (petitioner).

Zenobia G. Graham-Days, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare E. Kindall*, solicitor general, for the appellee (respondent).

Opinion

DiPENTIMA, J. Following the denial of his petition for certification to appeal, the self-represented petitioner, Joe Baltas, appeals from the judgment of the habeas court dismissing as moot his petition for a writ of habeas corpus. Because the petitioner failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal, we dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our disposition of this appeal. The petitioner is a state prisoner currently serving a total effective sentence of ninety-five years of incarceration. On December 21, 2016, Warden Henry Falcone of the Garner Correctional Institution in Newtown initiated a request for a hearing regarding the placement of the petitioner in administrative segregation "for safety and security concerns based on his extremely violent behavior and gang influence." On December 27, 2016, the petitioner received notice that a hearing would take place on December 30, 2016, "to determine whether [his] presence in general population present[ed] a threat to the safety and security of the institutional community due to repetitive disciplinary infractions and/or involvement in a serious incident." At the hearing, both the petitioner and another inmate, Stephen Curtis, provided written statements. On January 13, 2017, the petitioner received notice that Falcone's request had been approved, and the petitioner was placed in administrative segregation.

On that same date, the petitioner filed an appeal with the Department of Correction, claiming that his placement in administrative segregation was "unwarranted [and] improper." On January 30, 2017, the petitioner's appeal was denied.

On April 13, 2017, the petitioner filed a petition for a writ of habeas corpus, alleging that his constitutional rights were violated when he was placed in administrative segregation. The sole relief sought by the petitioner was his release from administrative segregation. On September 5, 2019, pursuant to a state agreement, custody of the petitioner was transferred to the Commonwealth of Massachusetts to continue his incarceration. On the same date, the respondent, the Commissioner of Correction, filed a motion to dismiss the habeas petition as moot because the petitioner was no longer in administrative segregation.

On September 11, 2019, the day that the habeas trial was scheduled to commence, the habeas court heard argument on the respondent's motion to dismiss and initially denied the motion.[1] The trial proceeded and, after its conclusion, the respondent filed a posttrial brief renewing his argument that there was no actual case or controversy because the petitioner was no longer in administrative segregation. On November 22, 2019, the court issued a memorandum of decision. The court noted that "the petitioner [was] no longer being held in Connecticut," and concluded that "there is no actual case or controversy at issue because the petitioner is no longer in administrative segregation." For these reasons, the court dismissed the petition as moot pursuant to Practice Book

[1] In denying the respondent's motion to dismiss, the court stated that, although "[the petitioner is in Massachusetts' custody . . . there's been no pleading indicating that the [administrative] segregation as argued has ended. The court is stuck without enough information to make the determination that that . . . would not affect his placement in Massachusetts based on the pleadings of the record."

§ 23-29 (4). On December 12, 2019, the petitioner filed a petition for certification to appeal, which was denied by the habeas court. This appeal followed.

The petitioner claims on appeal that (1) "the [habeas] court erred in dismissing [his] petition as moot," (2) "the [habeas] court based its ruling on errors of fact," (3) "the petitioner was entitled to [a] ruling on the merits of his petition," and (4) the habeas court denied the petitioner due process. The petitioner, however, has failed to brief the threshold issue of whether the habeas court abused its discretion in denying his petition for certification to appeal. Because a petitioner who has failed to brief that issue is not entitled to further appellate review; see *Goguen* v. *Commissioner of Correction*, 195 Conn. App. 502, 505, 225 A.3d 977, cert. granted, 335 Conn. 925, 234 A.3d 980 (2020); we decline to review his claims on the merits.

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . If this burden is not satisfied, then the claim that the judgment

of the habeas court should be reversed does not qualify for consideration by this court." (Internal quotation marks omitted.) *Goguen* v. *Commissioner of Correction*, supra, 195 Conn. App. 504.

The petitioner's appellate brief does not address the threshold question of whether the habeas court abused its discretion in denying his petition for certification to appeal. By failing to demonstrate that the denial of his petition for certification to appeal constituted an abuse of discretion, the petitioner has failed to satisfy the first prong of *Simms*. See *Simms* v. *Warden*, supra, 230 Conn. 612. Accordingly, we decline to review his claims on appeal.[2]

The appeal is dismissed.

In this opinion the other judges concurred.

[2] We note that our Supreme Court has granted certification to review this court's decision in *Goguen*, specifically, to determine whether this court "properly dismiss[ed] the self represented petitioner's appeal because he failed to brief whether the habeas court had abused its discretion in denying his petition for certification to appeal . . . ." *Goguen* v. *Commissioner of Correction*, 335 Conn. 925, 234 A.3d 980 (2020). In light of that, we briefly address the merits of the dismissal by the habeas court. In short, it is apparent from the record that the habeas court properly dismissed the underlying petition as moot.

"Mootness . . . implicates subject matter jurisdiction, which imposes a duty on the [trial] court to dismiss a case if the court can no longer grant practical relief to the parties. . . . Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition of affairs between the parties. . . . A case becomes moot when due to intervening circumstances a controversy between the parties no longer exists." (Internal quotation marks omitted.) *Paulino* v. *Commissioner of Correction*, 155 Conn. App. 154, 160, 109 A.3d 516, cert. denied, 317 Conn. 912, 116 A.3d 310 (2015).

The habeas court concluded that it could not grant the sole practical relief that the petitioner sought—removal from administrative segregation—because the petitioner, by his own admission, was no longer in administrative segregation at the time the habeas court rendered judgment. We agree that the habeas court properly determined that, at the time it rendered judgment, the case was moot. Moreover, we disagree with the petitioner's assertion on appeal that this case falls into one of the recognized exceptions to the mootness doctrine. Accordingly, even if the petitioner had briefed the threshold question of whether the habeas court had abused its discretion by denying certification to appeal, we would still conclude that the habeas court did not abuse its discretion in denying certification because it is not debatable among jurists of reason that the habeas court properly dismissed the habeas petition as moot.

TRICIA COCCOMO *v.* COMMISSIONER OF CORRECTION (AC 42933)

Alvord, Prescott and Moll, Js.

Syllabus

The petitioner, who had been convicted of manslaughter in the second degree with a motor vehicle, misconduct with a motor vehicle and operating a motor vehicle while under the influence of intoxicating liquor or drugs, sought a writ of habeas corpus, claiming that her trial counsel rendered ineffective assistance. The petitioner contended that she was prejudiced by counsel's responses to evidence of her blood alcohol content and consciousness of guilt in connection with a motor vehicle collision that killed the occupants of a vehicle that was struck by the petitioner's vehicle. The petitioner had consumed alcohol at a party prior to the accident. A paramedic at the accident scene drew and labeled five tubes of the petitioner's blood, which were placed in a biohazard bag and taken with the petitioner in an ambulance to a hospital. Each of the tubes had a different colored cap. A computer in the hospital's laboratory scanned the tubes and printed labels that identified the test to be performed on each tube of blood. After a hearing outside the jury's presence, the trial court denied the petitioner's motion to exclude the blood alcohol content evidence. W, a laboratory director at the hospital, then testified that a printout from the laboratory's computer had indicated that the type of tube normally used to test blood alcohol content had a cap that was different in color from the caps on the five tubes that were in the biohazard bag. The petitioner's counsel thereafter did not renew his motion to exclude the blood alcohol content evidence on chain of custody grounds. The state also offered consciousness of guilt evidence that, shortly after the accident, the petitioner had executed a quitclaim deed transferring her one-half interest in her home to her mother. Defense counsel objected unsuccessfully to the admission of that evidence on the ground that, although evidence of a transfer of property to shield assets from recovery may be admissible in a civil case as probative of liability, it was not admissible to establish consciousness of guilt in a criminal case, and that the prejudicial effect of the evidence outweighed its probative value. *Held*:

1. The petitioner could not prevail on her claim that trial counsel rendered deficient performance when he did not renew his motion to exclude the blood alcohol content evidence after W's testimony or discuss it during closing argument to the jury:

   a. There was no reasonable probability that the trial court would have excluded the blood alcohol evidence if counsel had renewed his objection or that a reviewing court would have concluded that the trial court abused its discretion in overruling such an objection: counsel's more

than sufficient, reasonable explanation for the discrepancy between the color of the tube cap in the hospital's records and the color of the cap on the tube into which the paramedic drew the petitioner's blood did not undermine the chain of custody evidence so as to require the exclusion of the test results, as the evidence tended to demonstrate that the hospital and the ambulance service used tubes with different colored caps relative to blood alcohol testing, the tubes the ambulance service used were a smaller, acceptable version of the tubes the hospital used, and, as it was unclear whether the hospital's computer system had an option in a drop-down menu to describe the color of the tube that contained the blood sample being tested, it was likely that the technician inputting the data selected the option that showed the type of tube used by the hospital, despite its not having been the precise color of the cap on the actual blood tube from which the sample tested was drawn; moreover, the state elicited substantial testimony tracing the chain of custody of the petitioner's blood samples, no witness from the laboratory testified as to any confusion, problems or mix-ups in processing the laboratory's work at the time the blood test was conducted, and the only other blood sample that was tested that night, which was from another patient, showed no detectable alcohol, a result that made it highly unlikely that it came from the petitioner in light of her admissions and other evidence that she drank a significant amount of alcohol before the accident.

b. The habeas court properly concluded that the petitioner failed to establish that her counsel rendered deficient performance by failing to emphasize during closing argument W's testimony regarding the discrepancy in the color of the test tube caps: the petitioner did not demonstrate that there was a reasonable probability that the outcome of the trial would have been different had counsel emphasized W's testimony, as counsel gave a well reasoned, detailed closing argument in which he attempted to undermine the reliability of the blood alcohol test result by focusing on discrepancies in the collection, labeling and testing of the petitioner's blood, he highlighted the testimony of the medical professionals and witnesses who had attended the party that she did not exhibit behavior there that was consistent with intoxication, and, had counsel emphasized W's testimony, the state could have responded by focusing on facts that provided a reasonable explanation for the discrepancy; moreover, as there was strong evidence of the petitioner's guilt, which included her statement to a paramedic at the accident scene that she had been drinking at the party, the petitioner failed to establish that she was prejudiced by her counsel's failure during closing argument to emphasize W's testimony.

2. The habeas court properly concluded that the petitioner was not prejudiced by her counsel's performance with respect to consciousness of guilt evidence concerning the transfer of her interest in her home to her mother shortly after the accident:

a. Testimony from witnesses that counsel decided not to call, who would have corroborated the petitioner's explanation that she was planning

to divorce her husband and wanted to protect her mother's finances from him, was not reasonably likely to have resulted in the exclusion of the property transfer evidence or changed the outcome of the trial, as the petitioner did not initiate divorce proceedings until fourteen months after the accident, which placed in issue her motivation for the transfer so soon after the accident, and, as the evidence of the property transfer itself was mundane, it was unlikely that the jury gave significant credence to the state's contention that it evidenced a guilty conscience. b. The petitioner failed to prove that her counsel undermined her innocent explanation for the property transfer when he elicited from her testimony that her interest in the property was transferred back to her because the initial transfer to her mother was inappropriate; it was unlikely that the trial was impacted by that single response from the petitioner, given the collateral relationship of the property deed when viewed against the substantial direct evidence against her, as the trial court sustained the state's objection to her testimony and, in its charge to the jury, instructed that the jury was not to consider testimony that had been stricken, which it must be presumed the jury followed in the absence of evidence to the contrary.

Argued October 21, 2020—officially released April 6, 2021

Procedural History

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

Damian K. Gunningsmith, assigned counsel, with whom was *Drew Cunningham*, assigned counsel, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, chief state's attorney, and *Joseph C. Valdes* and *Brenda L. Hans*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

PRESCOTT, J. This habeas corpus action arises out of the conviction of the petitioner, Tricia Coccomo, of multiple offenses related to a drunken driving accident

in which she caused the death of three individuals. She appeals from the judgment of the habeas court denying her petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court improperly concluded that her trial counsel had not rendered constitutionally ineffective assistance in the manner in which he responded to evidence of the petitioner's (1) blood alcohol content and (2) consciousness of guilt. We affirm the judgment of the habeas court.

The following facts, as set forth by our Supreme Court on the petitioner's direct appeal, are relevant to the claims on appeal. "On the evening of July 26, 2005, the [petitioner] attended a dinner party hosted by Louise Orgera at her home on Dannell Drive in the city of Stamford. Orgera had prepared two pitchers of sangria, each containing a 'double bottle' of wine, to which the party guests helped themselves. Between the time that the [petitioner] arrived at the party shortly after 7 p.m. and the time that she left at approximately 9 p.m., she consumed approximately one and three quarters cups of sangria.

"After leaving the party, the [petitioner] was driving northbound on Long Ridge Road at approximately 9:30 p.m. when her vehicle crossed the center line and collided with a southbound vehicle occupied by James Inverno, Barbara Inverno and Glenn Shelley. The estimated combined speed of the impact was ninety miles per hour, and both vehicles sustained severe damage. All three occupants in the other vehicle died as a result of the injuries that they incurred in the collision. The [petitioner] suffered broken bones in her left foot and lacerations, and was transported to Stamford Hospital (hospital), where a blood test revealed that she had a blood alcohol content of 241 milligrams per deciliter or 0.241 percent. It was estimated that the [petitioner's] blood alcohol content at the time of the collision was

approximately 250 milligrams per deciliter or 0.25 percent." *State* v. *Coccomo*, 302 Conn. 664, 666–67, 31 A.3d 1012 (2011).

The petitioner was charged with numerous offenses and was convicted, following a jury trial, of three counts of manslaughter in the second degree with a motor vehicle in violation of General Statutes § 53a-56b (a), three counts of misconduct with a motor vehicle in violation of General Statutes § 53a-57 (a), and one count of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of General Statutes § 14-227a (a) (2). Id., 667.[1] On direct appeal, this court declined to review the petitioner's unpreserved claim that the trial court improperly had admitted evidence of her blood alcohol content in light of a discrepancy in the evidence regarding the color of the test tube cap on the vial containing a sample of her blood. *State* v. *Coccomo*, 115 Conn. App. 384, 394, 396, 972 A.2d 757 (2009). This court reversed the petitioner's conviction, however, concluding that the trial court improperly had admitted consciousness of guilt evidence. Id., 386. Following the granting of the state's petition for certification to appeal, our Supreme Court reversed the decision of this court and affirmed the petitioner's conviction. *State* v. *Coccomo*, supra, 302 Conn. 666.

On September 26, 2016, the petitioner filed a petition for a writ of habeas corpus alleging ineffective assistance of her trial counsel, Michael Sherman. Count one of the petition alleged various ways in which Sherman was ineffective in responding to the evidence of the petitioner's blood alcohol content. Count two of the petition alleged various ways that Sherman was ineffective in response to consciousness of guilt evidence

[1] The petitioner was sentenced to a total effective term of twenty years of incarceration, execution suspended after twelve years, followed by five years of probation and a $1000 fine. *State* v. *Coccomo*, 115 Conn. App. 384, 391, 396, 972 A.2d 757 (2009).

offered by the state that, shortly after the accident, the petitioner had executed a quitclaim deed transferring her interest in her home to her mother.

Following a habeas trial on July 5 and 6, 2018, the habeas court, *Newson*, *J.*, issued a memorandum of decision denying the petition. The habeas court thereafter granted the petitioner certification to appeal to this court. The petitioner then filed the present appeal, claiming that the habeas court improperly concluded that Sherman had not rendered ineffective assistance of counsel with regard to both evidence of her blood alcohol content and her consciousness of guilt evidence. Additional facts will be set forth as necessary.

Before addressing the petitioner's specific claims on appeal, we first set forth the applicable law governing a claim of ineffective assistance of counsel and our appellate standard of review. "It is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings . . . . This right arises under the sixth and fourteenth amendments to the United States [c]onstitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: [A] performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish

that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for [his counsel's] ineffectiveness, the outcome would have been different. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . The court, however, may decide against a petitioner on either prong, whichever is easier." (Internal quotation marks omitted.) *Francis* v. *Commissioner of Correction*, 182 Conn. App. 647, 651–52, 190 A.3d 985, cert. denied, 330 Conn. 903, 191 A.3d 1002 (2018).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are entitled to great weight. . . . Furthermore, 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. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citation omitted; internal quotation marks omitted.) *Rogers* v. *Commissioner of Correction*, 194 Conn. App. 339, 346–47, 221 A.3d 81 (2019).

I

The petitioner asserts two related claims regarding the blood alcohol content evidence admitted at trial. First, she claims that the habeas court improperly concluded that she failed to demonstrate that she was prejudiced by Sherman's failure to object, on chain of custody grounds, to evidence of her blood alcohol content

following testimony from a hospital employee regarding a discrepancy between the color of the test tube used to draw the petitioner's blood and the color of the test tube listed in the hospital's computer records.[2] The petitioner further claims that the habeas court improperly concluded that she failed to demonstrate that Sherman engaged in deficient performance by failing to argue the chain of custody issue in closing argument, and that, even if his performance was deficient, the petitioner suffered no prejudice. We disagree with both of the petitioner's assertions.

The following testimony, as summarized by our Supreme Court on direct appeal, was elicited at trial and is relevant to the disposition of the petitioner's claim. "[Paramedic Kirsten] Engstrand testified that she drew five tubes of the [petitioner's] blood, each with a different colored cap, namely, gold, green, pink, purple and blue, placed the tubes in a biohazard bag, rolled the bag up, and taped it to the [petitioner's] intravenous fluid bag, all before the ambulance arrived at the hospital. Although Engstrand did not label the blood tubes or the biohazard bag, she stated that, upon arriving at the hospital, she placed the intravenous fluid bag and the biohazard bag containing the tubes on or between the [petitioner's] legs. She then turned the [petitioner's] care over to [Toren] Utke, the [hospital] nurse who met Engstrand and the [petitioner] when the ambulance arrived at the hospital.

"Utke testified that Engstrand identified the biohazard bag as belonging to the [petitioner] and that he left the bag with the [petitioner] while he went to obtain the printed labels produced for each patient during the hospital registration process. At that time, Shelley, the

[2] As to this portion of the petitioner's claim, the habeas court concluded that, because the petitioner had suffered no prejudice, it need not address the adequacy of Sherman's performance.

only other patient in the trauma room, was approximately twenty-five feet away from the [petitioner] and was separated from the [petitioner] by several curtains. Utke stated that he knew the blood in the biohazard bag was the [petitioner's] blood because Engstrand had informed him that it was, the bag was taped to the [petitioner's] intravenous fluid bag and each emergency medical team dealt with only one person at a time. Utke stated that, after he obtained the sheet of printed labels containing information identifying the [petitioner], he affixed a label to each tube of blood, initialed the labels, returned the tubes and a requisition sheet listing the tests to be performed to the biohazard bag, placed the bag in a special canister for transport to the laboratory and sent the canister to the laboratory through the hospital's pneumatic tube system. Utke also testified that the labels contained bar codes and that all of the other documentation pertaining to the [petitioner] contained printed labels from the same label sheet.

"No witness recalled testing the [petitioner's] blood after it arrived at the laboratory, but William H. Wilson, the administrative director of the laboratory, testified as to the procedures that were typically followed at the time in question. Wilson explained that the technician receiving the canister would take the biohazard bag out of the canister, open it, compare the name on the blood tube labels with the name on the requisition sheet to make sure they matched and then order the requested tests through the laboratory computer system by identifying the name of the patient and the tests to be performed. If a label indicated the time that the blood was drawn, the technician would enter that time into the system, but, if no time was indicated, the computer would default to the time that the information was entered into the system. Similarly, if the label contained the initials of the person who had drawn the blood, that person's initials would be entered into the system. Following

entry of this information, the computer would scan the tests to be performed and print out a new label for each tube containing the patient's name, a laboratory identification number, a new bar code and the tests to be performed on the blood in that tube. The technician would then compare the name on the new laboratory label and the name on the label affixed to each tube by the emergency department staff to determine that the names matched before placing the new bar coded and numbered laboratory label over the previous label. At that point, the technician would centrifuge the bar coded tubes, if necessary, before setting them on a rack between the processing and testing areas. Once inside the testing area, the tubes would be placed in the testing machine, which would read the bar code on each tube and perform the requested tests. In short, once the new bar coded label was placed on the tube and the tube was accepted for testing, there would be no human intervention, and the machine would mechanically read the label, conduct the tests and produce a report containing the test results. At the conclusion of this process, the technician would take the printout, check the computer screen to make sure the printout matched the information on the screen and verify and release the results, which would be communicated back to the emergency department.

"With respect to the testing of the [petitioner's] blood, Wilson testified that, after checking the records for the night of the collision, it appeared that the blood from the [petitioner] and three other patients had been tested around the same time. Neither Wilson nor [Mariela] Borrero, the laboratory technician who processed the requisition, recalled any problems or mix-ups that night. *In responding to a question as to whether any of the five tubes used to draw the* [*petitioner's*] *blood was the type of tube normally used for testing blood alcohol content*,

Wilson testified that '[*t*]*he* [*type of*] *tube that was indicated in the computer is not in that bag.'* [3] *In other words, the computer printout indicated that the tube used to test the* [*petitioner's*] *blood alcohol content had a red and gray cap, but none of the five tubes in the* [*petitioner's*] *biohazard bag had a red and gray cap.* Wilson further explained, however, that, although a tube with a red and gray cap normally was used for testing blood alcohol content because it contained a gel that separates serum from red blood cells, a smaller tube with a gold cap, like one of the tubes in the [petitioner's] biohazard bag, contained the same gel and also could be used to test a person's blood alcohol content. In addition, Wilson explained that the computer printout describing each patient's test results contained a check mark indicating that the technician on duty had compared the printed report and the patient information with the computer results for accuracy." (Emphasis added; footnote added.) *State* v. *Coccomo*, supra, 302 Conn. 691–94.[4]

The following procedural history is also relevant to the disposition of this claim. On January 26, 2007, after the trial had started, the court held a hearing, outside the presence of the jury, on the petitioner's motion challenging the admissibility of the blood alcohol content evidence.[5] At this hearing, Wilson testified generally "about

[3] Prior to Wilson's testimony, the court admitted, as demonstrative evidence, exhibit 25, a bag containing five tubes that were representative of the type of tubes used to draw the petitioner's blood on July 26, 2005. Wilson's testimony that "[t]he tube that was indicated in the computer is not in that bag" was not based on a specific recollection of the actual tubes used to draw the petitioner's blood but, rather, was based on his review of the demonstrative evidence.

[4] Wilson further testified in front of the jury that, in October, 2005, the hospital changed its procedure for labeling blood tubes; under the new procedure, the blood tubes are not relabeled by the laboratory. This change in procedure was done to eliminate the potential that the laboratory could mislabel a blood sample.

[5] The habeas court noted that, although this motion purportedly was filed pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which involves

hospital and laboratory protocols relating to the collection, processing, and laboratory testing of blood samples, as well as the workings of some of the relevant machinery." Although the petitioner challenged the admissibility of the blood alcohol content evidence at this hearing, she did not assert a challenge on the basis of any discrepancy in the color of the test tube cap containing the sample of her blood because no such testimony had yet been elicited. Following the hearing, the trial court admitted the evidence of the petitioner's blood alcohol content, concluding that the chain of custody was sufficient to allow the jury to consider the test results.[6] Accordingly, the blood alcohol content test results were admitted into evidence that day through the testimony of James Sarnelle, the trauma surgeon on call on July 26, 2005. Wilson's later testimony regarding the color of the test tube cap, which was described in the records, took place in front of the jury on January 30, 2007. After

challenges to the reliability of scientific evidence, the hearing focused on a challenge to the chain of custody of the blood evidence.

The petitioner had filed a prior motion to suppress any and all of the blood evidence on the ground that the search warrant obtained by the police sought the analysis of blood that was drawn at the hospital, and the petitioner's blood was drawn in the ambulance before she arrived at the hospital. Following a hearing, the court denied this motion to suppress.

[6] In its ruling, the court stated: "I mean, there's a line of evidence here, which, if the jury chooses to accept it, that the [petitioner's] blood was drawn in the ambulance, and taped to a saline bag and then taken down by the emergency department nurse, and a label put on the tubes and put in this pneumatic system up to the lab and tested. And there's things that the defense will raise to question that chain of events, but I don't see it as sufficiently affecting the integrity of the sample so that the jury should not be in a position to weigh that evidence and make a decision as to its credibility.

"So, to the extent the [challenge pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)] is addressed to the actual machine that did the chemistry, I think the law is clear in Connecticut that that's an accepted method of testing blood, and is—that question has been settled law in Connecticut.

"As to the other matters the defense has raised, I do see them as going to the weight of the evidence, all in the nature of a chain of custody challenge. And I think the custody is sufficient to allow the jury to consider the test results."

Wilson testified in front of the jury that the "[t]he [type of] tube that was indicated in the computer is not in that bag," Sherman did not renew his prior objection to the admission of the blood alcohol content evidence.

In concluding that the trial court's admission of the blood alcohol content evidence did not constitute plain error,[7] our Supreme Court stated that "the testimony indicates that the procedures used in collecting, labeling and testing the [petitioner's] blood were straightforward and apparently free of errors and that, even though the administrative director of the laboratory and the technician who processed the requisition for the tests could not specifically recall testing the [petitioner's] blood, their testimony regarding the course of conduct and their inability to recall or identify any errors in the testing procedures at the time the blood was tested supports the conclusion that there was no break in the chain of custody.

"To the extent the . . . [petitioner claims] that the inconsistent evidence regarding the color of the blood tube caps indicates that the [petitioner's] blood alcohol test results could have been obtained from a sample of someone else's blood, we reiterate that the discrepancy arises solely from a single computer record and that Wilson merely testified that the tube identified in the computer printout as containing the [petitioner's] blood did not resemble any of the tubes in the biohazard bag." *State* v. *Coccomo*, supra, 302 Conn. 694–95.

[7] Because the Appellate Court concluded that this evidentiary claim had not been preserved adequately for appellate review, the petitioner argued in our Supreme Court, as an alternative ground for affirming the decision of the Appellate Court, that the trial court committed plain error in admitting the results of the blood alcohol test. *State* v. *Coccomo*, supra, 302 Conn. 678 n.6. Specifically, the petitioner challenged the admission of the test results "on the basis of a discrepancy between the type of tube used by the paramedics to draw her blood and the type of tube listed in the computer records as the one that was used to test her blood." Id.

In her habeas petition, the petitioner alleged, inter alia, that Sherman provided ineffective assistance of counsel by failing to renew the motion to exclude the blood alcohol content evidence in light of Wilson's testimony regarding the different colored tube cap. At the habeas trial, Sherman was asked about the discrepancy regarding the color of the test tube cap. In response, he indicated that Wilson's testimony was confusing and that he did not think it would be helpful for him to follow up regarding the discrepancy because of the technical nature of the testimony. Instead, Sherman focused on other aspects of the case. When asked about the fact that the "audit trail" of the testing performed on the petitioner's blood reflected that the blood sample came from a tube with a "red/gray" top, Sherman testified that it was his understanding that the description of the tube tested came from a computer screen drop-down menu that had limited choices.

In its decision, the habeas court focused on the issue created by Wilson's testimony in front of the jury that "[t]he tube that was indicated in the computer is not in that bag." The habeas court noted that this "subject . . . had not necessarily been addressed by Wilson during his testimony outside the presence of the jury." In considering the petitioner's claim, the habeas court noted Wilson's trial testimony that the tube that was used for blood alcohol testing, which "was not in that bag," was a red-gray speckled topped tube called a "tiger top" and that the "audit trail" of the blood alcohol testing performed on the petitioner indicated that the tube tested for the petitioner's blood had a "red/gray" top. As also noted by the habeas court, however, almost immediately after Wilson's statement regarding the "tiger top" tube not being in the bag, he testified that the gold topped tube in the Stamford Emergency Medical Services (EMS) array was an appropriate substitute for the standard tiger top tube; it was just a smaller version.

Furthermore, as the habeas court pointed out, it was undisputed that EMS did not carry "tiger top" tubes in their vehicles.

In its decision, the habeas court rejected the petitioner's claim because she failed to demonstrate prejudice as a result of Sherman's allegedly deficient performance. The court stated that, although "Wilson's statement provided obvious fodder for cross-examination, given the substantial direct evidence from the witnesses who actually handled the petitioner's blood, and the unrefuted testimony they provided about quality controls protocols they observed, there is no reasonable basis in law, or fact, upon which this evidence could have, or should have, been kept from the jury by the trial judge. . . . The petitioner's intoxication level was directly relevant to the operating under the influence charge, and consumption of alcohol was also relevant to the manslaughter charges. Therefore, evidence supporting or refuting intoxication was presumably admissible. . . . Further, all of the witnesses who testified to the direct handling of the petitioner's blood—paramedic Engstrand, nurse Utke, and lab technician Borrero—if believed, established an unbroken chain of custody from the drawing of the petitioner's blood to the reporting of the lab results. So, while the petitioner can legitimately argue that . . . Wilson's statement, if accepted for the meaning she advocates, conflicts with chain of custody evidence offered by other witnesses, there is no reasonable probability that the trial judge would have excluded the blood evidence, even had defense counsel specifically emphasized Wilson's lone statement." (Citations omitted; footnote omitted.) The habeas court concluded by stating that, "[i]n sum, given the totality of the evidence, [because] there is no reasonable basis upon which this court can conclude that the trial court could have, or would have, excluded the blood evidence from the jury's consideration . . . the

petitioner has suffered no prejudice. . . . Therefore, the claim fails, and there is no need for the [c]ourt to address defense counsel's performance." (Citation omitted.)

A

On appeal, the petitioner argues that the habeas court improperly concluded that she had not demonstrated prejudice as a result of Sherman's failure to object to the blood alcohol content evidence on chain of custody grounds following Wilson's testimony because it likely would have led the trial court to strike the previously admitted test results derived from the blood sample or, in the alternative, to success on appeal in challenging the trial court's overruling of such a renewed objection. We disagree.

We agree with the habeas court's conclusion that, given the totality of the evidence, there was no reasonable probability (1) that the trial court would have excluded the blood alcohol evidence from the jury's consideration if a renewed objection had been made or (2) that a reviewing court would conclude that the trial court abused its discretion by overruling a renewed objection to the admissibility of that evidence. "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court." Conn. Code Evid. § 1-3 (a). The admissibility of the blood alcohol test results in this case primarily revolved around the question of whether the blood tested was in fact drawn from the petitioner. In other words, the petitioner's claim raises a question of authentication: Are the blood alcohol test results what the state purports them to be?

Typically, "[t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be. Conn. Code Evid. § 9-1 (a)." (Internal quotation marks omit-

ted.) *State* v. *Smith*, 179 Conn. App. 734, 761, 181 A.3d 118, cert. denied, 328 Conn. 927, 182 A.3d 637 (2018). In such cases, "[t]he proponent need only advance prima facie proof that the proffered evidence is what it is claimed to be before the evidence may be admitted, with the ultimate determination of authenticity resting with the fact finder." *State* v. *Petitt*, 178 Conn. App. 443, 451, 175 A.3d 1274 (2017), cert. denied, 327 Conn. 1002, 176 A.3d 1195 (2018).

In many cases, a preliminary showing of authenticity is established by a witness with a basis of knowledge, often from the appearance and distinct nature of the evidence, that the item is in fact what it purports to be. See id., 452. If, however, "the offered evidence is of such a nature as not to be readily identifiable, the foundation for authentication will be substantially more elaborate. Typically, it will entail testimony that traces the chain of custody of the item from the moment it was found to its appearance in the courtroom, with sufficient completeness to render it reasonably probable that the original item has neither been exchanged nor altered." (Internal quotation marks omitted.) Id., quoting 2 C. McCormick, Evidence (7th Ed. 2013) § 213, pp. 13–14.

"[W]hen the chain of custody of evidence is at issue, as in this case, [t]he state's burden . . . is met by a showing that there is a reasonable probability that the substance has not been changed in important respects. . . . The court must consider the nature of the article, [and] the circumstances surrounding its preservation and custody . . . ." (Internal quotation marks omitted.) *State* v. *Coccomo*, supra, 302 Conn. 685. As long as the state makes a sufficient preliminary showing regarding the chain of custody, a challenge to the chain of custody pertains to the weight of the evidence rather than to its admissibility. *State* v. *Russo*, 89 Conn. App. 296, 302–303, 873 A.2d 202, cert. denied, 275 Conn. 908, 882 A.2d 679 (2005).

In the petitioner's direct appeal, our Supreme Court thoroughly analyzed the question of whether the state had met its burden at trial to demonstrate a sufficient chain of custody in order to authenticate the test results of the petitioner's blood despite the minor discrepancy in the description of the color of the test tube cap. Although this analysis was conducted in the context of whether the petitioner could prevail on a claim of plain error, we conclude that it is just as apt in the procedural context of this habeas appeal.

First, as our Supreme Court noted, the state elicited substantial testimony tracing the chain of custody of the petitioner's blood samples from the paramedic who drew the petitioner's blood into five tubes to the laboratory technician who performed the laboratory analysis on the blood contained in those tubes. *State* v. *Coccomo*, supra, 302 Conn. 682–84, 691–94. No witness from the laboratory testified as to any confusion, problems or mix-ups in processing the work of the laboratory that evening. See id., 693. Second, only one other blood sample from another hospital patient was tested for blood alcohol content at about the same time that the petitioner's blood was tested that evening, and there was no detectable alcohol in that sample; id., 684; a result that would make it highly unlikely that the sample came from the petitioner in light of her admissions and other evidence that she drank a significant amount of alcohol before the accident. See id., 682–83.

Most importantly, at the habeas trial, Sherman provided a reasonable explanation for the discrepancy between the description of the color of the tube cap contained in the hospital medical records and the color of the cap on the blood tube into which the paramedic drew the petitioner's blood sample. The evidence tended to demonstrate that the hospital utilized only test tubes with a red-grey speckled cap ("tiger-top") to collect blood samples drawn in the hospital. The ambulance

service, however, used blood test tubes with a yellow-gold cap to collect blood taken in the field for testing for blood alcohol content and did not carry tiger-topped tubes in their vehicles. Wilson explained at trial that the tubes with a yellow-gold cap were merely a smaller, acceptable version of the tiger-top tubes used by the hospital. The hospital's computer system, however, contained a drop-down menu to describe the color of the tube containing the sample being tested by the laboratory, and it is unclear whether that menu gave an option for a tube with a yellow-gold cap. As a result, the technician inputting the data most likely selected the tiger-top menu option despite its not having been the precise color of the cap on the actual blood tube from which the sample tested was drawn.[8] This reasonable explanation was more than sufficient to explain the discrepancy described by Wilson in his testimony and did not undermine the chain of custody evidence so as to require the exclusion of the test results.

In light of the foregoing, the petitioner has not shown a reasonable probability that the trial court would have ruled in her favor had Sherman renewed his motion to exclude Wilson's testimony or that she would have been successful on appeal in challenging the denial of such a motion.[9] Accordingly, we are not persuaded that the

[8] "[C]omputer and human error was discussed in other contexts [in the criminal trial], such as when Robert Voss and James Duffy, two paramedics employed by [EMS], explained how inaccurate information could end up in the [EMS] computer system due to the fact that the options available for describing a patient's condition in the system's [drop-down] menus sometimes were limited." *State* v. *Coccomo*, supra, 302 Conn. 696 n.12.

[9] In support of her argument regarding prejudice, the petitioner relies on the dissenting opinions in *State* v. *Coccomo*, supra, 115 Conn. App. 403–404 (*Berdon*, *J.*, concurring in part and dissenting in part), and *State* v. *Coccomo*, supra, 302 Conn. 723–42 (*Eveleigh*, *J.*, dissenting), which concluded, contrary to the majority opinions in the Supreme Court and Appellate Court decisions, that Sherman had preserved adequately the chain of custody objections to the admissibility of the blood alcohol content evidence and, further, would have reversed the judgment of conviction because, in their view, the evidence was improperly admitted and the admission of the test results constituted harmful error. According to the petitioner in this habeas appeal, Judge

court improperly concluded that she failed to establish that she was prejudiced by counsel's failure to renew his objection. See *Haywood* v. *Commissioner of Correction*, 153 Conn. App. 651, 666–67, 105 A.3d 238, cert. denied, 315 Conn. 908, 105 A.3d 235 (2014).

B

The petitioner next asserts that the habeas court improperly concluded that Sherman did not render deficient performance by failing to discuss Wilson's testimony in his closing argument. We disagree and conclude that the habeas court properly concluded that Sherman's performance met constitutional requirements and that, even if it did not, the petitioner suffered no prejudice.

In considering this argument, we first emphasize that "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. . . . [A] court must indulge a strong presump-

Berdon and Justice Eveleigh were the only judges to review the admissibility of the blood alcohol content as a preserved issue and, therefore, their dissenting opinions on this issue are the most persuasive indication of what would have occurred but for Sherman's failure to preserve adequately a challenge to the admissibility of this evidence.

The petitioner places more weight on these dissenting opinions than they will bear. Simply put, just because one judge on the Appellate Court and one justice of our Supreme Court would have reversed the judgment of conviction on this issue had it been preserved adequately does not mean necessarily that the trial court would have exercised its discretion to exclude the previously admitted test results had Sherman renewed an objection to the blood alcohol content evidence following Wilson's testimony or that the majority of any appellate panel reviewing a decision by the trial court to overrule an objection would have reversed the judgment of conviction, particularly in light of the relatively low burden necessary to make a prima facie showing of the authenticity of the blood sample and the deferential appellate standard of review of abuse of discretion that would have applied in reviewing the trial court's decision.

tion that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *State* v. *Sinchak*, 173 Conn. App. 352, 373, 163 A.3d 1208, cert. denied, 327 Conn. 901, 169 A.3d 796 (2017).

In considering whether Sherman's performance was deficient, the habeas court stated that, "[r]eviewing the closing arguments, it is true that [Sherman] failed to directly mention . . . Wilson's 'it's not there' statement during his closing argument. Even absent this specific reference, however, it was abundantly clear to anyone participating in the trial that, from the moment the first witness took the [witness] stand, [Sherman] was attacking the collection and handling of the petitioner's blood from her first interaction with paramedics to the final lab results. [Sherman's] cross-examination of each witness was thorough and exhaustive. The court can find no support in the law that review of the reasonableness of defense counsel's conduct can be so hypertechnical that he could spend the entire trial emphasizing, with every medical witness who testified, that there were mistakes and violations in protocol, yet be found to have performed 'unreasonably' for failing to directly mention a single statement of a lone witness during his closing arguments. . . . Further, since counsel elicited the testimony before the jury, it was free to consider and credit it as [it] saw fit, notwithstanding his failure to specifically mention it in closing. . . . Therefore, the court finds that counsel's performance in this respect meets constitutional requirements." (Citations omitted.)

Our review of the record reveals that Sherman gave a well reasoned and detailed closing argument in which he attempted to undermine the reliability of the 0.241 blood alcohol content test result by focusing on discrep-

ancies in the collection, labeling, and testing of the petitioner's blood. Specifically, Sherman attempted to cast doubt on the qualifications of Yannick Passemart, an emergency medical technician, to draw the petitioner's blood, pointed out inconsistencies regarding whether Engstrand or Passemart drew the petitioner's blood, challenged the credibility of Engstrand's statement that the petitioner had told her she had been drinking on the night in question, and emphasized the fact that Engstrand did not label the tubes with the blood once it had been drawn. In addition, Sherman highlighted the testimony of the medical professionals and the witnesses who attended the dinner party on the night in question who stated that the petitioner did not exhibit behavior consistent with intoxication. In sum, Sherman argued that the 0.241 blood alcohol content test result was a mistake and that, in order for the jury to believe that it was accurate, it would have to disregard all of the other witnesses and evidence introduced at trial indicating that the petitioner was not intoxicated.

In *State* v. *Sinchak*, supra, 173 Conn. App. 372, the petitioner argued, in part, that trial counsel in his underlying criminal trial was ineffective in failing to marshal the facts in the petitioner's favor during closing argument. In concluding that the petitioner had failed to demonstrate that trial counsel's representation fell below an objective standard of reasonableness, we stated: "As [trial counsel] was not required to take any particular approach in the argument, nor to address every facet of the case, we conclude that he did not provide ineffective assistance of counsel. . . . [Trial counsel] had a limited amount of time in which to present the main themes of the petitioner's defense in a long and complicated trial, and he did so competently. He was not required to present every minor detail of his defense theory. Even if some of the arguments would unquestionably have supported the defense, it does

not follow that counsel was incompetent for failing to include them. Focusing on a small number of key points may be more persuasive than a shotgun approach.'' (Citation omitted; internal quotation marks omitted.) Id., 377–78.[10] As in *Sinchak*, we conclude that the petitioner has failed to establish deficient performance by Sherman in failing to discuss Wilson's testimony regarding the discrepancy in the color of the test tube cap during his closing argument.

We also agree with the habeas court that the petitioner failed to demonstrate that she was prejudiced by Sherman's failure to emphasize Wilson's statement in his closing argument. If Sherman had emphasized Wilson's testimony regarding the discrepancy between the color of the cap on the test tube used to draw the petitioner's blood and the color of the cap on the test tube contained in the hospital medical records, the state could have responded by focusing on the facts, as set forth previously in this opinion, that provide a reasonable explanation for the discrepancy. Specifically, the state could have pointed out that, although the hospital utilized only the red-gray topped tubes, the ambulance service used tubes with a yellow-gold cap, which were also acceptable. The state also could have argued that it was likely that the hospital's drop-down menu did not contain an option for a tube with a yellow-gold cap. In light of this reasonable explanation for this discrepancy, the petitioner failed to demonstrate that there is a reasonable probability that, but for Sherman's failure to emphasize this aspect of Wilson's testimony, the outcome of the petitioner's criminal trial would have been different.

We also consider the strength of the state's case in determining whether the petitioner was prejudiced by

[10] The petitioner's claim of ineffective assistance of counsel in *State* v. *Sinchak*, supra, 173 Conn. App. 376, failed on both the performance and the prejudice prongs of *Strickland* v. *Washington*, supra, 466 U.S. 687.

Sherman's failure to emphasize Wilson's statement in his closing argument. "[T]he strength of the state's case is a significant factor in determining whether [any deficient performance] caused prejudice to the petitioner. The stronger the case, the less probable it is that a particular error caused actual prejudice." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, 183 Conn. App. 556, 567, 193 A.3d 671, cert. denied, 330 Conn. 918, 193 A.3d 1211 (2018). The petitioner acknowledges that, in evaluating prejudice, the habeas court was required to evaluate the strength of the state's case. She argues, however, that it is "indisputable that the state's case was very weak." We disagree.[11]

In evaluating the strength of the state's case, we note that the petitioner was convicted of three counts of manslaughter in the second degree with a motor vehicle in violation of § 53a-56b (a),[12] three counts of misconduct with a motor vehicle in violation of § 53a-57 (a),[13] and

[11] We acknowledge the prior statement by a panel of this court that "the state's case was not very strong and relied almost entirely on the admission of a blood alcohol content report." *State* v. *Coccomo*, supra, 115 Conn. App. 401. The decision containing that statement, however, has been reversed by our Supreme Court.

[12] General Statutes § 53a-56b provides in relevant part: "(a) A person is guilty of manslaughter in the second degree with a motor vehicle when, while operating a motor vehicle under the influence of intoxicating liquor or any drug or both, he causes the death of another person as a consequence of the effect of such liquor or drug. . . ."

As to this charge, the state was required to prove that "(1) the [petitioner] caused the death of another person (2) while operating a motor vehicle (3) under the influence of intoxicating liquor or any drug and (4) the victim's death was a consequence of the effect of such liquor or drug. . . . In this context, 'under the influence of intoxicating liquor,' means that, as a result of drinking such intoxicating liquor, the [petitioner's] mental, physical, or nervous processes 'have become so affected that he lacks to an appreciable degree the ability to function properly in relation to the operation of his motor vehicle.' " *State* v. *Perkins*, 271 Conn. 218, 247, 856 A.2d 917 (2004).

[13] General Statutes § 53a-57 provides in relevant part: "(a) A person is guilty of misconduct with a motor vehicle when, with criminal negligence in the operation of a motor vehicle, he causes the death of another person. . . ."

As to this charge, the state was required to prove that "(1) the [petitioner] was operating a motor vehicle; (2) the [petitioner] caused the death of another person; and (3) the [petitioner] possessed the mental state for

one count of operating a motor vehicle while under the influence of intoxicating liquor or drugs in violation of § 14-227a (a) (2).[14] The charges of manslaughter in the second degree with a motor vehicle and misconduct with a motor vehicle did not require proof of an elevated blood alcohol content. The charge of operating a motor vehicle while under the influence of intoxicating liquor or drugs required proof of an elevated blood alcohol content, which is defined as "a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . ." General Statutes § 14-227a (a) (2). As we will discuss, there was substantial evidence to support a finding of guilt of all of these charges. With respect to the charge of operating a motor vehicle while under the influence of intoxicating liquor or drugs, we note that the petitioner's blood alcohol content was three times the legal limit set forth § 14-227 (a) (2) and the following undermines the petitioner's attempt to discredit the blood alcohol content results and buttresses the reliability of that evidence.

Jennifer Mardi, a paramedic with EMS, testified at trial that, when she approached the petitioner at the

criminal negligence." *State* v. *Carter*, 64 Conn. App. 631, 637, 781 A.2d 376, cert. denied, 258 Conn. 914, 782 A.2d 1247 (2001). "A person acts with 'criminal negligence' with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation . . . ." Id., quoting General Statutes § 53a-3 (14).

[14] General Statutes § 14-227a (a) provides in relevant part that "[a] person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor or any drug or both if such person operates a motor vehicle . . . (2) while such person has an elevated blood alcohol content. For the purposes of this section, 'elevated blood alcohol content' means a ratio of alcohol in the blood of such person that is eight-hundredths of one per cent or more of alcohol, by weight . . . ."

We note that, although § 14-227a has been amended since the events at issue, those amendments are not relevant to this appeal. For convenience, we refer in this opinion to the current revision of § 14-227a.

scene of the accident to ask if she was okay, the petitioner told her to hold on because she was on the phone. Mardi smelled what appeared to be alcohol and asked the petitioner if she had been drinking, and the petitioner responded that she "had a few drinks." Engstrand, the paramedic who took over the petitioner's care, testified that the petitioner never asked about the other people involved in the accident but, rather, told Engstrand about her impending divorce. Engstrand noticed that the petitioner's speech was slightly slurred and asked the petitioner if she had been drinking. In response, the petitioner told Engstrand that she had consumed a few glasses of champagne and a glass of wine at a party downtown. Engstrand's partner, Passemart, also detected the odor of alcohol on the petitioner and recalled the petitioner stating that she had come from a party with a friend and had had a few drinks.

Upon arrival at the hospital, Utke, a registered nurse, took over the petitioner's care. He described the petitioner as very anxious. According to Utke, in response to questioning, the petitioner indicated that she did not know if she had been driving the vehicle involved in the accident. Utke did not notice any alcohol on the petitioner's breath but stated that something was not right in terms of the petitioner's mental status. Robert Bulman, a police officer with the Stamford Police Department, met the ambulance at the hospital and spoke with the petitioner in the trauma room. Due to the noise in the trauma room, Bulman had to bend down so that he was approximately one inch from the petitioner's face and he noticed the odor of alcohol. When asked about the intensity of the odor, Bulman responded: "Strong. It's strong. For [the petitioner], it's a strong smell. We're not talking, 'Gee, I wonder if,' or, 'Maybe,' or—no, it's there." Finally, the emergency room physician listed "alcohol intoxication" in his report under clinical impressions.

In sum, there was strong evidence of the petitioner's guilt of all of the crimes charged. In light of the foregoing, the habeas court properly concluded that the petitioner failed to establish that she was prejudiced by Sherman's failure to emphasize Wilson's statement in closing argument. The habeas court, therefore, properly concluded that the petitioner failed to establish ineffective assistance of counsel with regard to the admission of the blood alcohol content evidence.

II

The petitioner next claims that the habeas court improperly concluded that Sherman was not constitutionally ineffective in challenging the admissibility of evidence that, shortly after the accident, the petitioner had executed a quitclaim deed transferring her interest in her home to her mother. The petitioner claims that the habeas court improperly concluded that she suffered no prejudice from Sherman's performance with respect to this evidence. We disagree.

The following additional facts are relevant to this claim. "At trial, the state sought, over the [petitioner's] objection, to present evidence that, during her stay in the hospital, the [petitioner] had requested and received the results of a blood alcohol test that had been performed on her blood. It also sought to present evidence that, several days after the collision, the [petitioner] had quitclaimed to her mother her one-half interest in her Stamford residence (property), which she had coowned with her mother, for consideration of $1 and other value less than $100. The state argued that the foregoing evidence showed consciousness of guilt and was therefore relevant." *State* v. *Coccomo*, supra, 302 Conn. 668. Specifically, the state argued that the petitioner transferred the property to her mother shortly after the accident, for a price far below its value, because she knew that she had caused an accident that resulted in

the death of three people and wanted to protect herself from potential civil liability.

Sherman objected on the ground that, although evidence of a transfer of property to shield assets from recovery may be admissible in a civil case as probative of liability, it was not admissible to establish consciousness of guilt in a criminal case. He also contended that the prejudicial effect of the evidence outweighed its probative value and argued that this evidence, if admitted, "would necessitate us putting on the [witness] stand—which I can—we can do—members of her family as to the basis of the transaction, which is not necessarily so nefarious." Sherman then requested twenty-four hours to brief the matter, which the court granted. The following day, Sherman did not submit a brief but, rather, the defense renewed the argument that the probative value of the evidence was outweighed by its prejudicial effect.[15] The defense argued that the admission of the property transfer evidence would create "the ultimate distraction of a little mini civil trial determining the motives, putting lawyers on the [witness] stand and this type of thing." The court thereafter agreed with the state and admitted evidence of the property transfer as probative of consciousness of guilt.

The petitioner subsequently testified that, prior to the accident, she was planning to divorce her husband. With regard to the property transfer, the petitioner testified that, "[t]hroughout the course of the past five years, my husband has borrowed close to a quarter of a million dollars from my mom, and my mom felt it would be in her best interest to put the house back in her name to protect her money. As that would be the only way she would get that money back from him. So, I would say probably about two weeks before the accident, [the

[15] The argument on this issue was made by Attorney Stephan E. Seeger, not Sherman. Seeger also represented the petitioner.

real estate attorney] . . . started the paperwork to [quitclaim] it back." The petitioner further testified, however, that following the advice of Sherman, her mother subsequently executed another quitclaim deed that essentially reversed the earlier quitclaim deed.[16]

At the habeas trial, the petitioner testified that she had informed Sherman, over the course of several meetings, that she had quitclaimed the property to her mother to protect the family home and her mother's finances from her husband, whom she was planning to divorce.[17] She testified that, prior to the accident, she

[16] The petitioner testified as follows on direct examination:

"[Sherman]: And when was the [quitclaim] actually filed, if you know? If you know.

"[The Petitioner]: Filed, or—I don't know when it was filed. We signed it shortly after the accident.

"[Sherman]: It was after the accident?

"[The Petitioner]: Right.

"[Sherman]: Prepared before but signed after the accident?

"[The Petitioner]: Right.

"[Sherman]: And then did you ever wind up [quitclaiming] it back, or—

"[The Petitioner]: We did. We put it back to the original way. I don't, the original way has been back and forth so many times. But we put it back to my mother owning half and myself owning half.

"[Sherman]: Who told you to do that?

"[The Petitioner]: And that's the way it is right now.

"[Sherman]: Who told you to do that, to put it back to where it was?

"[The Petitioner]: You did.

"[Sherman]: Do you know why?

"[The Petitioner]: You said, because it was inappropriate.

"[The Prosecutor]: Objection, Your Honor. It calls for hearsay, it's basically—

"The Court: Objection sustained.

"[The Prosecutor]: Yes.

"[Sherman]: The bottom line is that the house was put back to where it was before the accident?

"[The Petitioner]: Right.

[17] The petitioner testified that, at a meeting with Sherman in late October or early November, 2005, Sherman brought up ownership of the home. She testified: "I had recently transferred my share of my home, the property, to my mother . . . . I explained to him that I was in a marriage. My husband was horrible at managing his finances. He was in a lot of trouble financially, and he had even been arrested for—on some occasions. So, I knew before I filed for divorce that I had to basically get the home out of my name because that was not—when we went into the marriage that had been a family home already. So, I did not want him being able to get any share of

had already scheduled an appointment with an attorney to represent her in her divorce action. She further testified that her real estate attorney had prepared the paperwork transferring the property to her mother two or three weeks prior to the accident; as a result of the accident, however, she was unable to sign the documents until she got out of the hospital in the first week of August following the accident. The petitioner testified that during her meetings with Sherman, she gave him the names of several witnesses who could corroborate the veracity of her explanation for the transfer of the property.[18] Sherman, however, insisted that the petitioner's mother transfer the property back to the petitioner to show the petitioner's good faith. Accordingly, on March 9, 2006, the petitioner's mother executed another quitclaim deed, reversing the effect of the earlier quitclaim deed.

Sherman testified at the habeas trial that, although the petitioner had explained her reasons for the property transfer to him, he was concerned that a judge or jury would not look favorably on it. He told her that, because of the accident, the transfer was "inappropriate" and that it "looked bad . . . ." Sherman told her that reversing the property transfer would show good faith and that "it was incumbent upon us to put the deed back to a situation where the jurors didn't believe [the petitioner] was doing a sneaky thing." He testified that he asked the petitioner at trial about reversing the property transfer because he "wanted the jury to see

that. You know, he owed my mother a lot of money. . . . I had explained this to [Sherman], and I—he was questioning it. He said, you know, it doesn't, it doesn't look good, and I said, but it was done, it was in the works prior to the accident." When asked for clarification about it being "in the works prior to the accident," the petitioner testified that she already had an appointment with her divorce attorney and that, although the appointment was scheduled on July 27, 2005, the day after the accident, she had made the appointment before the accident.

[18] These witnesses, Kelly Robb, Rebecca Siwicki, Atara Capalbo, Alda Bracchia, and Patricia Saxe, testified at the habeas trial.

that she had character and a good [conscience] and good measure of will, that she could undo something that needed to be done, and also a little insurance policy because she was telling the jury that the lawyer did it, not me, and it was true." Sherman further testified that he did not call the witnesses that the petitioner had provided because he did not know that they would be helpful to the presentation of his defense, and, depending on what they said, the testimony could have been potentially prejudicial.

In its decision, the habeas court noted the novelty of the state's theory, in that it appeared to be the first reported case in which the consciousness of guilt evidence in a criminal case was tied to conduct involving a defendant's attempt to avoid civil liability. The petitioner claimed at the habeas trial that she had provided Sherman with the names of numerous witnesses who would have testified at the criminal trial regarding the innocent motive for the property transfer; the habeas court, however, rejected the petitioner's contention that the testimony of these witnesses would have resulted in the trial court's excluding the evidence of the property transfer or, if it were admitted, the jury's rejection of that evidence.[19] The habeas court ultimately concluded that, because it was not reasonably probable that evidence of the quitclaim transfer could have, or should have, been excluded from evidence, the petitioner was not prejudiced by any alleged deficient performance. The habeas court did not address whether Sherman's performance was deficient.

[19] As to this claim, the habeas court indicated that "these witnesses simply reiterated or corroborated testimony the petitioner provided during her trial testimony. Generally, [the] witnesses testified to having conversations with the petitioner about [her] being unhappy in her marriage for some time, about her husband's alleged financial mismanagement, and that she had made the decision to move forward with filing for divorce. Adding, or attempting to add, the testimony of these witnesses, however, would not have changed the outcome of the trial . . . because none of them added anything that the petitioner had not testified to herself at trial." (Citation omitted.)

On appeal, the petitioner claims that the habeas court improperly concluded that she suffered no prejudice from Sherman's performance. She contends that, in the absence of deficient performance by Sherman, she would have been successful in obtaining the exclusion of the evidence of the property transfer. In support of this claim, she contends that, had the trial court been presented with the overwhelming evidence corroborating the fact that the transfer was made due to the petitioner's marital issues, evidence of the transfer could not reasonably have been admitted at trial. She further claims that, even if the evidence of the property transfer was potentially admissible as consciousness of guilt evidence, it is likely that the trial court would have excluded the evidence as being more prejudicial than probative.[20] Finally, the petitioner argues that she suffered prejudice as a result of Sherman's elicitation of her testimony that the property had been transferred back to her because the initial transfer was " 'inappropriate' . . . ." The respondent, the Commissioner of Correction, argues that the habeas court properly concluded that the petitioner had failed to prove that she was prejudiced by counsel's failure to exclude evidence of the quitclaim deed. We agree with the respondent.

A

The petitioner's primary argument is that the habeas court improperly concluded that she suffered no prejudice from Sherman's decision not to call as witnesses Kelly Robb, Rebecca Siwicki, Atara Capalbo, Alda Braccia, and Patricia Saxe. According to the petitioner, these

[20] In support of her argument, the petitioner relies, in part, on the majority opinion of this court in *State* v. *Coccomo*, supra, 115 Conn. App. 401–402 and the dissenting opinion in *State* v. *Coccomo*, supra, 302 Conn. 716–23 (*Eveleigh*, *J.*, dissenting), which concluded that the admission of the consciousness of guilt evidence was both improper and harmful. This reliance is misplaced because this court is bound by the majority opinion in *State* v. *Coccomo*, supra, 302 Conn. 674, which concluded that the trial court properly admitted the consciousness of guilt evidence.

witnesses would have corroborated her innocent explanation for the property transfer, and, therefore, their testimony likely would have affected the outcome of the trial. We disagree.

The petitioner cannot prevail on her claim because she cannot prove that she was prejudiced by the absence of these witnesses at trial. As the habeas court noted, the petitioner did not initiate divorce proceedings against her husband until September 29, 2006, which was fourteen months after the accident at issue. Thus, as recognized by the habeas court, "had defense counsel offered the urgency of preparing for divorce as the 'innocent' basis for the petitioner going through with the property transfer so soon after the accident, the defense would then have been left explaining the obvious, and easily discovered, fact that no divorce action had been filed. The fact that no divorce had been filed [until September 29, 2006] at a minimum, place[s] the question of the petitioner's true motivation for transferring the property so soon after the accident up for debate." In light of the foregoing, the habeas court properly concluded that it was neither reasonably likely that the testimony of these witnesses would have resulted in the evidence of the property transfer being excluded from trial, nor would it have changed the outcome of the trial.[21]

[21] In its opinion, the habeas court also stated that September 26, 2006, the date that the petitioner initiated divorce proceedings, was nine months after the criminal trial was completed. The record reflects, however, that the jury reached its verdict in the petitioner's criminal trial on February 7, 2007, and that the petitioner was sentenced on April 27, 2007.

We also note the petitioner's argument that the habeas court improperly took judicial notice of the filing of her divorce action to draw an unfavorable inference against her without giving her the opportunity to be heard. As to this argument, we note that it is unclear from the habeas court's decision whether it took judicial notice of the filing of the petitioner's divorce action. It would not have been necessary for the habeas court to take judicial notice of this fact, however, because the petitioner herself testified on direct examination at trial that she had filed for divorce in September, 2006.

It is also important to note that, on direct appeal, our Supreme Court concluded that the trial court had not abused its discretion in admitting the evidence of the property transfer. *State* v. *Coccomo*, supra, 302 Conn. 666. As part of its analysis, the court concluded that the admission of this evidence was not more prejudicial than probative. Id., 672. Specifically, the court stated: "First, defense counsel did not argue at trial that this evidence would unduly arouse the jurors' emotions, hostility or sympathy, nor do we believe that evidence as mundane as a transfer of property for less than valuable consideration is the type of evidence that would inflame a reasonable juror in a criminal manslaughter case. Second, there is nothing in the record to indicate that the admission of this evidence created an unduly distracting side issue. The state connected the relevance of the evidence to the underlying criminal charges, and no significant amount of time was expended exploring the factual or legal issues raised by the transfer. Third, the state's introduction and explanation of the evidence, and defense counsel's subsequent rebuttal, comprised only a small portion of the multi-day trial. . . . Fourth, the defense was permitted to provide an innocent explanation for the transfer, and the [petitioner] was allowed to testify that, at the time of the trial, a one-half interest in the property already had been transferred back to her. Furthermore, in light of the conflicting evidence on this issue, *we find it unlikely that the jury gave significant credence to the state's contention that the transfer evinced a guilty conscience.*" (Citation omitted; emphasis added.) Id., 673–74. The analysis by our Supreme Court on direct appeal is persuasive in this habeas appeal on the issue of prejudice suffered by the petitioner. See *Diaz* v. *Commissioner*, 125 Conn. App. 57, 67–70, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011); id., 69 (because petitioner presented no evidence in habeas record undermining reasoning on direct appeal, "we allow our previous finding

of harmless error to influence the present prejudice inquiry").

As stated previously in this opinion, "[t]he strength of the state's case is a significant factor in determining whether an alleged error caused prejudice to the petitioner. The stronger the case, the less probable it is that a particular error caused actual prejudice." (Internal quotation marks omitted.) *Mercado* v. *Commissioner of Correction*, supra, 183 Conn. App. 567. As previously discussed, the case against the petitioner included her blood alcohol content test result of 0.241, her own admission that she had consumed "a few glasses of champagne and a glass of wine at a party downtown," testimony from witnesses who smelled alcohol on the petitioner's breath and noticed that her speech was slurred, and testimony that the petitioner was confused about what had happened.

For these reasons, the habeas court properly concluded that the petitioner had not demonstrated that she was prejudiced by Sherman's failure to present additional witnesses to explain the property transfer. This is especially so in light of the evidence of the petitioner's intoxication, and our Supreme Court's statements that the evidence of the property transfer was "mundane" and that it was "unlikely that the jury gave significant credence to the state's contention that the transfer evinced a guilty conscience." *State* v. *Coccomo*, supra, 302 Conn. 673–74.

B

Finally, the petitioner argues that she suffered prejudice as a result of Sherman's elicitation of her testimony on direct examination that the property had been transferred back to her because the initial transfer was " 'inappropriate' . . . ." See footnote 16 of this opinion. The petitioner argues that, with this testimony, Sherman

undermined her innocent explanation for the property transfer to her great prejudice. We disagree.

In concluding that the petitioner failed to prove that she was prejudiced by Sherman's elicitation of this testimony, the habeas court stated that, "given the collateral relationship of the deed when viewed against the substantial direct evidence against the petitioner, the court finds that it is not reasonably likely that the result of the trial was at all impacted by this single answer." On the basis of the strength of the state's case, as indicated previously, and our Supreme Court's statement that the evidence of the property transfer was "mundane" and that it was "unlikely that the jury gave significant credence to the state's contention that the transfer evinced a guilty conscience"; *State* v. *Coccomo*, supra, 302 Conn. 674; we agree with the habeas court that it was unlikely that this single response affected the outcome of the trial. We also note that, immediately after the petitioner's response, the state objected to the testimony, and the trial court sustained the objection. Furthermore, in its charge to the jury, the court instructed that, "[a]ny testimony that was ordered stricken must not be considered by you," which we must presume the jury followed in the absence of evidence to the contrary. See, e.g., *State* v. *Hazard*, 201 Conn. App. 46, 76, 240 A.3d 749, cert. denied, 336 Conn. 901, 242 A.3d 711 (2020). In sum, the habeas court properly concluded that the petitioner failed to prove that she was prejudiced by Sherman's elicitation of this single response from her at trial.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* HASSAN FOSTER (AC 41235)

Prescott, Cradle and Suarez, Js.

Syllabus

Convicted, after a trial to the court, of the crimes of assault in the first degree and criminal possession of a firearm in connection with a shooting, the defendant appealed to this court. He claimed that the trial court lacked subject matter jurisdiction over his case and personal jurisdiction over him. *Held* that the defendant's challenges to the trial court's jurisdiction were without merit, as his assertions lacked an arguable legal basis in that they were sovereign citizen claims that were based on the argument that the state and federal governments lack constitutional legitimacy and therefore have no authority to regulate his behavior, a defense that has been uniformly held to have no conceivable validity in American law.

Submitted on briefs February 11—officially released April 6, 2021

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Harmon, J.*; judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Hassan Foster, self-represented, the appellant (defendant), filed a brief.

Maureen Platt, state's attorney, *Ana L. McMonigle*, special deputy assistant state's attorney, and *John J. Davenport*, senior assistant state's attorney, filed a brief for the appellee (state).

Opinion

PER CURIAM. The defendant, Hassan Foster, appeals from the judgment of conviction, rendered after a court trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and criminal possession of a firearm in violation of General Statutes § 53a-217 (a)

(1). He claims that the trial court lacked subject matter jurisdiction over his case and personal jurisdiction over him. We affirm the judgment of the trial court.

On April 8, 2015, the defendant was arrested by warrant, and appeared before the court for arraignment, in connection with a shooting that occurred in Waterbury on March 27, 2015. On March 6, 2017, by way of a substitute information, he was charged with assault in the first degree and criminal possession of a firearm. At his request, the defendant was permitted to represent himself at his criminal trial with the assistance of appointed standby counsel. On April 12, 2017, the court found the defendant guilty of both crimes.

After the court found the defendant guilty, but before sentencing, the defendant filed several affidavits and three motions challenging the court's jurisdiction. He alleged, inter alia, that the state "fail[ed] to present a cause of action or crime" and failed to establish that the United States constitution, as well as federal and state law, apply to him in light of his contention that he is "an American national and a common man of the sovereign people."

On September 29, 2017, at the defendant's sentencing hearing, the court denied the defendant's motions and sentenced him to a total effective term of fifteen years of incarceration, execution suspended after ten years, followed by five years of probation. This appeal followed.

On appeal, the defendant claims that the trial court lacked subject matter jurisdiction over his case and personal jurisdiction over him, reasserting the grounds that he argued in support of his jurisdictional challenges before the trial court. The defendant's challenges to the trial court's jurisdiction are "sovereign citizen" claims, which are based on the argument that "the state and federal governments lack constitutional legitimacy and

therefore have no authority to regulate [the defendant's] behavior." *United States* v. *Ulloa*, 511 Fed. Appx. 105, 106 n.1 (2d Cir. 2013). It has been uniformly held that "[this] defense has no conceivable validity in American law." (Internal quotation marks omitted.) *Johnson* v. *Raffy's Café I, LLC*, 173 Conn. App. 193, 201, 163 A.3d 672 (2017), citing *United States* v. *Jonassen*, 759 F.3d 653, 657 n.2 (7th Cir. 2014), cert. denied, 577 U.S. 864, 136 S. Ct. 152, 193 L. Ed. 2d 114 (2015). The claims asserted by the defendant lack an arguable legal basis. Accordingly, the defendant's challenges to the trial court's subject matter and personal jurisdiction are without merit.

The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* ROBERT R., SC 20355
Judicial District of Fairfield

Criminal; Whether Evidence was Sufficient to Prove that Defendant Committed Sexual Assault in the First Degree; Whether Trial Court Properly Admitted Testimony from Expert Witness Regarding Child Sexual Abuse; Whether Preventing Defense Counsel from Arguing that Victim Planted Evidence Deprived Defendant of Sixth Amendment Right to Present Complete Defense. The victim alleged that, beginning when she was thirteen years old, the defendant sexually assaulted her on multiple occasions. She alleged that in 2016, when she was eighteen years old, the defendant forced his way into her family's house while she was alone and forced himself on her. On the basis of those allegations, the state charged the defendant with one count of sexual assault in the first degree, one count of sexual assault in the second degree, and three counts of risk of injury to a child. During his testimony at trial, the defendant denied the victim's allegations but claimed that he had consensual sex with the victim on two separate occasions in 2016. The jury found the defendant guilty of sexual assault in the first degree but acquitted him of the remaining charges, and the trial court sentenced him to twenty years of incarceration. The defendant appeals. On appeal, the defendant claims that the state failed to prove that he committed sexual assault in the first degree because no reasonable jury could have credited the victim's testimony about his alleged use of force. He argues that the victim's testimony was internally inconsistent and contradicted by the lack of any physical evidence. The defendant also claims that the trial court abused its discretion in allowing a pediatric nurse practitioner to testify as an expert witness regarding child sexual abuse when the victim was eighteen years old at the time of the alleged 2016 assault. Finally, he claims that the trial court deprived him of his sixth amendment right to present a complete defense by precluding defense counsel from arguing to the jury that the victim had planted physical evidence in an effort to substantiate her false allegations against the defendant.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* DAMARQUIS GRAY, SC 20368
Judicial District of New Haven

Felony Murder; General Statutes §§ 54-82j and 54-82k; Whether Defendant's Right to Due Process Was Violated When Witnesses Were Incarcerated Pursuant to Material Witness Warrants; Whether Trial Court Erred in Admitting Grand Jury Transcripts Into Evidence as Prior Inconsistent Statements Under *Whelan*. Daryl Johnson was upset because his sister, Alexis, was involved in a relationship with the victim, Durell Law. Johnson wanted to fight Law, and, on January 20, 2014, Johnson directed Alexis to call Law and arrange for him to meet her at a certain housing project where there was an absence of security cameras. Alexis and her friend Chyna Wright met Law at a bus stop. Those three individuals then met the defendant, who had been at his house with Delano Lawrence and Anton Hall, before proceeding to the housing project. The defendant took a shortcut, and, at some point, he was given a handgun. When Alexis, Wright and Law arrived, Johnson and his associate, Erika Gomez, were already waiting at the housing project. As the three got closer to Johnson, the defendant and several of his associates arrived behind them and began to follow the group. The defendant pointed a gun at Law and demanded that he empty his pockets. Law struck the defendant, turned, and ran away when he was then shot from behind. He was later pronounced dead at the hospital. The witnesses to the shooting were generally uncooperative, and the prosecutor applied for material witness warrants under General Statutes § 54-82j, which authorizes the trial court to issue a warrant for a material witness who the prosecutor believes is likely to avoid testifying. The prosecutor applied for material witness warrants with respect to Gomez, Hall and Wright, who were arrested and incarcerated overnight pursuant to General Statutes § 54-82k. None of those witnesses had a prior criminal record, one witness was five months pregnant at the time, and another witness was kept from her minor child overnight. Following their testimony, each of the witnesses was released, and the jury ultimately found the defendant guilty of, inter alia, felony murder. The defendant appeals to the Supreme Court under General Statutes § 51-199 (b) (3), claiming that the trial court violated his federal due process rights by incarcerating material witnesses in a way that risked coercing them into testifying favorably for the state. He specifically argues that the trial court implied that the witnesses were being held because they claimed not to remember the shooting and, as a result, the witnesses could have understood the court's remarks as pressuring them into testifying favorably for the state. In addition to claiming reversible

error, the defendant urges the Supreme Court to direct trial courts to balance the state's interest in the testimony against the rights of defendants and witnesses such that a material witness is only incarcerated if a less restrictive method of ensuring his or her presence at trial is not available. Furthermore, the defendant claims that the trial court abused its discretion by allowing the state to read lengthy grand jury transcripts into evidence as prior inconsistent statements under *State* v. *Whelan* (200 Conn. 743). The state counters that the defendant's claims are not reviewable on appeal and, moreover, that they fail on the merits.

STATE *v.* JUAN J., SC 20406
Judicial District of New Britain

Criminal; Whether Trial Court Erred in Admitting Evidence of Defendant's Uncharged Misconduct; Whether Trial Court Committed Plain Error in Admitting Videotaped Forensic Interviews of Victim Into Evidence; Whether Trial Court Committed Plain Error in Admitting Constancy of Accusation Testimony. The defendant was charged with sexual assault and risk of injury to a minor in connection with allegations that he had engaged in sexual conduct with the minor victim on two occasions. At trial, the defendant moved to preclude the state from introducing evidence of his uncharged misconduct, specifically the victim's testimony that the defendant sexually assaulted her on other occasions, pursuant to Connecticut Code of Evidence § 4-5 (a), which prohibits the introduction of uncharged misconduct evidence to prove "bad character, propensity, or criminal tendencies." Subsection (c) of § 4-5 sets forth exceptions to the general prohibition on the admission of uncharged misconduct evidence in § 4-5 (a) and provides that such evidence is admissible to prove, inter alia, "intent" or "absence of mistake or accident." The trial court denied the defendant's motion, ruling that the uncharged sexual misconduct evidence was admissible under § 4-5 (c) to prove the defendant's "intent" to commit the charged crimes and/or to show an "absence of mistake or accident" and that, under the circumstances, its probative value was not outweighed by its prejudicial effect. The defendant also moved to exclude the admission of two videotaped forensic interviews of the victim conducted by Lisa Murphy-Cipolla, a clinical services coordinator at a family advocacy center, on the ground that they contained inadmissible hearsay. In those interviews, the victim disclosed additional incidents of sexual assaults by the defendant. In response, the state made an offer of proof in which Murphy-Cipolla testified that

part of the purpose of the interviews was so she could "make necessary recommendations for a medical exam and/or therapy depending on what was disclosed in the interview." The defendant thereafter withdrew his objection to the admission of the interviews. Nevertheless, the court found that the interviews were admissible under the medical treatment exception to the hearsay rule set forth in Connecticut Code of Evidence § 8-3 (5). The defendant was convicted, and he appeals directly to the Supreme Court under General Statutes § 51-199 (b) (3). He claims that the trial court abused its discretion in admitting the uncharged sexual misconduct evidence. He argues in support thereof that § 4-5 (c) did not apply because the evidence was not relevant to prove "intent" or "absence of mistake or accident" where his defense was that the sexual assaults never occurred and where the charged offenses were general intent crimes. In addition, the defendant claims that the trial court committed plain error in admitting the victim's videotaped forensic interviews into evidence under the medical treatment exception to the hearsay rule because the interviews were conducted solely for investigative and not medical purposes. Finally, he claims that the trial court committed plain error in allowing the victim's cousin and a school social worker to testify as constancy of accusation witnesses and argues that neither witness's testimony sufficiently connected the alleged disclosure to either of the two pending charges.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

WILLIE A. SAUNDERS *v.* COMMISSIONER OF CORRECTION, SC 20430
Judicial District of Tolland

Habeas; Procedural Default; Competency; Whether Doctrine of Procedural Default Applies to Competency Claims; Whether Petitioner's Pleadings Failed to Allege Sufficient Cause and Prejudice to Overcome Procedural Default. The petitioner was convicted of sexual assault in the first degree and risk of injury to a child. He filed a two count habeas petition alleging due process violations under the federal and state constitutions in that he had been incompetent to be prosecuted and stand trial and that no competency evaluation had been requested during his criminal trial in violation of General Statutes § 54-56d. The petitioner alleged that he suffers from severe intellectual disabilities in count one and that he has a history of significant physiological and mental health afflictions in count two.

The respondent filed a return denying the allegations and raising a special defense of procedural default on the ground that the petitioner had not raised his competency claims during his criminal trial or on direct appeal. The respondent also argued that the petitioner could not allege sufficient cause and prejudice to overcome the procedural default. The petitioner filed a reply arguing that his claims were not subject to procedural default, that he could not have raised them earlier due to his developmentally disabled status, and that he nonetheless could allege sufficient cause and prejudice. The respondent thereafter filed a motion to dismiss the petition on procedural default grounds, which the habeas court granted. The petitioner appealed to the Appellate Court (194 Conn. App. 473), which affirmed the habeas court's judgment. The Appellate Court acknowledged federal precedent providing that it is contradictory that a defendant who may be incompetent may waive his right to a competency determination. The court also noted, however, the distinction between waiver and procedural default and determined the application of the procedural default doctrine to competency claims promotes the doctrine's objectives of finality of judgments and judicial economy "by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case." The court further posited that the promotion of these objectives outweighed the minimal risk of convicting and sentencing a truly incompetent person without making a competency determination or otherwise allowing competency based challenges during his or her criminal trial. After concluding that procedural default applied to the petitioner's competency claims, the court held that the petitioner had failed to establish sufficient cause and prejudice to overcome the procedural default. It determined that the petitioner's reply, with its cursory references to the petition, was deficient and that his alleged incompetency was an internal rather than external impediment to his defense that could not serve as cause to overcome the procedural default. The petitioner has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the doctrine of procedural default applies to competency claims and that the petitioner's pleadings failed to allege sufficient cause and prejudice to overcome a procedural default.

The Practice Book Section 70-9 (a) presumption in favor of coverage by cameras and electronic media does not apply to the case above.

STATE *v.* GERJUAN RAINER TYUS, SC 20462
Judicial District of New London

Criminal; Whether Murder Cases Properly Joined for Trial; Whether Right to Confrontation Violated by Testimony of Substitute Firearms Examiner Where Primary Examiner Unavailable; Whether Limiting Instruction on Substitute Examiner's Testimony Was Required; Whether Fourth Amendment Rights Violated When Police Obtained Cell Site Location Information without Warrant. The defendant and Darius Armadore were convicted of murder in connection with the shooting death of Todd Thomas outside of Ernie's Café in New London. The defendant appealed, and the Appellate Court (184 Conn. App. 669) affirmed the conviction. The Appellate Court rejected the defendant's claim that his case was improperly joined for trial with Armadore's case. The Appellate Court found that, because both cases arose from the same incident, virtually all of the state's evidence against the two defendants would have been admissible against either of them if they had been tried separately. The Appellate Court also noted that their defenses were not antagonistic and that each was the other's principal alibi witness. The Appellate Court, moreover, disagreed with the defendant that, if they had been tried separately, a statement made by Armadore to his girlfriend that he shot someone on the day of Thomas' killing would not have been admissible against the defendant under the coconspirator exception to the hearsay rule in the absence of a conspiracy charge. The Appellate Court also rejected the defendant's claim that the trial court violated his right to confrontation by permitting the state's firearms examiner, James Stephenson, to testify regarding the firearms evidence in the case because his opinions were based on the findings and conclusions of the prior firearms examiner, Gerald Petillo, who died before trial. The Appellate Court found that, although Stephenson reviewed Petillo's report, the report was not admitted into evidence and that Stephenson conducted his own physical examination of the evidence and came to his own conclusions. The Appellate Court additionally rejected the defendant's claim that the trial court erred in denying his request for a limiting instruction to the jury regarding Stephenson's testimony. Rather, the Appellate Court found that, although the instruction given to the jury did not specifically highlight Stephenson's testimony as requested by the defendant, there was no substantive difference between the instruction given to the jury and the instruction requested by the defendant. The Appellate Court also found that the instruction given to the jury properly advised it as to its exclusive role in assessing the credibility of expert witnesses and determining the weight to be given

to expert testimony. The defendant filed a petition for certification to appeal, which the Supreme Court granted as to the questions of whether the Appellate Court properly concluded that the defendant and Armadore's cases were properly joined for trial, that the defendant's right to confrontation was not violated by Stephenson's testimony, and that the trial court properly refused to give a limiting instruction concerning Stephenson's testimony. The Supreme Court also granted certification to appeal on the question of whether, pursuant to *Carpenter* v. *United States*, 138 S. Ct. 2206 (2018), the defendant's fourth amendment rights were violated when the police obtained his cell phone records, including his cell site location information, without a warrant.

STATE *v.* A.B., SC 20471
Judicial District of Ansonia-Milford

Criminal; Whether Trial Court Properly Dismissed Charge Against Out-of-State Resident Defendant on Ground That State Failed to Execute Arrest Warrant Without Unreasonable Delay. In 2009, the police seized two computers from the defendant's residence during the execution of a search warrant. The defendant thereafter voluntarily signed a sworn statement admitting to possessing child pornography. He moved to California in 2011. In 2013, after the state forensic lab confirmed that the computers contained child pornography, the defendant was charged with possession of child pornography, and an arrest warrant was issued on May 22, 2013. The defendant was not arrested in California, however, until March 15, 2018. He filed a motion to dismiss, claiming that the prosecution was barred by the five-year statute of limitations set forth in General Statutes (Rev. to 2009) § 54-193 (b). Specifically, he argued that, although the arrest warrant was issued within the limitations period of § 54-193 (b), the limitations period was not tolled under *State* v. *Crawford*, 202 Conn. 443 (1987), because the warrant was not executed "without unreasonable delay." In response, the state argued the limitations period had been tolled under § 54-193 (c) because the defendant had "fled" from Connecticut, citing *State* v. *Ward*, 306 Conn. 698 (2012). In *Ward*, the Supreme Court held that § 54-193 (c) "may toll the statute of limitations when a defendant absents himself from the jurisdiction with reason to believe that an investigation may ensue as the result of his actions." The trial court disagreed and concluded in accordance with *Roger B.* v. *Commissioner of Correction*, 190 Conn. App. 817, cert. denied, 333 Conn. 929 (2019), that § 54-193 (c) was irrelevant because the arrest warrant was issued within the limitations period and that the dispositive question therefore was whether the warrant was executed without

unreasonable delay under *Crawford*. The court answered that question in the affirmative, noting that the state provided no explanation for its failure to execute the warrant for five years despite knowing the defendant's California address during that time. The court ruled in the alternative that, even if § 54-193 (c) applied, the state could not prevail on its tolling argument because the defendant knew an investigation was ongoing when he moved to California and therefore had not "fled" within the meaning of the statute. The state appealed to the Appellate Court, and the Supreme Court granted the state's motion to transfer the case to itself. The state claims on appeal that the trial court erred in concluding that the statute of limitaitons was not tolled when the defendant fled from and resided out of state. It argues that, notwithstanding *Roger B.*, *Ward* and not *Crawford* applies when a suspect flees the state for purposes of determining whether § 54-193 (c) indefinitely tolls the limitations period of § 54-193 (b). The state also argues that, under *Ward*, a suspect flees the state within the meaning of § 54-193 (c) not only when he believes that an investigation might ensue but also when, as here, he knows that an investigation has begun. The state accordingly takes the position that the the trial court erroneously dismissed the action where the limitations period of § 54-193 (b) was tolled indefinitely under § 54-193 (c) because the defendant had "fled" to California under the statute.

JERMAINE WOODS *v.* COMMISSIONER OF CORRECTION, SC 20487
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded that Petition for Writ of Habeas Corpus Filed by Self-Represented Party Could Not Be Construed as Raising Ineffective Assistance of Counsel Claim. The petitioner was charged with murder. His first trial resulted in a mistrial. The petitioner was retried and convicted of murder. The petitioner filed a habeas petition alleging that his trial counsel was ineffective for failing to prepare an adequate diminished capacity defense. The habeas court granted the petition and ordered a new trial. After the petitioner's third criminal trial, a three judge panel convicted him of murder and sentenced him to fifty years imprisonment. The petitioner filed a second habeas petition alleging various claims of ineffective assistance of counsel during his third criminal trial, including a claim that trial counsel failed to timely notify and adequately prepare his expert witness, psychiatrist John Felber, to testify. The habeas court denied the second habeas petition. The petitioner subsequently filed the present third habeas petition alleging that his sentence is illegal because evidence of his diminished capacity

was not presented at trial. The habeas court dismissed the claim, finding that it had been adjudicated previously at his third criminal and second habeas trials and, therefore, was barred by the doctrines of res judicata and collateral estoppel. The petitioner appealed, claiming that the habeas court improperly dismissed his claim because it failed to construe his allegations broadly as pleading a claim of ineffective assistance of his second habeas counsel. The Appellate Court (197 Conn. App. 597) affirmed, holding that even under the most generous reading of the petitioner's allegations, his third habeas petition could not be construed to allege a claim of ineffective assistance by his second habeas counsel. The Appellate Court noted that the petitioner alleged in his third habeas petition that (1) his conviction is illegal because significant evidence of his diminished capacity could have changed the outcome of his case if it had been presented to the triers of fact; (2) his first habeas corpus petition was granted because of the testimony of Dr. Felber, but the triers of fact never got to hear that testimony; and (3) three other witnesses testified previously as to his diminished capacity, but their testimony was not heard by the triers of fact. The Appellate Court determined that, because the three other witnesses testified at the petitioner's second habeas trial, the triers of fact to which he referred in the third habeas petition must refer to the three judge panel that presided over his third criminal trial. The Appellate Court concluded, therefore, that on the basis of its construction of the pleadings, there was no allegation that reasonably could be construed as a reference, either directly or indirectly, to the petitioner's second habeas counsel. The petitioner sought certification to appeal, which the Supreme Court granted as to the issue of whether the Appellate Court correctly concluded that the third petition for writ of habeas corpus, which the petitioner filed in a self-represented capacity, did not raise a claim of ineffective assistance of counsel with respect to his second habeas trial.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE *v.*
MARGIT MADISON et al., SC 20493
Judicial District of New Haven

Foreclosure; Whether Defendant Did Not Have Standing in Foreclosure Action to Raise Defense Not Identified as Bankruptcy Estate Asset in Schedule of Assets Filed in Bankruptcy Action Adjudicated While Foreclosure Action Was Pending. The plaintiff commenced the present foreclosure action in 2017 against the defendant and Eric Demander, Jr., who is now deceased. The plaintiff alleged that Demander had executed a mortgage on the subject

property in favor on the plaintiff's predecessor in interest in 2007, that the defendant was the owner of record of the property in 2010, and that the mortgage and note evidencing the underlying debt were in default due to nonpayment starting in 2016. The trial court rendered a judgment of strict foreclosure. The defendant thereafter filed notice of her pending Chapter 7 bankruptcy petition, which automatically stayed the foreclosure action. She filed a schedule of assets in the bankruptcy action that listed the amount of the debt claimed by the plaintiff and the fair market value of the property but did not identify the plaintiff's claim as unsecured or as contingent, unliquidated, or disputed. The bankruptcy trustee was discharged upon his representation that the bankruptcy estate had been fully administered, and the bankruptcy action was closed. The plaintiff filed a motion to reenter the judgment of strict foreclosure after the termination of the automatic bankruptcy stay. The defendant filed an objection thereto and claimed that she was not authorized to execute the mortgage and note because Demander had not validly executed the power of attorney that appointed her as his attorney-in-fact. The trial court granted the plaintiff's motion and overruled the defendant's objection, agreeing with the plaintiff that the defendant lacked standing to pursue her claimed defense because she failed to identify it as an asset of the bankruptcy estate. It accordingly rendered a judgment of strict foreclosure, which the defendant appealed and the Appellate Court (196 Conn. App. 267) affirmed. The Appellate Court observed that, pursuant to precedent, all of a debtor's assets, including prepetition causes of action, become assets of the bankruptcy estate and must be scheduled for the benefit of creditors in order for them to pass to the debtor if they are not administered when the bankruptcy action is closed. The court rejected the defendant's argument that her claim was distinguishable because it entailed a defense to the enforcement of the lien rather than a claim for money damages, determining that the argument discounted her disclosure obligations to the bankruptcy trustee and could allow for an end run around the bankruptcy process via the recoupment of an inaccurately valued asset. The court accordingly concluded that the defendant lacked standing to pursue her defense, consistent with the principle that a failure to list a legal claim as a bankruptcy estate asset causes the claim to remain the property of the estate and vest with the trustee. The defendant has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the defendant did not have standing to raise a defense that she had failed to identify as an asset of the bankruptcy estate in the schedule of assets filed in her Chapter 7 bankruptcy case adjudicated while the foreclosure case was pending.

DEVONTE DALEY *v.* ZACHARY KASHMANIAN et al., SC 20498
Judicial District of Hartford

Torts; General Statutes § 52-557n; Whether Defendant Entitled to Governmental Immunity for Negligent Operation of Motor Vehicle in Course of Conducting Surveillance. The defendant Zachary Kashmanian is a detective in the defendant city of Hartford's police department. On June 1, 2013, he was operating a gray sedan that was not equipped with lights, sirens, or law enforcement markings, which made it appear to be an ordinary civilian car. A confidential informant contacted police and stated that an individual riding a yellow motorcycle was in possession of a gun. At the time, the plaintiff, along with a group of other individuals, was riding a motorcycle that matched that description on Asylum Avenue in Hartford. Kashmanian was instructed to perform surveillance on the group and proceeded to follow it. At one point, he collided with another motorist but was directed by officers to continue surveilling the plaintiff. In order to catch up to the plaintiff, Kashmanian crossed the double yellow line and traveled at speeds reaching forty or fifty miles per hour in a twenty-five mile per hour zone. He found the plaintiff still riding the motorcycle, drove closer, and, without slowing or braking, struck the motorcycle's back tire causing the plaintiff to crash into a parked vehicle, thereby ejecting him from the motorcycle. The plaintiff was found approximately ninety-five feet away with significant injuries. He commenced this action against Kashmanian and sought indemnification from the city, alleging that Kashmanian's negligent or reckless conduct caused his injuries. As a special defense, the defendants argued that Kashmanian had been engaged in discretionary acts at the time and, therefore, was entitled to governmental immunity under General Statutes § 52-557n. Following the close of evidence, the trial court granted Kashmanian's motion for a directed verdict on the plaintiff's recklessness claim, and, thereafter, the jury returned a verdict in favor of the plaintiff on his negligence claim. The trial court, however, set aside that verdict after concluding that Kashmanian was entitled to governmental immunity because he had been engaged in a discretionary police activity. The plaintiff appealed to the Appellate Court (193 Conn. App. 171), which reversed the trial court's judgment on the recklessness claim, finding that is should have been submitted to the jury, and affirmed the decision to set aside the verdict on the negligence claim. The Appellate Court found that Kashmanian had discretion regarding the manner in which he conducted surveillance, and, therefore, he was entitled to immunity under § 52-557n. In doing so, that court rejected the plaintiff's claim that Kashmanian had a

ministerial duty to comply with all traffic laws, finding that his decision whether to comply with such laws while engaged in surveillance was inherently discretionary. The Supreme Court granted the plaintiff's petition for certification to appeal, limited to whether the Appellate Court correctly determined that § 52-557n confers governmental immunity for injuries caused by a police officer's negligent operation of a motor vehicle while conducting surveillance. The plaintiff argues that certain statutes governing the operation of motor vehicles imposed ministerial duties on Kashmanian while engaged in surveillance and that, even if he were entitled to governmental immunity under the circumstances, his conduct exceeded the bounds of that immunity because he was actually engaged in a pursuit.

PHYLLIS LARMEL *v.* METRO NORTH COMMUTER RAILROAD CO., SC 20535
Judicial District of New Haven

Civil; Accidental Failure of Suit Statute; Whether Judgment Rendered After Mandatory Arbitration Is "Trial on the Merits" That Bars Plaintiff from Utilizing Accidental Failure of Suit Statute; Whether Plaintiff's Failure to Request Trial De Novo Following Entry of Arbitrator's Decision Was "Matter of Form" Under Accidental Failure of Suit Statute. The plaintiff was injured when she slipped and fell on the floor of a train operated by the defendant, and she brought a negligence action against the defendant. The trial court ordered the parties to submit to compulsory arbitration under General Statutes § 52-549u, and the arbitrator found in favor of the defendant. The plaintiff failed to file a timely demand for a trial de novo within twenty days under General Statutes § 52-549z, and the trial court rendered judgment for the defendant in accordance with the arbitrator's decision. The plaintiff then brought a second negligence action against the defendant pursuant to General Statutes § 52-592, the accidental failure of suit statute. That statute allows a plaintiff to commence a new action for the same cause within one year if a prior action failed to be tried on its merits due to "any matter of form." In the second action, the plaintiff alleged that her failure to file a timely motion for a trial de novo was due to "mistake, inadvertence, and/or excusable negelect" in that her attorney was on vacation and did not receive notice of the arbitrator's decision until after the time for filing a demand for a trial de novo had expired. The defendant moved to dismiss the second action for lack of subject matter jurisdiction based on the principles of res judicata, arguing that § 52-592 is inapplicable

because the trial court in the first action rendered a final judgment on the merits pursuant to § 52-549z. The trial court granted the motion to dismiss, and the plaintiff appealed, claiming that the trial court wrongly dismissed the action when § 52-592 applied because the first action was "dismissed" as a matter of form when she failed to file a timely demand for a trial de novo. The plaintiff argued that the judgment in the first action was akin to a disciplinary dismissal and that the trial court was required to determine whether her failure to file a timely demand for a trial de novo constituted mistake, inadvertence, or excusable negelect within the meaning of the statute. The Appellate Court (200 Conn. App. 660) first determined that the trial court improperly dismissed the action because res judicata does not implicate a court's subject matter jurisdiction but rather is pleaded properly as a special defense. The court then held that the first action was resolved on the merits by an arbitrator under § 52-549u and, therefore, the second action was not saved by the accidental failure of suit statute. Accordingly, the Appellate Court reversed the judgment dismissing the action and remanded the case with direction to render judgment for the defendant. The Supreme Court granted the plaintiff's petition for certification to appeal. It will decide whether the Appellate Court properly concluded that a judgment rendered after mandatory arbitration is a "trial on the merits" that precludes a plaintiff from bringing a second action under the accidental failure of suit statute and whether the plaintiff's failure to file a timely demand for a trial de novo constitutes "a matter of form" under the statute.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

Connecticut Higher Education Supplemental Loan Authority

Notice of Intent to Amend CHESLA Scholarship Programs Program Manual

In accordance with the provisions of Connecticut General Statutes § 1-121, notice is hereby given that the Connecticut Higher Education Supplemental Loan Authority (''CHESLA'') intends to amend the CHESLA Scholarship Programs Program Manual (''Manual''), for purposes of removing the requirement of an expected family contribution for an eligible student planning to enroll in a healthcare or manufacturing certificate program, as a criteria for scholarship eligibility, by adding the following language at the end of Section D. 3. (b) of the Manual: ''provided that an Expected Family Contribution is not required for an Eligible Student planning to enroll in a healthcare or manufacturing certificate program''.

The amendment to the Manual shall be deemed adopted and effective 30 days after notice thereof has been published in the Connecticut Law Journal, unless the Executive Director shall determine based on comments received from members of the public during such 30-day period that it would be desirable or appropriate to defer such effectiveness so that the CHESLA Board of Directors (''Board'') may reconsider the proposed amendment to the Manual in light of such comments, such determination to be conclusively evidenced by the Executive Director's notice thereof to the Board.

All written comments, questions, and concerns regarding the proposed amendment may be submitted within 30 days of the publication of this notice in the Connecticut Law Journal to Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

A copy of the proposed amendment and the Manual are available upon request by contacting Jeanette W. Weldon, Executive Director, Connecticut Higher Education Supplemental Loan Authority, 10 Columbus Boulevard, 7th Floor, Hartford, CT 06106 or via email at jweldon@chesla.org.

NOTICES

The Connecticut Supreme Court Policies for the Establishment and Maintenance of a System of Law Libraries

(Approved by the Connecticut Supreme Court on January 18, 2018)

1. Law libraries are established in the Judicial Districts of Danbury at Danbury, Fairfield at Bridgeport, Hartford at Hartford, New Britain at New Britain, Litchfield at Torrington, Middlesex at Middletown, New Haven at New Haven, New London at New London, Stamford/Norwalk at Stamford, Tolland at Rockville, Waterbury at Waterbury and Windham at Putnam.

2. Access to current legal publications shall be provided at each of the above-mentioned law libraries in a format and manner sufficient to meet the needs of the user, including but not limited to print, electronic or microform format. Each law library shall have as a minimum the materials specified in Appendix A.

3. All law libraries shall be open to the public from 9:00 a.m. to 5:00 p.m., Monday through Friday, exclusive of state holidays, unless otherwise posted, and such times as they may be closed due to adverse weather conditions, staff shortages, or as may be ordered by the Chief Court Administrator.

4. In accordance with generally accepted library science principles and practices, law libraries shall provide reference, circulation, bibliographic instruction, computer-assisted research, interlibrary loan, document delivery, computer printer, photocopier, and microform reader-printer services to the courts and citizens of the state at all times the libraries are open and staffed. These services shall be provided free of charge, except that a reasonable fee shall be charged for the photocopier, computer printer, document delivery, and microform reader-printer services.

5. (a) A law library advisory committee, consisting of thirteen members, is hereby established. The members of the committee shall be appointed by the Chief Justice for a term commencing on the date of their appointment and expiring three years after the July 1st following their appointment. The Chief Justice shall designate from among the members of the committee a chairperson and a vice chairperson who shall act in the absence of the chairperson, each for terms of one year commencing July 1st. The Deputy Director of Law Libraries shall attend all meetings and act as Secretary to the Committee.

   (b) The committee shall meet at least annually and more often if its business so dictates. Meetings may be called by the chairperson on the chairperson's own motion or on the request of any three members of the committee.

   (c) The committee, annually and at such other times as it deems necessary, may report to the Chief Justice and the Chief Court Administrator any recommendations it may have concerning the adequacy of the funding

and services provided by the various law libraries, whether additions or deletions should be made to the list of law libraries so established, whether amendments should be made to the minimum collection standards (Appendix A) for the law libraries, and such other matters as the committee believes are pertinent to the operation of the law libraries.

6. These policies shall be published annually in the Connecticut Law Journal.

APPENDIX A

(Approved by the Connecticut Supreme Court on January 18, 2018*)*

LAW LIBRARY MINIMUM COLLECTION STANDARDS

(1) Connecticut Materials

(A) Official and commercially published judicial decisions
(B) Official and commercially published digests
(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service
(D) Official session laws
(E) Official and commercially published statutory compilations
(F) Administrative code and published agency decisions
(G) Official and commercially published practice books
(H) Bar association ethics opinions, Statewide Grievance Committee decisions and the Rules of Professional Conduct
(I) Local charters and ordinances for towns in the judicial district in accordance with C.G.S. § 7-148a
(J) A comprehensive collection of Connecticut textbooks, treatises, looseleaf services, form books, and practice aids
(K) A collection of Connecticut legal newspapers, law reviews, and journals
(L) Records and briefs of cases heard in the appellate courts of the state
(M) Proposed bills, legislative bulletins, list of bills, file copies, calendars, public acts, and journals for the current session
(N) Transcripts of the House and Senate proceedings and the public hearings
(O) Attorney General Opinions
(P) Current state constitution, and various historical versions of the constitution

(2) Federal Materials

(A) Official or another reporter of the decisions of the Supreme Court of the United States
(B) All published decisions of the U.S. District Courts, U.S. Courts of Appeal, and U.S. Bankruptcy Courts
(C) A digest of United States Supreme Court reports, or electronic equivalent
(D) A digest of federal reports, or electronic equivalent
(E) A citation service, such as Shepard's or KeyCite, or a comparable citation service
(F) United States Code Congressional and Administrative News, or a comparable online resource for researching federal legislative history
(G) United States Code Annotated or United States Code Service
(H) Federal Register and Code of Federal Regulations
(I) Federal Cases
(J) United States Statutes At Large

(K) United States Treaties And Other International Agreements
(L) United States Government Manual
(M) Federal court rules
(N) Local federal rules and forms for courts within jurisdiction

(3) **General National Publications**

(A) Case law from the courts of last resort in all fifty states
(B) Decennial Digests, or electronic equivalent
(C) A citation service, such as Shepard's or KeyCite, or a comparable citation service for the courts of last resort in all fifty states
(D) American Law Reports
(E) A collection of textbooks, treatises, practice aids, and looseleaf services of contemporary value on legal subjects of interest to the legal community and the public
(F) A collection of legal periodicals
(G) A legal encyclopedia, two law dictionaries, a general dictionary, a medical dictionary, and a general reference collection
(H) A basic form set, a general pleading, a general evidence and a general trial practice set
(I) A legal periodical index, or comparable online service
(J) Restatements Of The Law
(K) Uniform Laws Annotated
(L) Statutory compilations for all fifty states
(M) American Bar Association standards and professional ethics opinions
(N) The published reports of decisions of the courts of last resort prior to the National Reporter System
(O) A collection of general legal and self-help titles on subjects of interest to the public and self-represented parties

Notice of Suspension of Attorney

Pursuant to Practice Book Section § 2-54, notice is hereby given that on March 2, 2021, in Docket Number HHD-CV20-6122615-S, David V. Chomick, Juris No. 428595 of East Hartford, CT was suspended from the practice of law in Connecticut for a period of one (1) year retroactive to November 11, 2020.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

The Respondent shall apply for reinstatement pursuant to the provisions of § 2-53 of the Connecticut Practice Book. However, the Respondent shall not be eligible to apply for reinstatement until he has made the restitution as required by the order dated February 11, 2020 or has reimbursed the Client Security Fund, if applicable.

David Sheridan
Presiding Judge

Notice of Attorney Resignation

Pursuant to Practice Book § 2-52, notice is hereby given that on January 29, 2021 in docket number HHD-CV18-6095837-S, this court accepted the resignation of Michael T Kogut (juris no. 419933), of East Longmeadow, Massachusetts, and found that he has knowingly and voluntarily both resigned from the Connecticut Bar and waived the privilege of reapplying.

David Sheridan
Presiding Judge