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ORDERS

CONNECTICUT REPORTS

VOL. 336

ORDERS

STEVEN K. STANLEY *v.* COMMISSIONER OF CORRECTION

The petitioner Steven K. Stanley's petition for certification to appeal from the Appellate Court, 194 Conn. App. 903 (AC 40557), is denied.

KELLER, J., did not participate in the consideration of or decision on this petition.

James E. Mortimer, assigned counsel, in support of the petition.

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

Decided December 22, 2020

JOHN DOE *v.* STEPHEN FLANIGAN ET AL.

The defendant city of Waterbury's petition for certification to appeal from the Appellate Court, 201 Conn. App. 411 (AC 42567), is denied.

Daniel J. Foster, acting assistant corporation counsel, in support of the petition.

Chris DeMarco, in opposition.

Decided December 22, 2020

STATE OF CONNECTICUT *v.* DENNIS G. HAZARD

The defendant's petition for certification to appeal from the Appellate Court, 201 Conn. App. 46 (AC 43384), is denied.

MULLINS, J., did not participate in the consideration of or decision on this petition.

James B. Streeto, senior assistant public defender, and *Susan Brown*, public defender, in support of the petition.

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

Decided December 22, 2020

IN RE D'ANDRE T. ET AL.

The petition of the respondent mother for certification to appeal from the Appellate Court, 201 Conn. App. 396 (AC 43883), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

Evan O'Roark, assistant attorney general, in opposition.

Decided December 22, 2020

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* WILLIAM J. RUTTKAMP ET AL.

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 43974) is dismissed.

KELLER, J., did not participate in the consideration of or decision on this petition.

Shlomit Ruttkamp, self-represented, in support of the petition.

Geraldine A. Cheverko, in opposition.

Decided December 22, 2020

NIAMBI HEYWARD *v.* VERNON J. LEFTRIDGE, JR.

The defendant's petition for certification to appeal from the Appellate Court (AC 44011) is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Vernon J. Leftridge, Jr., self-represented, in support of the petition.

Decided December 22, 2020

NIAMBI HEYWARD *v.* VERNON J. LEFTRIDGE, JR.

The defendant's petition for certification to appeal from the Appellate Court (AC 44012) is denied.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Vernon J. Leftridge, Jr., self-represented, in support of the petition.

Decided December 22, 2020

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

GEORGE FIGUEROA *v.* COMMISSIONER OF CORRECTION (AC 42140)

Alvord, Prescott and DiPentima, Js.

Syllabus

The petitioner, who previously had been convicted of the crimes of murder and carrying a pistol without a permit in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, D, rendered ineffective assistance by failing to request an alibi instruction. He claimed that his appellate counsel, C, rendered ineffective assistance by failing to raise a claim on direct appeal that his sixth amendment right to a trial by jury was violated by the trial court's handling of a jury note inquiring about the testimony of a witness, T, that invaded the fact-finding province of the jury. The habeas court rendered judgment denying in part and dismissing in part the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner was not prejudiced by any alleged ineffective assistance of D as the petitioner failed to establish that there was a reasonable probability that, but for D's failure to request an alibi instruction, the outcome of the petitioner's criminal trial would have been different; the petitioner's alibi defense was weak, as the petitioner testified vaguely that he believed he was in New York City on the day of the murder, his only alibi witness did not testify as to his whereabouts on the day of the murder but only testified that he had moved to New York City a couple of months prior to the murder, there was substantial evidence linking the petitioner to the murder of the victim, including the testimony of two eyewitnesses who observed the petitioner shoot the victim, testimony which the jury clearly credited over the testimony of the petitioner, and there was

evidence that the victim and the petitioner had engaged in a previous altercation in which the petitioner shot at the victim two years earlier.

2. The habeas court properly determined that the petitioner was not prejudiced by C's failure to raise a sixth amendment claim on direct appeal; the trial court did not impermissibly find facts in violation of the petitioner's sixth amendment right to a jury trial, as that court's reference to certain relevant pages of the transcript of T's tape-recorded statement to the police, in response to the jury's question during deliberations, was not improper marshaling of the evidence, as the statement was in evidence, the court did not specifically read portions of the statement to the jury but only highlighted pages it believed were material to the jury's request, it allowed the jury to review the statement itself and reminded the jurors that the weight accorded to the evidence was up to them.

3. The habeas court properly dismissed the petitioner's freestanding claim that the trial court violated his state and federal constitutional rights to a jury trial on the ground of procedural default; on direct appeal, the petitioner failed to argue that the court, in its handling of the jury note, impermissibly found facts in violation of his right to a jury trial, and he failed to meet his burden of proving that his procedural default should be excused; the petitioner failed to prove that he was prejudiced by the trial court's handling of the jury note, and, thus, the petitioner's constitutional right to a trial by jury was not violated.

Argued September 16, 2020—officially released January 5, 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, *Kwak*, *J.*; judgment denying in part and dismissing in part the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Michael W. Brown, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

DiPENTIMA, J. The petitioner, George Figueroa, appeals from the judgment of the habeas court denying in part and dismissing in part his petition for a writ of

habeas corpus. On appeal, the petitioner claims that the court erred by concluding that (1) he failed to sustain his burden of establishing prejudice caused by his trial counsel's failure to request an alibi instruction, (2) he failed to sustain his burden of establishing prejudice caused by his appellate counsel's failure to argue on direct appeal that his constitutional right to a trial by jury was violated, and (3) his claim that his constitutional right to a trial by jury was violated was procedurally defaulted. We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of the petitioner's claims. The petitioner was charged with murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35. The matter proceeded to trial, and the jury returned a verdict of guilty on both counts. The trial court, *Hartmere*, *J.*, accepted the verdict and imposed a total effective sentence of sixty years imprisonment. The petitioner thereafter appealed from the judgment of conviction

On appeal, we affirmed the petitioner's conviction. See *State* v. *Figueroa*, 74 Conn. App. 165, 810 A.2d 319 (2002), cert. denied, 262 Conn. 947, 815 A.2d 677 (2003). The following facts, which the jury reasonably could have found, were set forth in our opinion in that appeal. In the summer of 1995, the petitioner and the victim, John Corbett, were involved in a physical altercation on Lilac Street in New Haven. Id., 166. During that altercation, the victim hit the petitioner in the face. Thereafter, the petitioner retreated to his residence on Lilac Street, retrieved his gun, and, from a window of his third floor apartment, began firing at the victim. Id., 166–67. The victim was not injured during this incident, which was never reported to the police. Id., 167.

Shortly thereafter, the victim was incarcerated until sometime in November, 1997. Id. Approximately two

weeks after his release, on the afternoon of December 7, 1997, the victim was standing at the corner of Lilac and Newhall Streets, speaking with Edward Wells. Id. The two men were standing in front of 44-46 Lilac Street when the petitioner approached, driving his white 1997 Toyota Camry, which he parked in front of a red sports car that also was parked along the side of Lilac Street. Id. The petitioner got out of his car and entered 40-42 Lilac Street. Id.

In the meantime, Ebonie Moore approached, driving her black car, which she parked along Lilac Street behind the red sports car. Id. She and her passenger, Takheema Williams, who had dated the petitioner, were sitting in Moore's car listening to music. Id.

The petitioner then emerged from the 40-42 Lilac Street residence and stood near his car. Id. The victim told Wells that he wanted to speak with the petitioner, and he walked over to where the petitioner was standing. Id. "The two talked for a short time, they shook hands, and then a shot was fired. As [the victim] turned away from the [petitioner], he fell face down onto the sidewalk. Wells and Moore then watched as the [petitioner] stood over [the victim], with his arm fully extended and a pistol in his hand, and fired several additional shots into [the victim's] body. The [petitioner] then walked to his white Toyota Camry, which was parked a few feet away, got into the driver's seat and sped along Lilac Street toward Newhall Street." Id., 167–68.

Wells ran to Moore's parked car, banged on the window, and yelled for Moore to call for an ambulance because " '[the petitioner] had just shot [the victim].' " Id., 168. Moore and Wells administered cardiopulmonary resuscitation (CPR) to the victim until the police arrived. Id. "Shortly thereafter, an ambulance arrived and transported [the victim] to Yale-New Haven Hospital where he was pronounced dead about eight minutes

after his arrival. [The victim] suffered six gunshot wounds. He was shot once in the stomach, four times in the lower back and once in the back of his left shoulder. Either or both of two of the wounds to [the victim's] lower back were fatal." Id.

"Soon thereafter, Wells and Moore arrived at the hospital where they told a New Haven police detective that it was the [petitioner] who had shot [the victim]. Within the next few days, both Wells and Moore gave statements to the police implicating the [petitioner] as the shooter and selected the [petitioner's] photograph from a photographic array, identifying him as the man who shot [the victim]. On December 10, 1997, Williams gave the police a tape-recorded statement regarding the December 7, 1997 shooting on Lilac Street." Id. Thereafter, the matter proceeded to trial, and the petitioner was convicted.

Following his direct appeal, the petitioner filed a pro se petition for a writ of habeas corpus on August 14, 2006. The habeas court, *Swords*, *J.*, granted the motion to dismiss filed by the respondent, the Commissioner of Correction, and this court affirmed the habeas court's judgment and dismissed the petitioner's appeal. See *Figueroa* v. *Commissioner of Correction*, 123 Conn. App. 862, 871, 3 A.3d 202 (2010), cert. denied, 299 Conn. 926, 12 A.3d 570 (2011). Thereafter, the petitioner filed a second petition for a writ of habeas corpus, which is the subject of this appeal. In the operative petition dated August 14, 2017, the petitioner alleged ineffective assistance of trial and appellate counsel. He also alleged that his constitutional rights to a trial by jury and due process of law had been violated. The habeas court, *Kwak*, *J.*, denied in part and dismissed in part the petition. The court determined that the petitioner had failed to prove that he was prejudiced by any of the alleged errors. The petitioner filed a petition for certification to appeal, which the court granted. Additional facts will be set forth as necessary.

I

The petitioner claims that the habeas court erred in concluding that he was not prejudiced by his trial counsel's failure to request an alibi instruction. Specifically, the petitioner argues that there is a reasonable probability that the outcome of his trial would have been different if the jury had been instructed as to how it should assess the alibi evidence presented at his trial. The petitioner contends that the jury, without proper guidance, could have believed that he had the burden of proving his alibi. In response, the respondent argues that an alibi instruction would not have led the jurors to question the credibility of Wells and Moore due to the strong evidence of the petitioner's identity as the shooter and the weakness of the petitioner's alibi evidence. Moreover, the respondent contends that the petitioner was not prejudiced because the jurors had the capacity to assess alibi evidence adequately without the aid of a specific alibi instruction by relying on their common knowledge. We agree with the respondent that the court properly concluded that the petitioner was not prejudiced by any alleged ineffectiveness of his trial counsel.

The following additional facts and procedural history are relevant. At trial, both Wells and Moore testified that they saw the petitioner shoot the victim. Wells testified that he heard a shot, saw the victim fall to the ground, and then watched as the petitioner stood over the victim and continued to fire at him. He further stated that he had a good look at the petitioner, it was not dark out, he had an unobstructed view, and there was no question in his mind that the petitioner was the individual firing at the victim. Wells also testified that, after the petitioner drove off in his car, Wells banged on the window of Moore's car and asked her to call an ambulance because the petitioner had just shot the victim. Wells told the police officers at the scene that the petitioner had shot the

victim, and repeated this to the detectives who took his statement at the police station later that evening. While at the station, the police showed Wells approximately six or seven photographs, and asked him to identify the petitioner. Wells identified the petitioner from the photographs.

Following Wells' testimony, Moore testified that she also saw the petitioner shoot the victim. Specifically, she testified that she saw the petitioner talking with the victim, saw the victim turn away and begin to walk toward her car, and then watched as the petitioner began to fire at the victim. Moore testified that the victim fell over and the petitioner stood over him and continued to fire. After he stopped firing at the victim, the petitioner got into his car and drove off. Moore testified that Wells then came up to her car and yelled that "[the petitioner] just shot [the victim]." Moore and Wells performed CPR on the victim. Moore went to Yale-New Haven Hospital with Wells and another friend, and later told a detective there that the petitioner "did the shooting." The following day, Moore went to the police station, and iterated that the petitioner had shot the victim. While there, the police showed Moore a photographic array from which she was able to identify the petitioner as the shooter.

The petitioner testified during his criminal trial. On direct examination, he stated that he was not in New Haven on December 7, 1997, the day of the murder. Although the petitioner testified that he could not remember exactly where he was, he believed that he was in New York City watching a football game with friends. During cross-examination, the petitioner repeated that he was in New York City on the day of the murder watching a football game, specifically in Yonkers at the house of a friend, Clifton McQueen. He further stated that there were around eight to ten people at McQueen's house, and that he did not remember any of their names.

In support of the petitioner's contention that he was not in New Haven on the date of the shooting, the defense

also called Tanya Fleming, the mother of one of the petitioner's daughters, as a witness. Fleming testified that the petitioner stayed with her in New Haven until September, 1997, and that, sometime during that month, he left to go to New York City. She further testified that the petitioner left his white Toyota Camry with her when he went to New York. She also testified that when she went to Maryland for Thanksgiving for approximately two weeks, she left the Camry at her apartment. When she returned home, however, the Camry was gone. Fleming did not report the car as stolen because she had not made any payments on it, and assumed that it had been repossessed.[1] The police later found the white Toyota Camry abandoned in Orange at a rest area along the Merritt Parkway.

Prior to closing arguments, the court discussed the final version of the jury charge with the prosecutor and defense counsel, Chris DeMarco. DeMarco confirmed with the court that he was not requesting an alibi instruction because he did not believe there was an alibi. On the basis of defense counsel's representations, the court stated that it would not give the jury an alibi instruction. During closing argument, DeMarco noted that the petitioner was not sure where he was on the day of the murder, and that he was unable to have any alibi witness testify for this reason. DeMarco repeated this theme later on, stating that he was unable to call McQueen to testify as an alibi witness because the petitioner was unsure as to his own whereabouts on the day of the shooting.

During the petitioner's habeas trial, DeMarco testified about his decision not to request an alibi instruction. DeMarco testified that he had not sought an alibi

[1] Fleming later testified on cross-examination that the petitioner left her his car so that she could get to and from work, and that she had assumed responsibility for making payments on the car. She never registered the car in her name.

instruction because the petitioner's alibi claim "[was not] solid." Specifically, although he believed that the jury could have credited the petitioner's testimony that he did not know exactly where he was on the day of the murder, DeMarco did not think that the petitioner was entitled to an alibi instruction because, legally, he could not be an alibi witness for himself. He also testified that he did not believe that Fleming's testimony was strong enough to support an alibi claim because any person could leave Connecticut and travel to and from a neighboring state in a few hours.

The petitioner then called Attorney Michael Fitzpatrick to testify as an expert witness regarding trial and appellate advocacy. Fitzpatrick opined that DeMarco should have requested an alibi instruction. He testified that, in his opinion, this failure prejudiced the petitioner because it deprived him of a "recognized defense and a basis for acquittal." Fitzpatrick stated that, although technically speaking the petitioner could not be an alibi witness for himself, he believed that Fleming's testimony "put things over the top and entitled him to an alibi instruction." Finally, he testified that without an alibi instruction, the jury would not have received clear guidance on who had the burden of proving or disproving an alibi defense, as they "may very well believe that the party that's offered the evidence has the burden to prove it."

Following trial, the habeas court concluded that the petitioner had failed to sustain his burden of establishing prejudice with respect to his ineffective assistance of trial counsel claim. Specifically, the habeas court found that "[i]n the underlying criminal case, the evidence linking the petitioner to the crime was substantial, including testimony by multiple eyewitnesses who identified the petitioner as the shooter. Based on the record, the court finds that there does not exist a reasonable likelihood that the outcome of the petitioner's trial would have been different if an alibi instruction

had been given." Thereafter, the habeas court denied the petitioner's claim.

We are guided by the following relevant legal principles. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 417, 202 A.3d 453, cert. denied, 331 Conn. 905, 202 A.3d 373 (2019).

"A claim of ineffective assistance of counsel as enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], 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. . . . Our Supreme Court has stated that the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances, and that [j]udicial scrutiny of counsel's performance must be highly deferential. . . .

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . 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 that ineffectiveness, the outcome would have

been different. . . . In making this determination, a court hearing an ineffectiveness claim . . . must consider the totality of the evidence before the judge or the jury. . . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. . . .

"A petitioner's claim will succeed only if both prongs are satisfied. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unworkable. . . . A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." (Internal quotation marks omitted.) *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 530–31, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019).

On the basis of our review of the record, we conclude that the petitioner has failed to establish that there was a reasonable probability that, but for DeMarco's failure to request an alibi instruction, the outcome of his trial would have been different. In the present case, there was substantial evidence linking the petitioner to the victim's murder. Specifically, two eyewitnesses testified to observing, at close range, the petitioner shoot the victim. Wells testified that he was about a "house away" from the petitioner when he heard a shot and saw the victim fall to the ground. Wells then watched as the petitioner stood over the victim and shot him approximately seven times. Wells further testified that he had an unobstructed and good view of the petitioner, and that it was light out. Upon witnessing the event, Wells

immediately banged on the window of Moore's car, told her that the petitioner had just shot the victim, and asked her to call an ambulance. He told the police both at the scene and later that evening at the police station that the petitioner was the victim's shooter, and he identified the petitioner from a photographic array. Wells' testimony thus provided strong evidence of the petitioner's guilt.

Moore independently corroborated Wells' identification of the petitioner. Moore testified that she witnessed the incident at close range, from approximately two car lengths away.[2] Even though a tree and a red car were partially obstructing her view, Moore testified that she saw the petitioner speaking with the victim, saw them shake hands following their conversation, saw the victim turn away, and then watched as the petitioner began firing at the victim. Although Moore did not see the gun, she could tell that the petitioner was firing at the victim because she felt a vibration and saw "fire come out" from the petitioner's arm. Moore then testified that the petitioner stood over the victim and shot him approximately seven times. Following the shooting, Moore stated that Wells ran up to her car, banged on her window, and shouted that "[the petitioner] just shot [the victim]." Moore traveled to the hospital with Wells and a friend and, while there, she told a detective that "[the petitioner] did the shooting." The next day, Moore went to the police station, where she iterated that the petitioner had shot the victim, and identified him from a photograph array. Moore's testimony, therefore, also provided strong evidence of the petitioner's identity as the shooter.

In addition to the eyewitness testimony, the state presented circumstantial evidence against the petitioner during his trial on the issues of intent and motive,

[2] Upon returning to Lilac Street, Moore parked her car behind a red car, which was parked right behind the petitioner's white Camry.

further establishing the likelihood that he was the shooter.[3] "Evidence of prior threats by a defendant directed to his victim has been held relevant to the issues of intent and motive." (Internal quotation marks omitted.) *State* v. *Fisher*, 57 Conn. App. 371, 376, 748 A.2d 377, cert. denied, 253 Conn. 914, 754 A.2d 163 (2000). Here, during the petitioner's criminal trial, Moore testified that, in the summer of 1995, the petitioner and the victim had been involved in an altercation. During that summer, the victim and the petitioner had gotten into a physical fight, and the victim "beat the [petitioner] up." This angered the petitioner, who went into his house and began shooting out the window at the victim. The victim was not shot during this incident, which was never reported to the police. Moore's testimony demonstrated that the petitioner had threatened the victim previously, and provided circumstantial evidence that the petitioner intended to shoot the victim, and had a motive for doing so. Such evidence, therefore, provided additional support for the state's case against the petitioner. On the record presented, we thus are not persuaded that there is a reasonable probability that the outcome of the petitioner's trial would have been different had his defense counsel requested an alibi instruction given the strength of the state's case.

Moreover, the very nature of an alibi and the detailed instructions that the court gave the jury on the burden of

[3] Although motive is not an element of the charges against the defendant; see General Statutes §§ 29-35 and 53a-54a; "[e]vidence of motive is a highly relevant factor for assessing the guilt or innocence of a defendant. . . . Motive is a fact which may be inferred from circumstances; hence the circumstances from which it may be inferred are relevant." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Carter*, 84 Conn. App. 263, 278, 853 A.2d 565, cert. denied, 271 Conn. 932, 859 A.2d 931 (2004), cert. denied, 544 U.S. 1066, 125 S. Ct. 2529, 161 L. Ed. 2d 1120 (2005). Any evidence of the petitioner's motive or intent to shoot the victim, therefore, is highly relevant in assessing the strength of the state's case and whether the petitioner was prejudiced by his defense counsel's failure to request an alibi instruction.

proof and witness credibility undermine the petitioner's argument that he was prejudiced by the lack of an alibi instruction. An alibi "is a claim by the defendant that he or she was in a place different from the scene of the crime at the time of the alleged offense." *State* v. *Tutson*, 278 Conn. 715, 733, 899 A.2d 598 (2006). "A defendant asserting an alibi and relying upon it as a defense is entitled to have the jury charged that the evidence offered by him on that subject is to be considered by them in connection with all the rest of the evidence in ascertaining whether he was present, and that if a reasonable doubt on that point exists, it is the jury's duty to acquit him." *State* v. *Butler*, 207 Conn. 619, 631, 543 A.2d 270 (1988). However, a "trial court has no duty to instruct upon alibi in the absence of a request, and . . . the failure to instruct in such an instance will not ordinarily constitute reversible error, even though substantial alibi evidence may have been introduced by the defense." (Internal quotation marks omitted.) Id. "While an alibi is commonly called a defense, strictly speaking it is merely rebuttal of the state's evidence." (Internal quotation marks omitted.) *State* v. *Parham*, 174 Conn. 500, 510, 391 A.2d 148 (1978). Accordingly, "an unrequested instruction is not necessary inasmuch as it is within the common knowledge of jurors, without being told, that if the accused was at a place other than the scene of the commission of a crime requiring personal presence, he cannot be guilty." (Internal quotation marks omitted.) Id.

Here, although the court did not deliver an alibi instruction to the jury, it repeatedly emphasized that the state had the burden of proof throughout its instructions. The court initially told the jury that "the burden to prove the [petitioner] guilty of the crime with which he is charged is upon the state. The [petitioner] does not have to prove his innocence. This means that the state must prove beyond a reasonable doubt each and

every element necessary to constitute the crime charged." The court later instructed the jury that the "state must prove beyond a reasonable doubt that the [petitioner] caused the death of [the victim] with the intent to cause the death. The state must prove beyond a reasonable doubt that the [petitioner] caused the death of [the victim] by the use of a firearm."

The court also provided the jury with thorough instructions on witness credibility. Specifically, the court instructed the jury that it "must decide which testimony to believe and which testimony not to believe. You may believe all, none or any part of any witness' testimony, that is up to you. In making that decision you may take into account a number of factors including the following: (1) Was the witness able to see or hear or know the things about which that witness testified? (2) How well was the witness able to recall or describe those things? (3) What was the witness' manner while testifying? (4) Did the witness have an interest in the outcome of this case, or any bias or prejudice concerning any party or any matter involved in the case? (5) How reasonable was the witness' testimony considered in the light of all the evidence in the case? And (6) was the witness' testimony contradicted by what that witness has said or done at another time, or by the testimony of other witnesses or by other evidence?" The petitioner did not object to the burden of proof and witness credibility portions of the court's charge to the jury.

Because the state had the burden of proving that the petitioner caused the death of the victim by use of a firearm, to find the petitioner guilty, the jury necessarily needed to find that the state had proven beyond a reasonable doubt that the petitioner was present at the scene of the crime and had, in fact, shot and killed the victim. Although the jurors did not receive a specific instruction from the court regarding a claim of alibi, it

was within their common knowledge "without being told, that if the accused was at a place other than the scene of the commission of a crime requiring personal presence, he cannot be guilty." (Internal quotation marks omitted.) *State* v. *Parham*, supra, 174 Conn. 510. By finding the petitioner guilty, the jury clearly weighed the credibility of the witnesses' testimony, in accordance with the court's instructions, and rejected the petitioner's testimony that he had been in New York City during the time of the murder, and instead credited the testimony of both Wells and Moore that they saw the petitioner shoot the victim. See *State* v. *Perez*, 147 Conn. App. 53, 111, 80 A.3d 103 (2013) (acknowledging that "[i]t is a fundamental principle that jurors are presumed to follow the instructions given by the judge" (internal quotation marks omitted)), aff'd, 322 Conn. 118, 139 A.3d 654 (2016). The jury's apparent rejection of the petitioner's alibi indicates that it did not find his testimony credible. Moreover, in light of the court's instructions that placed the burden of proof squarely on the state, the jury would not have been misled by the absence of any discussion in the charge of the petitioner's alibi claim. See *State* v. *Parham*, supra, 510 (concluding absence of alibi instruction could not have misled jury when it was clear jury was instructed that it could not find defendant guilty unless he was at scene of burglary and defendant failed to claim error in charge regarding burden and quantum of proof required for conviction). Consequently, receiving an alibi instruction likely would not have caused the outcome of the petitioner's trial to be different.

The weakness of the petitioner's alibi evidence presented at trial further indicates that the petitioner was not prejudiced by DeMarco's failure to request an alibi instruction. During trial, the petitioner testified vaguely that he was not in New Haven on the day of the murder, and that he "believed" he was in New York City watching a football game with friends. Although he later

stated during cross-examination that he was at the house of his friend Clifton McQueen, neither McQueen, nor any of the approximately eight to ten people whom the petitioner said were with him but whom he could not name, testified in order to corroborate his alibi.

The petitioner's only alibi witness was Tanya Fleming, and her testimony did not strengthen the alibi claim. Although she testified that the petitioner left Connecticut to move to New York City sometime in September, 1997, she did not testify as to the petitioner's whereabouts on December 7, 1997, the day of the murder. Even assuming that the petitioner had moved to New York City in September, 1997, Fleming's testimony did not foreclose the possibility that the petitioner returned to Connecticut on December 7, 1997, murdered the victim, and then returned to New York City. Indeed, as DeMarco testified during the petitioner's habeas trial, Fleming's testimony did not strongly corroborate the petitioner's alibi because any person can leave Connecticut and travel to and from a neighboring state in a few hours. Due to Fleming's inability to specify where the petitioner was on the day of the murder, the jury faced a credibility determination between the petitioner's claim that he was in New York City, and the testimony of Wells and Moore that they witnessed the petitioner shoot the victim. By returning a guilty verdict, the jury appears to have credited the testimony of Wells and Moore rather than that of the petitioner. The petitioner, therefore, has not met his burden of demonstrating that there is a reasonable probability that, but for DeMarco's failure to request an alibi instruction, the outcome of his trial would have been different.[4]

[4] The petitioner also argues on appeal that he was prejudiced by statements that his defense counsel made during closing argument that seemingly undermined the alibi evidence that had been presented during trial. These statements consist of two comments during the entirety of his counsel's closing argument. First, DeMarco argued that he did not present an alibi witness because the petitioner was not sure where he was on the day of the murder. DeMarco attempted to explain the petitioner's lack of certainty about his

On the basis of the record, we conclude that the habeas court properly determined that, due to the substantial evidence linking the petitioner to the crime, the petitioner cannot establish prejudice as a result of any allegedly deficient performance by his trial counsel. Accordingly, his claim of ineffective assistance of trial counsel fails.

II

The petitioner next claims that the habeas court erred by concluding that he was not prejudiced by his appellate counsel's failure to raise as a claim on direct appeal that the trial court's handling of a jury note inquiring about Takheema Williams' testimony violated his sixth amendment right to a trial by jury. Specifically, the petitioner argues that a claim that the trial court violated his sixth amendment rights by invading the fact-finding province of the jury is more "favorable" to a criminal defendant than the claim raised by his appellate counsel, and that the habeas court erred by failing to consider this when determining that the petitioner was not prejudiced. In response, the respondent contends that the petitioner was not prejudiced by his appellate counsel's failure to raise a sixth amendment claim because

whereabouts by arguing that the petitioner had no reason to remember that date if he indeed did not murder the victim, as he was arrested in September, 1998, approximately nine months after the murder. Second, DeMarco noted to the jury that he could not call McQueen as an alibi witness because the petitioner was not positive where he was, and thus where McQueen was, on the day of the murder.

Due to this lack of certainty, defense counsel stated that he was not permitted to call McQueen as a witness. In light of the strength of the state's case against the petitioner, the strength of the court's instructions, and the weakness of the petitioner's alibi evidence that we have noted above, we conclude that the petitioner has not met his burden of proving that he was prejudiced by these comments. See *Leon* v. *Commissioner of Correction*, supra, 189 Conn. App. 540 (concluding that petitioner was not deprived of right to effective assistance of counsel despite petitioner's challenge to defense counsel's remarks during closing argument because petitioner failed to meet burden of proving that outcome would have been different where evidence strongly supported jury's verdict).

any alleged court fact-finding was limited to a single eyewitness, and, due to the strength of Wells' and Moore's testimony, Williams' identification testimony was of marginal significance. We agree with the respondent that the petitioner was not prejudiced by his appellate counsel's failure to raise a sixth amendment claim.

The following additional facts and procedural history are relevant to this claim. At trial, the state called Williams to testify about the events on the day of the murder. Williams testified that she was with Moore on Lilac Street on December 7, 1997. Williams and Moore went to the flea market, and then returned to Lilac Street in Moore's black car. When the two of them returned, Moore once again parked her car on Lilac Street. The state then attempted to ask Williams questions about the events that transpired after she and Moore returned to Lilac Street, but Williams testified that she was unable to remember most of the day's events. As a result, her taped statement from December 10, 1997, and a twenty-one page transcript of that tape were admitted into evidence as full exhibits for substantive and impeachment purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).[5]

On April 27, 2000, during the fifth day of jury deliberations, the jury submitted the following question to the court: "We'd like to hear if [Takheema] Williams was ever asked to answer the question 'Did you see [the petitioner] at the scene?' " After reviewing Williams' testimony, and outside the presence of the jury, the court

[5] In *State* v. *Whelan*, supra, 200 Conn. 753, our Supreme Court adopted a rule "allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination." Pursuant to *Whelan*, a court can admit a witness' prior written inconsistent statement for substantive purposes when the witness claims to have no memory of the subject they are being asked to testify about. See id., 749 n.4 ("inconsistencies may be found . . . in denial of recollection").

stated to counsel that "[t]he literal answer [to the question] is no, she was never asked that question. . . . I think, in terms of the live testimony, the answer is 'no.' She was never asked that question." The court further stated, however, that Williams' *Whelan* statement had been admitted for substantive and impeachment purposes, and that on pages eighteen[6] and twenty[7] of the transcript of that statement, she did testify as to what she saw. The court indicated that it intended to inform the jurors that there were two parts to their question, the first being whether there was live testimony to that effect and the second being whether there was other evidence to that effect. DeMarco objected on the ground that any reference to the relevant pages of Williams' *Whelan* statement would constitute an improper marshaling of the evidence. He requested that the court refrain from making any specific reference to page numbers. The court noted the objection, but stated that it intended to reference the page numbers in order to "shortcut" it for the jury.

[6] Page eighteen of Williams' *Whelan* statement reveals the following colloquy between Williams and Detective Edwin Rodriguez:

"Q. Okay, when was the last time you'd seen [the petitioner]? Two days before the shooting?

"A. Yes.

"Q. And you saw him the day he took off in the car, too.

"A. Uh-huh."

[7] Page twenty of Williams' *Whelan* statement reveals the following colloquy between Williams and Detective Edwin Rodriguez:

"Q. Getting back to when you were in the vehicle, and you stated to me, [Moore] told you something after everything was done. What did she tell you, again? Can you tell—

"A. You seen that. You know who did it.

"Q. And she meant saying that if you saw the same thing she did?

"A. Yeah.

"Q. And you told her no at the time. Is that correct?

"A. No, I didn't.

"Q. And what did you tell her?

"A. I told her 'yeah.'

"Q. Okay, you told her you—you saw the same thing she saw.

"A. Uh-huh."

Thereafter, the jury was brought back into the courtroom. The court instructed the jury that Williams was never asked whether she saw the petitioner at the scene during her in-court testimony. The court also told the jurors, however, that it "want[ed] to remind you that as to the witness [Takheema] Williams, her prior tape recorded statement was introduced. . . . You have that. The transcript is state's exhibit 97, which you also have, and I'll refer you to my instructions on the use of that statement, which [is] on page eighteen of my instructions as to the use you may make of it. I'll also refer you to, in the transcript, and if you listen to the tape-recorded statement, pages eighteen and twenty, of her statement, but again, it's up to you as to what weight you accord to any evidence. I just wanted to remind you of that. So, I think the answer to your question is in two parts, then, as I've described." Four days later, on May 1, 2000, the jury returned a verdict of guilty of both counts.

On direct appeal, the petitioner claimed that "the trial court improperly directed the jury to two pages of a witness' twenty-one page statement in response to a question by the jury during its deliberations." *State* v. *Figueroa*, supra, 74 Conn. App. 165. He argued that the court's response to the jury's inquiry was improper and violated his right to a fair trial because "(1) the court had authority to refer the jury to Williams' in-court testimony only and lacked authority to direct the jury to Williams' *Whelan* statement, and (2) referring to only two pages of the twenty-one page *Whelan* statement constituted an improper marshaling of the evidence by the court in favor of the state."[8] Id., 171. The petitioner made this claim pursuant to the due process clause

[8] On appeal, the petitioner conceded that his claim that the trial court had acted beyond the scope of its authority when referring the jury to Williams' *Whelan* statement was unpreserved. *State* v. *Figueroa*, supra, 74 Conn. App. 171. Accordingly, we reviewed this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A. 2d 823 (1989).

of the fourteenth amendment. This court rejected the petitioner's claims, holding that "[t]he court's reference to particular pages of the *Whelan* statement in an effort to answer the jury's inquiry did not constitute a marshaling of evidence in favor of the state but, instead, a simple response to the jury's request for a review of a portion of the record under Practice Book § 42-26." Id., 176. We also concluded that "the court acted in furtherance of the interests of justice by referring the jury to Williams' *Whelan* statement because, if it had not done so, the court would not have been completely responsive to the jury's request. In addition, we fail to see how the court violated the defendant's constitutional right to a fair trial by referring the jury to Williams' *Whelan* statement because it already had been admitted for substantive purposes and was in the jury's possession during its deliberations. Accordingly, the defendant cannot prevail on his claim because he has failed to demonstrate that the alleged constitutional violation . . . exists and . . . deprived [him] of a fair trial . . . ." (Internal quotation marks omitted.) Id., 174–75.

During the petitioner's habeas trial, his appellate counsel, Richard Condon, testified that, on direct appeal, he had argued that the defendant was denied his right to a fair trial only in violation of the fourteenth amendment's due process clause. He testified that he did not raise a sixth amendment claim on appeal because the arguments involved with such a claim would have been similar to and duplicative of the claims he brought under the fourteenth amendment. Later that day, Fitzpatrick testified that he was of the opinion that it was objectively unreasonable for Condon not to have raised a sixth amendment claim. Fitzpatrick testified that a sixth amendment claim is stronger than a fourteenth amendment claim because the standard of review for a sixth amendment claim is not the more deferential abuse of discretion standard, and, under the

sixth amendment, "any intrusion into the jury's right to decide and decide along the facts is reversible error."[9]

The habeas court held that the "petitioner has failed to sustain his burden of establishing prejudice with respect" to his claim premised on the ineffective assistance of Condon. The habeas court further concluded that "[p]ursuant to the record, the court determines that the petitioner has failed to sustain his burden of proving prejudice by demonstrating a reasonable probability that, but for [Condon's] failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal. The Appellate Court's holding in the petitioner's direct appeal indicates that it is not reasonably likely that the petitioner would prevail on his claim that he was deprived of a fair trial by the trial court's actions in handling the jury note. . . . Therefore, this claim must be denied." Accordingly, the habeas court denied the petitioner's claim.

We are guided by the following relevant legal principles. "To succeed on an ineffective assistance of appellate counsel claim, the petitioner must satisfy both the performance prong and the prejudice prong of*Strickland* . . . ." *Tutson* v. *Commissioner of Correction*, 168 Conn. App. 108, 122, 144 A.3d 519, cert. denied, 323 Conn. 933, 150 A.3d 233 (2016). "The first part of the *Strickland* analysis requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . To satisfy the prejudice prong,

[9] We note that Fitzpatrick further opined that the petitioner would have prevailed on appeal if the stronger sixth amendment claim had also been raised; we do not address the propriety of that opinion in this appeal. See generally *Hodges* v. *Commissioner of Correction*, 187 Conn. App. 394, 404–405, 202 A.3d 421("expert opinion as to the ultimate issue in a case is admissible only when necessary for the trier of fact to make sense of the proffered evidence, rendering the situation . . . of such a nature as to require an expert to express an opinion on the precise question upon which the court ultimately had to pass" (internal quotation marks omitted)), cert. denied, 331 Conn. 912, 203 A.3d 1246 (2019).

the petitioner must demonstrate that there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . Thus, to determine whether a habeas petitioner had a reasonable probability of prevailing on appeal, a reviewing court necessarily analyzes the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citations omitted; internal quotation marks omitted.) Id., 123.

The sixth amendment to the United States constitution provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const., amend. VI. "The [c]onstitution casts judge and jury in mutually supporting—yet nevertheless distinct—roles. Undeniably inherent in the constitutional guarantee of trial by jury is the principle that a court may not step in and direct a finding of contested fact in favor of the prosecution regardless of how overwhelmingly the evidence may point in that direction. The trial judge is . . . barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." (Internal quotation marks omitted.) *United States* v. *Argentine*, 814 F.2d 783, 788 (1st Cir. 1987). "Although [a court] may, at its discretion, reread testimony where the jury makes a request to have specific testimony reread . . . the culling of testimony in response to a jury's open-ended question may, in effect, make the court a finder of fact . . . ." (Citations omitted; internal quotation marks omitted.) *United States* v. *Rivera-Santiago*, 107 F.3d 960, 965 (1st Cir. 1997). A constitutional error may thus occur where a court's "answer to a jury's factual question had the effect of mandating that the jury reach a conclusion on a particular issue." Id.; see

also *C & H Associates Ltd. Partnership* v. *Stratford*, 122 Conn. App. 198, 203, 998 A.2d 833 (2010) ("litigants have a constitutional right to have factual issues resolved by the jury" (internal quotation marks omitted)).

Nevertheless, the court has discretion when determining how to respond to a jury question that arises during deliberation. Practice Book § 42-26 provides that "[i]f the jury after retiring for deliberations requests a review of certain testimony, the jury shall be conducted to the courtroom. Whenever the jury's request is reasonable, the judicial authority, after notice to and consultation with the prosecuting authority and counsel for the defense, shall have the requested parts of the testimony read to the jury." "[T]he trial court has discretion to grant a jury's request to review testimony. . . . What portions of the record, if any, will be submitted to the jury for [its] consideration is a matter of sound judicial discretion. . . . In determining whether the trial court has abused its discretion, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . [T]he exercise of [the trial court's] discretion will not constitute reversible error unless it has clearly been abused or harmful prejudice appears to have resulted." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 743–44, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

As a preliminary matter, we note that the petitioner makes the conclusory statement that his appellate counsel's failure to raise a sixth amendment claim was prejudicial because "if the province of the jury is violated as to a material fact in a criminal proceeding, reversal is virtually automatic." In the petitioner's view, because reversal is automatic when the province of the jury is violated, his appellate counsel rendered ineffective assistance by failing to raise a sixth amendment claim

because the analysis of a sixth amendment claim based on court fact-finding is more favorable to a criminal defendant. We have found no authority for the proposition that reversal is automatic if the province of the jury is violated, nor has the petitioner provided us with any authority for his assertion. We, therefore, conclude that this claim is inadequately briefed. See *State* v. *Claudio C.*, 125 Conn. App. 588, 600, 11 A.3d 1086 (2010) ("[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 300 Conn. 910, 12 A.3d 1005 (2011). Accordingly, we address whether the petitioner was prejudiced by any allegedly ineffective assistance of his appellate counsel on other grounds.

As we concluded on direct appeal, it was within the court's discretion to refer the jury to Williams' *Whelan* statement because the jury's inquiry was not limited to in-court testimony. The jury requested to know whether Williams "was *ever* asked to answer the question, [D]id you see [the petitioner] at the scene?" (Emphasis in original; internal quotations marks omitted.) *State* v. *Figueroa*, supra, 74 Conn. App. 173. Because Williams was never asked that question during her in-court testimony, "the most reliable means for the jury fairly and intelligently to ascertain whether she ever had been asked and had answered that question was for the court to refer the jury to a material part of the evidence, namely, Williams' *Whelan* statement, which already was in the jury's possession." Id. Referring the jury to Williams' *Whelan* statement, therefore, was a matter entirely within the court's discretion, and the court did not abuse its discretion in doing so. Id., 173–74.

We also refer to our conclusion on direct appeal that the court did not unfairly and prejudicially marshal the

evidence in favor of the state when it referred to two particular pages of Williams' *Whelan* statement. As we noted previously, the court did not marshal the evidence in favor of the state, and its response to the jury's question was, instead, "a simple response to the jury's request for a review of a portion of the record under Practice Book § 42-26." Id., 176. Because the court has discretion to determine what portions of the record, if any, should be submitted to the jury for its review, it was "in the court's discretion to determine that those particular pages, and not the entire twenty-one page statement, were responsive to the jury's request." Id., 177.

We now turn to the issue of whether the petitioner was prejudiced by his appellate counsel's failure to argue that the court violated the petitioner's sixth amendment right to a jury trial by referring the jury to two pages of Williams' *Whelan* statement. We conclude that the petitioner was not prejudiced because the court did not violate the petitioner's sixth amendment rights by impermissibly finding facts. Although the court referred the jury to two specific pages of Williams' *Whelan* statement, the manner in which the court handled this referral did not constitute fact-finding. First, the court never affirmatively stated that Williams had been asked and answered the question of whether she had seen the petitioner at the scene. Instead, the court informed the jury that it wanted "to remind you that as to the witness Takheema Williams, her prior tape-recorded statement was introduced. . . . I'll also refer you to, in the transcript, and if you listen to the tape-recorded statement, pages eighteen and twenty, of her statement . . . ." The court, therefore, left it to the jury to review Williams' statement to determine if she had indeed stated that she had witnessed the petitioner at the scene.[10]

[10] It is clear from the transcript of the colloquies identified in footnotes 6 and 7 of this opinion that Williams was never asked the precise question

Second, the court did not selectively read only portions of Williams' *Whelan* statement to the jury when answering its question. Although the court highlighted the two pages of her statement that the court believed were material to the jury's request, the court did not read any of her statement to the jury and, again, left it to the jury to review the statement itself. It also never represented to the jury that it should review only this portion of her statement. It, thus, cannot be said that the court's referral to Williams' *Whelan* statement culled her statement and, in effect, made the court a finder of fact. See *United States* v. *Rivera-Santiago*, supra, 107 F.3d 965.

Third, the court's instructions about the use of Williams' statement indicates that the court did not override or interfere with the jurors' independent judgment. Specifically, the court instructed the jurors that "it's up to you as to what weight you accord to any evidence." The court also referred the jury to its prior instructions on the use of Williams' statement, in which it had instructed the jury that it could use her statement for both substantive and impeachment purposes. The court's instructions thus reinforced to the jury that it was not required to find that Williams had ever stated that the petitioner was at the scene and, even if it did find she had made that statement, it was up to the jury to determine what weight to give the statement.

of whether she had seen the petitioner at the scene. During her statement to the police, Williams did, however, state that she had seen the petitioner on the day he took off in the car, and that she had confirmed with Moore that she had seen the same thing that Moore had seen and that she knew who shot the victim. See footnotes 6 and 7 of this opinion. Accordingly, the jury could have interpreted the colloquies between Williams and the detective taking her statement as the functional equivalent of being asked whether she had seen the petitioner at the scene and, thus, material to its inquiry. See *State* v. *Figueroa*, supra, 74 Conn. App. 173 (concluding that most reliable means for jury to assess whether Williams had ever been asked and had ever answered question was to refer jury to material part of evidence already in jury's possession).

Consequently, we conclude that the court left the consideration of Williams' statement completely to the jury's discretion, and did not, in effect, mandate that the jury reach a particular conclusion on the issue of whether Williams ever stated that she had seen the petitioner at the scene. See *United States* v. *Rivera-Santiago*, supra, 107 F.3d 965. The court, therefore, did not impermissibly find facts in violation of the petitioner's sixth amendment right to a jury trial.

We are unpersuaded by the petitioner's argument to the contrary. The petitioner mainly relies on federal cases in arguing that the court's handling of the jury note violated his sixth amendment right to a jury trial. These cases, however, are distinguishable. The cases he relies on are direct appeals from a judgment of conviction rendered following a jury trial. None of the cases involves a claim made during a habeas proceeding that the appellant was denied effective assistance of appellate counsel. Moreover, the cases are factually distinguishable from the present case. In the cases that the petitioner cites, the court reversed the appellant's conviction because the trial court impermissibly found facts by: (1) selectively reading portions of the germane testimony and affirmatively representing to the jury that the testimony it read would provide " 'the' " answer to the jury's question; id., 966; (2) presenting a witness' testimony as an accomplished fact derived from a collaborative checking of the record; *United States* v. *Argentine*, supra, 814 F.2d 787; (3) improperly permitting the attorneys to deliver supplemental arguments on a jury's question when a one word answer would have provided a direct and complete response; *United States* v. *Ayeni*, 374 F.3d 1313, 1316 (D.C. Cir. 2004); and (4) endorsing the jury's preliminary interpretation of an indictment and directing the jury to evidence that the jury had not inquired about in its note. *United States* v. *Miller*, 738 F.3d 361, 383–84 (D.C. Cir. 2013).

In the present case, the court's handling of the jury note did not implicate any of these concerns. As previously observed, the court here never affirmatively represented that Williams had ever answered the question of whether she had seen the petitioner at the scene. Instead, the court simply directed the jury to the relevant portions of her testimony that were material to the jury's inquiry and reminded the jurors that the weight accorded to that evidence was up to them. See *State* v. *Ruffin*, 144 Conn. App. 387, 406–407, 71 A.3d 695 (2013) (concluding that there was no error in court's instructions when court instructed jury on nature of inconsistent evidence and jury's role in determining witness credibility to aid jury in assessing credibility of and weighing witness' prior statements), aff'd, 316 Conn. 20, 110 A.3d 1225 (2015); *State* v. *Figueroa*, supra, 74 Conn. App. 173 (concluding that court did not abuse its discretion when most reliable means for jury to ascertain answer to its question was to refer jury to material part of evidence already in jury's possession). The cases that the petitioner relies on, therefore, are distinguishable.

We conclude that the habeas court properly determined that the petitioner failed to meet his burden of proving the prejudice prong of *Strickland*. In the present case, the court did not impermissibly find facts in violation of the petitioner's sixth amendment right to a jury trial. Because there was no sixth amendment violation, the petitioner has failed to meet his burden of proving that there is a reasonable probability that, but for appellate counsel's failure to raise the sixth amendment issue on appeal, he would have prevailed on direct appeal. Accordingly, his claim of ineffective assistance of appellate counsel fails.

III

Finally, the petitioner claims that the habeas court erred by dismissing his claim that the trial court's handling of the jury note violated his federal and state

constitutional rights to jury fact-finding. This freestanding claim, which the habeas court dismissed on the ground of procedural default, was not tethered to any ineffective assistance of counsel claim. The petitioner argues that the habeas court incorrectly concluded that this claim was procedurally defaulted or, alternatively, that he failed to prove cause and prejudice necessary to overcome the default. In response, the respondent contends that the habeas court correctly concluded that this claim was procedurally defaulted. We agree with the respondent that the petitioner's claim was procedurally defaulted and that the petitioner failed to show that he was prejudiced by the improprieties he claims in his petition.

The following additional facts and procedural history are relevant. In his operative petition for a writ of habeas corpus, the petitioner alleged that his constitutional right to a trial by jury was violated. Specifically, the petitioner alleged that his right to a trial by jury is protected by the sixth amendment to the United States constitution, and article first, § 19, of the Connecticut constitution.[11] He further alleged that the trial court invaded the province of the jury by improperly responding to the jury note, and that this violation of his right to a trial by jury was a structural error that is not subject to the harmless error analysis. The petitioner's freestanding claim that his constitutional right to a trial by jury was violated was not raised either at the petitioner's criminal trial or in his direct appeal.

The respondent sought dismissal of this claim on procedural default grounds. The habeas court agreed with the respondent and concluded that the petitioner's

[11] Article first, § 19, of the Connecticut constitution provides that "[t]he right of trial by jury shall remain inviolate . . . ." Our Supreme Court continually has reaffirmed this principle that "[l]itigants have a constitutional right to have issues of fact determined by the jury." *Douglass* v. *95 Pearl Street Corp.*, 157 Conn. 73, 80–81, 245 A.2d 129 (1968); see also *C & H Associates Ltd. Partnership* v. *Stratford*, supra, 122 Conn. App. 203 (noting same).

claim was procedurally defaulted. The habeas court held that "the petitioner has failed to allege a legally cognizable cause and prejudice to rebut his procedural default, and he is thus barred from having the claim raised in his petition decided on the merits in the habeas corpus forum."[12] Accordingly, the habeas court dismissed the petitioner's claim.

"A party in a habeas appeal procedurally defaults on a claim when he raises issues on appeal that were not properly raised at the criminal trial or the appeal thereafter. . . . Habeas, as a collateral form of relief, is generally available to litigate constitutional issues only if a more direct route to justice has been foreclosed through no fault of the petitioner. . . . The reviewability of habeas claims not properly pursued on appeal is subject to the cause and prejudice standard." (Citation omitted; internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 511, 193 A.3d 625 (2018). "[A] petitioner must demonstrate good cause for his failure to raise a claim . . . on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . . The cause and prejudice requirement is not jurisdictional in nature, but rather a prudential limitation on the right to raise constitutional claims in collateral proceedings." (Citation omitted; internal quotation marks omitted.) Id., 515. "Cause and prejudice must be established conjunctively. . . . If the petitioner fails to demonstrate either one, a trial court will not review the merits of his habeas claim." (Internal quotation marks omitted.) *Mish* v.

[12] The habeas court did not specify in its memorandum of decision whether it was relying on the state or federal right to jury fact-finding when dismissing the petitioner's claim.

Commissioner of Correction, 133 Conn. App. 845, 850, 37 A.3d 179, cert. denied, 305 Conn. 918, 47 A.3d 390 (2012).

"For a petitioner to demonstrate prejudice, he must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. . . . [T]he petitioner would have to demonstrate that . . . there was a substantial likelihood that the jury would not have found the petitioner guilty of the crime of which he was convicted. . . . This is the same showing of prejudice that is required for *Strickland* . . . errors. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 515–16.

In the present case, the habeas court correctly determined that the petitioner's freestanding claim that his federal and state constitutional rights to a trial by jury were violated was procedurally defaulted. On direct appeal, the petitioner failed to argue that the trial court impermissibly found facts in violation of his right to a jury trial under the sixth amendment to the United States constitution and article first, § 19, of the Connecticut constitution. The habeas court, therefore, could only consider the petitioner's procedurally defaulted freestanding claim if the petitioner could demonstrate good cause for his failure to raise it on direct appeal and actual prejudice from this claimed impropriety. *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 515.

The habeas court properly determined that the petitioner failed to meet his burden of proving that his procedural default should be excused. Here, the petitioner failed to prove that he was prejudiced by the

trial court's handling of the jury note. As observed in part II of this opinion, the trial court did not impermissibly find facts in its handling of the jury note. The petitioner's constitutional right to a trial by jury, therefore, was not violated. Because there was no violation, the petitioner has failed to demonstrate that there was a substantial likelihood that the jury would not have found him guilty. Due to the conjunctive nature of the cause and prejudice standard, the petitioner's failure to meet his burden of proving prejudice prevented the habeas court from excusing his procedural default. *Mish* v. *Commissioner of Correction*, supra, 133 Conn. App. 850. Accordingly, the habeas court properly dismissed the petitioner's freestanding claim that his federal and state constitutional rights to a jury trial were violated on the ground of procedural default.

The judgment is affirmed.

In this opinion the other judges concurred.

MATTHEW WITTMAN ET AL. *v.* INTENSE MOVERS, INC., ET AL.
(AC 43027)

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

Syllabus

The plaintiffs sought, inter alia, to recover damages from the defendants, A and W, for their alleged mismanagement of the finances of a company, I Co., of which the parties together owned all of the shares. After the plaintiffs initiated the action, A filed with the trial court a notice of election to purchase the plaintiffs' shares of I Co. The parties then executed a memorandum of understanding resolving the primary issues of their dispute, which required that A make payments over time to the plaintiffs in exchange for receiving the plaintiffs' shares in I Co. The memorandum of understanding provided that the parties would enter into a more detailed settlement agreement that would provide the necessary terms to effectuate the plaintiffs' transfer of their shares to A. After the parties appeared to have reached a full settlement, the defendants did not sign a written settlement agreement and A did not make his first payment. Subsequently, the plaintiffs filed a motion to enforce the

settlement agreement. In objection, A claimed that he never had the funds to buy out the plaintiffs, and W claimed that the settlement was always conditional upon A raising the necessary funds through a loan. The court granted the plaintiffs' motion to enforce, and rendered judgment in favor of the plaintiffs, from which the defendants appealed to this court. *Held* that the defendants failed to establish that the trial court improperly enforced the settlement agreement, which consisted of the signed memorandum of understanding as supplemented by the unsigned settlement document with attachments: the defendants provided neither law nor argument that the court was clearly erroneous in its factual findings or incorrect in its legal conclusions, as the court, in its memorandum of decision, discussed the communications submitted to it by both the plaintiffs and the defendants, found that A had filed a notice of election to purchase the plaintiffs' shares of I Co., to which no shareholder had an objection and which A never sought to withdraw, and it acknowledged that the defendants referenced A's pursuit of financing in a number of the communications, but refused to infer an unexpressed intent on the part of the defendants that obtaining financing was a contingency to any settlement; moreover, the defendants signed the memorandum of understanding, which provided that it contained the essential terms of a settlement agreement between the parties that would form the basis for a written agreement, but contained no contingency for financing, and during negotiations of the final settlement agreement, the defendants requested multiple changes, but none concerned inserting language regarding the ability of the defendants to obtain financing as a contingency of the settlement agreement.

Argued October 15, 2020—officially released January 5, 2021

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk where the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the plaintiffs' motion to enforce a settlement agreement and rendered judgment for the plaintiffs, from which the defendant Alexander Leute et al. appealed to this court. *Affirmed.*

William R. Leute III, self-represented, the appellant (defendant).

Alexander Leute, self-represented, the appellant (defendant).

Richard S. Order, with whom was *Valerie M. Ferdon*, for the appellees (plaintiffs).

Opinion

BRIGHT, C. J. The self-represented defendants, Alexander Leute and William R. Leute III,[1] appeal from the judgment of the trial court enforcing a signed memorandum of understanding as supplemented by an unsigned settlement document with its attachments (jointly, settlement agreement) made between the defendants and the plaintiffs, Matthew Wittman and Carol Wittman, regarding the defendants' purchase of the plaintiffs' shares of stock in Intense Movers, Inc. (company). On appeal, the defendants claim that the trial court erred in granting the plaintiffs' motion to enforce the settlement agreement because the defendants' ability to obtain third-party financing to fund the purchase of the plaintiffs' shares was a contingency of the settlement agreement. We affirm the judgment of the trial court.

The following facts and procedural history, obtained from our review of the record and the court's memorandum of decision, inform our review of the issues in the appeal. The four parties are the sole shareholders of the company. The plaintiffs brought this action against the defendants, alleging in their amended complaint, among other things, breach of fiduciary duty, unjust enrichment, civil theft, and conversion, on the basis of their claims that the defendants mismanaged the finances of the company. The plaintiffs sought, inter alia, (1) pursuant to General Statutes § 33-896 (a) (1), a judicial dissolution of the company, (2) pursuant to General Statutes § 33-897 (c), the appointment of a receiver pendente lite, (3) pursuant to General Statutes § 33-898, the appointment of a permanent receiver, and (4) damages. On February 27, 2017, the defendant Alexander Leute filed with the court, pursuant to General Statutes § 33-900 (b), a notice of election to purchase the plaintiffs' shares of the company.

[1] The named defendant, Intense Movers, Inc., is not a party to this appeal. Accordingly, all references to the defendants are to Alexander Leute and William R. Leute III only.

On October 19, 2018, the parties executed a memorandum of understanding resolving the primary issues of their dispute, which required in part that the defendant Alexander Leute make payments over time to the plaintiffs in exchange for receiving the plaintiffs' shares in the company. The memorandum of understanding provided that the parties would enter into a more detailed settlement agreement that would provide, among other things, the necessary terms to effectuate the plaintiffs' transfer of their shares to Alexander Leute. As the parties negotiated the additional terms of the settlement agreement, the defendants repeatedly requested various new terms to which the plaintiffs agreed. On November 26, 2018, the parties appeared to have reached a full settlement, and the plaintiffs waited for the defendants to sign the written settlement agreement and for Alexander Leute to send his first payment of $150,000 toward his purchase of the plaintiffs' shares.

As the defendants continued to delay the signing of the settlement agreement and after Alexander Leute missed the first payment date as set forth in the agreement, the plaintiffs, on December 26, 2018, filed a motion to enforce the memorandum of understanding as supplemented by the settlement document (motion to enforce). In the motion to enforce, the plaintiffs alleged that the parties had reached a settlement on October 19, 2018, as evinced by the signed memorandum of understanding, which was revised and finalized on November 26, 2018, as evinced by the settlement agreement. The plaintiffs claimed that, despite the defendants' written assent to the terms of the settlement agreement, which had been drafted by the plaintiffs' attorney, Richard S. Order, the defendants then refused to sign the settlement agreement and Alexander Leute refused to make his initial payment of $150,000. The plaintiffs requested that the court issue an order (1) declaring the settlement agreement to be enforceable,

(2) directing the defendants to sign, within ten days, the settlement agreement and the implementation paperwork necessary to the settlement agreement, and (3) directing Alexander Leute to pay the $150,000 initial payment and any other missed payments within ten days and to begin making the future monthly and annual payments in accordance with schedules set forth in the settlement agreement.

Attached to the plaintiffs' memorandum in support of their motion to enforce was an affidavit of Attorney Order attesting to the facts surrounding his negotiation of the settlement agreement with the defendants and authenticating the many documents that were attached to his affidavit. Those documents included the memorandum of understanding reached and signed by Attorney Order and the defendants, numerous e-mails between Attorney Order and the defendants, e-mails between Alexander Leute and a banker that Alexander Leute had forwarded to Attorney Order, and the settlement agreement with supporting documents that Attorney Order had negotiated with the defendants on behalf of the plaintiffs.

On January 3, 2019, Alexander Leute filed an objection to the motion to enforce, arguing that he never had the funds to buy out the plaintiffs, despite having approached several different lenders. In response, the plaintiffs submitted a supplemental affidavit provided by Attorney Order, in which he attested that the defendants never requested that receipt of a loan be a condition precedent to the settlement agreement. William R. Leute III responded by arguing that the "settlement was always conditional upon Alexander Leute raising the necessary $150,000 funds . . . ." The defendants did not submit an affidavit, but did submit copies of various e-mails between the parties that were dated before the memorandum of understanding was executed.

On January 28, 2019, the court held a hearing on the plaintiffs' motion to enforce. During that hearing, the court carefully explained the purpose of the hearing, and it clarified that the defendants, who previously had been represented by counsel, were now self-represented. The court then explained the purpose of an *Audubon* hearing; see *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, 225 Conn. 804, 812, 626 A.2d 729 (1993) (*Audubon*) (clear and unambiguous settlement agreement is enforceable summarily if parties reached agreement after commencing litigation); and it explained that the parties were allowed to present sworn testimony and evidence during the hearing. Attorney Order stated on the record that he was available for cross-examination concerning the contents of his affidavit if the defendants wanted to examine him. Although considerable argument was presented by both parties,[2] neither party presented sworn testimony and the defendants did not cross-examine Attorney Order. The defendants did offer into evidence printouts of two e-mails, however, to which the plaintiffs offered no objection, and the court entered them as full exhibits. The plaintiffs relied on the submissions attached to their motion to enforce, to which the defendants voiced no objection.

[2] The parties, without objection, also made many unsworn representations of fact during the hearing. Unless those representations could be considered concessions of the party making the assertion, we will not consider them in this opinion. It does not appear that the trial court considered them in its written memorandum of decision. See *Federal National Mortgage Assn.* v. *Buhl*, 186 Conn. App. 743, 751, 201 A.3d 485 (2018) ("Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the [witness'] conscience and impress the [witness'] mind with the duty to do so. . . . Unsworn representations of counsel are not, legally speaking, evidence upon which courts can rely." (Citation omitted; internal quotation marks omitted.)), cert. denied, 331 Conn. 906, 202 A.3d 1022 (2019); see also *Presidential Village, LLC* v. *Perkins*, 332 Conn. 45, 53 n.9, 209 A.3d 616 (2019) (plaintiff bound by concession made during oral argument before trial court); *Housing Authority* v. *Pezenik*, 137 Conn. 442, 448, 78 A.2d 546 (1951) ("[a] party is bound by a concession made during the trial by his attorney").

During oral argument, the trial court asked Alexander Leute about his filing with the court, in February, 2017, an election to purchase shares, and it asked him whether he was "on the hook for [that]," to which he responded, "Correct, that's correct." The court also explained to the defendants that "the fact that you may need to obtain financing doesn't necessarily mean that the need to obtain financing is automatically a contingency if you don't say so. And that's part of the problem I think I am going to have to deal with in this case because you're saying we talked about the fact that we are looking for a loan, but you never put it expressly into the agreement." Alexander Leute stated that he understood. The court then asked him if this was "a fair summary of where we are," to which he responded, "That's—that's an exactly fair summary, Your Honor." Alexander Leute also stated that he had not understood the enforceability of the memorandum of understanding and that he "had not done [his] due diligence . . . ."

Attorney Order argued that the trial court should enforce the settlement agreement, require the defendants to sign it, and require the defendants to sign all the necessary attachments. The court asked Attorney Order whether the judgment alone would be sufficient or if the court necessarily had to order the defendants to sign the documents. Attorney Order stated that the judgment likely was enough. See footnote 4 of this opinion. At the end of the hearing, the court stated that it would take the matter on the papers.

On May 20, 2019, the court, guided in part by *Kidder* v. *Read*, 150 Conn. App. 720, 93 A.3d 599 (2014), rendered judgment granting the plaintiffs' motion to enforce. In its memorandum of decision, the court stated that it thoroughly had reviewed the communications between the defendants and the plaintiffs, noting the signed memorandum of understanding and the multiple e-mail

exchanges. The court stated that the defendants frequently had requested new changes to the parties' settlement agreement and that Attorney Order had addressed and resolved each new request. The court also stated that a frequent issue in the e-mail exchanges was the date upon which Alexander Leute would get the money to cover the initial $150,000 payment. In an e-mail dated November 26, 2018, Alexander Leute told Attorney Order, after making a request for another change to the settlement agreement regarding the number of company shares to be issued, that "[e]verything else looks good. *I will have this signed and sent over to you ASAP once that small change is made and I will have the check mailed out as well.*" (Emphasis added.) Attorney Order made the change requested that same day, and then e-mailed a new copy of the settlement agreement to the defendants for their signatures.

In its memorandum of decision, the court stated that, although Alexander Leute frequently referred to the need to obtain financing, Attorney Order's affidavit and the e-mail documents attached thereto, convinced it that "at no time was [Alexander Leute's] success in getting a loan identified as a condition for the [settlement] agreement." The court pointed to a specific e-mail in which Alexander Leute told Attorney Order that he had "several options for producing the initial payment and [that he was] on course for having the check for [him] by the last week of November but if something goes sideways I don't want to [be] forced to take out a high interest loan in order to produce the funds by the 16th." (Internal quotation marks omitted.) The court stated that the evidence showed that Alexander Leute "never made known to the plaintiffs, at the time of the execution of the memorandum of understanding or even in the month (plus) thereafter, that the [settlement] agreement was contingent upon him getting financing for the initial $150,000 payment. [Alexander Leute] has pointed

to no communication in which he generally referred to obtaining financing as a condition, much less identifying the specific terms of financing . . . that would be deemed acceptable to him."

The court also stated that, although the memorandum of understanding may have been incomplete as to all material terms, the settlement agreement " 'filled in the blanks' as to those issues . . . ." Additionally, the court explained that Alexander Leute had committed to purchasing the plaintiffs' shares in February, 2017, when he filed with the court a notice of election to purchase shares pursuant to § 33-900 (b),[3] that he never had attempted to withdraw that election, and that none of

[3] General Statutes § 33-900 provides in relevant part: "(a) In a proceeding under subdivision (1) of subsection (a) of section 33-896 to dissolve a corporation, the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder at the fair value of the shares. An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.

"(b) An election to purchase pursuant to this section may be filed with the court at any time within ninety days after the filing of the petition under subdivision (1) of subsection (a) of section 33-896 or at such later time as the court in its discretion may allow. If the election to purchase is filed by one or more shareholders, the corporation shall, within ten days thereafter, give written notice to all shareholders, other than the petitioner. The notice must state the name and number of shares owned by the petitioner and the name and number of shares owned by each electing shareholder and must advise the recipients of their right to join in the election to purchase shares in accordance with this section. Shareholders who wish to participate must file notice of their intention to join in the purchase no later than thirty days after the effective date of the notice to them. All shareholders who have filed an election or notice of their intention to participate in the election to purchase thereby become parties to ownership of shares as of the date the first election was filed, unless they otherwise agree or the court otherwise directs. After an election has been filed by the corporation or one or more shareholders, the proceeding under subdivision (1) of subsection (a) of section 33-896 may not be discontinued or settled, nor may the petitioning shareholder sell or otherwise dispose of his shares, unless the court determines that it would be equitable to the corporation and the shareholders, other than the petitioner, to permit such discontinuance, settlement, sale or other disposition. . . ."

the shareholders had an objection to the purchase. On the basis of the record before it, the court concluded that "[t]he only basis on which the defendant[s] [have] challenged the [settlement] agreement is [Alexander Leute's] contention that there was an implied condition of his obtaining financing, but, under the circumstances of this case, including his statutory election to purchase the plaintiffs' shares, his commitment to a settlement some [twenty] months later (memorandum of understanding), and his failure ever to identify financing as an intended contingency for the settlement until after the plaintiffs had indicated an intention to seek enforcement of the settlement [agreement], the court believes it would be inequitable not to approve the settlement [agreement], and, therefore, the court finds that it is equitable to permit the settlement [agreement] to go forward. . . . [T]he court has concluded that there was an enforceable settlement agreement between the parties as embodied in the memorandum of understanding, and, if not enforceable at that stage, then final and enforceable as modified by the subsequent negotiations of the parties and embodied in the final version of the formal settlement agreement drafted by the plaintiffs." Accordingly, the court rendered judgment in favor of the plaintiffs, granting their motion to enforce the settlement agreement. The defendants then filed the present appeal.[4]

On appeal, the defendants claim that the trial court erred in granting the plaintiffs' motion to enforce on the ground that Alexander Leute's ability to obtain third-

[4] The plaintiffs, thereafter, filed a motion with the trial court requesting that it reconsider or allow reargument as to whether the court could and should order the defendants to sign the settlement agreement and the documents attached to it. The court considered the motion but denied relief stating that it did not believe that it had the authority to order the defendants to sign the documents. It also stated that it believed that the judgment of the court specifically enforcing the settlement agreement was sufficient. The plaintiffs do not challenge that ruling on appeal.

party financing always was a contingency of the settlement.[5] The defendants set forth various arguments in support of their claim. First, they argue that the e-mails in the record "predat[ing] the October 19, 2018 [memorandum of understanding]" demonstrate that Alexander Leute repeatedly told the plaintiffs that he needed to obtain financing before they could settle their dispute[6] and that the court ignored these e-mails, and, instead, considered only the e-mails "between the Leutes and Attorney Order to establish that the parties agreed to the terms of the unsigned settlement agreement." Second, they argue that "*Audubon* requires clear and unambiguous language and *also that there is no dispute about the terms*." (Emphasis in original.) They contend that there is a dispute in this case regarding whether obtaining financing was a condition precedent. Finally, the defendants argue that the court modified an essential term of the settlement agreement by selecting arbitrary payment dates that differed from those set forth in the settlement agreement.[7] We are not persuaded by the defendants' arguments.

[5] During oral argument before this court, the defendants conceded that the unsigned settlement agreement contained all material terms with the exception of the purported financing contingency.

[6] Copies of those e-mails, which were attached to William R. Leute III's reply to the plaintiffs' supplemental affidavit in support of their motion to enforce, were not supported by an affidavit. Additionally, the e-mails demonstrate that Alexander Leute informed Attorney Order that he needed more time to obtain financing and that he had "been working relentlessly to raise the capital [needed] to settle this case." The e-mails contain neither a request nor a requirement that obtaining a certain type of financing be a condition precedent to settlement.

[7] The defendants also contend that the court improperly failed to find the terms of the settlement oppressive or that they were agreed to under duress. We have reviewed the defendants' oppositions to the motion to enforce, in which each of them separately argued only that their settlement agreement was contingent on their obtaining financing, and we can ascertain no claim of this nature raised in either of these memoranda. Furthermore, it is clear that the court found the terms of the settlement agreement and Alexander Leute's notice of election to purchase shares to be fair and equitable.

"A trial court has the inherent power to enforce summarily a settlement agreement as a matter of law when the terms of the agreement are clear and unambiguous. . . . Agreements that end lawsuits are contracts, sometimes enforceable in a subsequent suit, but in many situations enforceable by entry of a judgment in the original suit." (Citations omitted; internal quotation marks omitted.) *Audubon Parking Associates Ltd. Partnership* v. *Barclay & Stubbs, Inc.*, supra, 225 Conn. 811.

As was the case in *Kidder*, "[t]he issue on appeal is whether the communications between the parties constituted an enforceable settlement agreement. . . . Because the defendant[s] [challenge] the trial court's legal conclusion that the [settlement] agreement was summarily enforceable, we must determine whether that conclusion is legally and logically correct and whether [it finds] support in the facts set out in the memorandum of decision. . . . In addition, to the extent that the defendant[s'] claim implicates the court's factual findings, our review is limited to deciding whether such findings were clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *Kidder* v. *Read*, supra, 150 Conn. App. 732–33.

"A settlement agreement is a contract among the parties. . . . A contract is not made so long as, in the contemplation of the parties, something remains to be done to establish the contractual relation. The law does not . . . regard an arrangement as completed which the parties regard as incomplete. . . . In construing the agreement . . . the decisive question is the intent of the parties *as expressed*. . . . The intention is to be

determined from the language used, the circumstances, the motives of the parties and the purposes which they sought to accomplish." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 734. Furthermore, "[p]arties are bound to the terms of a contract even though it is not signed if their assent is otherwise indicated." (Internal quotation marks omitted.) *Aquarion Water Co. of Connecticut* v. *Beck Law Products & Forms, LLC*, 98 Conn. App. 234, 239, 907 A.2d 1274 (2006).

Finally, "[t]he fact that parties engage in further negotiations to clarify the essential terms of their mutual undertakings does not establish the time at which their undertakings ripen into an enforceable agreement . . . [and we are aware of no authority] that assigns so draconian a consequence to a continuing dialogue between parties that have agreed to work together. We know of no authority that precludes contracting parties from engaging in subsequent negotiations to clarify or to modify the agreement that they had earlier reached." *Willow Funding Co.* v. *Grencom Associates*, 63 Conn. App. 832, 843–44, 779 A.2d 174 (2001). "More important . . . [when] the general terms on which the parties indisputably had agreed . . . included all the terms that were essential to an enforceable agreement . . . [u]nder the modern law of contract . . . the parties . . . may reach a binding agreement even if some of the terms of that agreement are still indefinite." Id., 844; see also *Hogan* v. *Lagosz*, 124 Conn. App. 602, 616, 6 A.3d 112 (2010), cert. denied, 299 Conn. 923, 11 A.3d 151 (2011).

In the present case, the court found, and the record confirms, that Alexander Leute, on February 27, 2017, filed with the court a notice of election to purchase the plaintiffs' shares. It also found that the parties to this case were the sole shareholders and that none of them opposed his election. Additionally, Alexander Leute

never sought to withdraw that election. The court also found that, on October 19, 2018, the parties executed a memorandum of understanding, "facially resolving all of their disputes" and it found that the memorandum of understanding was supplemented and modified by the settlement agreement that subsequently was negotiated between the defendants and the plaintiffs' attorney, as had been anticipated by the specific language in the memorandum of understanding.[8] Nowhere in the memorandum of understanding or settlement agreement is any financing contingency set forth. Consequently, the court aptly described the issue in dispute as whether there was a condition precedent to the settlement agreement, which was not incorporated into the written words of the memorandum of understanding and the supplements thereto. The record reveals that, during the January 28, 2019 hearing, the parties agreed that this was the issue to be decided by the court.

In its memorandum of decision, the court stated that it considered the executed memorandum of understanding and the extensive subsequent written communications between the parties.[9] In particular, the court

[8] The memorandum of understanding provides in part that it "outlines the essential terms of a settlement agreement between [the plaintiffs and the defendants] that will form the basis for a written agreement that will be prepared and will elaborate in fuller detail on all the terms." It also provides that "[o]n or before December 6, 2018, [Alexander Leute] will pay the [plaintiffs] $150,000 . . . through check or wire transfer . . . . [Alexander Leute] will also pay the [plaintiffs] an additional $325,000 . . . over time . . . . On or before the 17th day of each month, beginning on January 17, 2019, and continuing until the [b]alance is paid in full, [Alexander Leute] will begin paying the [b]alance with monthly payments of $4000 . . . automatically deducted from the Intense Movers Bank of America account and transferred to an account the [plaintiffs] will designate." The memorandum of understanding also sets forth additional payment and transfer terms, and it provides that the parties would "submit the terms of the settlement to the [c]ourt . . . for its approval pursuant to . . . § 33-900 (b)."

[9] The court's memorandum of decision makes no reference to the unsworn oral representations of Attorney Order and the defendants as to what occurred during their settlement discussions. Thus, we conclude that the court properly did not give any evidentiary weight to these representations, and the parties do not argue otherwise.

considered and discussed the communications admitted into evidence and relied on by the defendants. The court first noted that the memorandum of understanding requires specific payments over time to the plaintiffs to effectuate the purchase of the plaintiffs' interest in the company, and it specifically provides that the terms of the memorandum of understanding will be set forth more fully in another written agreement. Both defendants signed the memorandum of understanding and Attorney Order signed it on behalf of the plaintiffs. The court specifically stated that, "[f]acially, the [memorandum of understanding] sets forth the material terms of what appears to be a comprehensive agreement, intended to resolve all issues presented in the litigation." The court also stated, however, that it recognized that the memorandum of understanding provided that the "scope of acts of default would be determined after the signing of the memorandum of understanding," and that this " 'to be determined' " term, arguably, could preclude a determination that the memorandum of understanding was a final agreement. The court further determined, however, that the subsequent agreement drafted by the plaintiffs and agreed to by the defendants, which " 'filled in the blanks' " as to those issues, cured any possible defect in the original memorandum of understanding. The defendants do not claim otherwise. In fact, they conceded at oral argument before this court that the final settlement agreement presented to them for execution set forth the parties' entire agreement, except for the purported financing contingency.

As to the purported financing contingency, after reviewing the written communications provided, including specifically those relied on by the defendants, the court found that Alexander Leute "never made known to the plaintiff[s] . . . that the agreement was contingent upon him getting financing for the initial $150,000 payment. The defendant[s] [have] pointed to no communi-

cation in which [they] generally referred to obtaining financing as a condition . . . . [T]he tenor of the e-mails provided—even those provided by the defendant[s]—was that the financing was a process underway with only some level of uncertainty as to precisely when the financing would be obtained. . . . Never was there a mention of conditioning the settlement [agreement] on whether funding could be obtained." Furthermore, the court found that "the fact that the parties had continued to fine-tune the agreement, as reflected by the e-mail exchanges submitted to the court, does not undercut the enforceability of the agreement reached on October 19, 2018."

These facts, combined with the notice of election to purchase shares that Alexander Leute filed with the court, persuaded the trial court that "there was an enforceable settlement agreement between the parties as embodied in the memorandum of understanding, and, if not enforceable at that stage, then final and enforceable as modified by the subsequent negotiations of the parties and embodied in the final version of the formal settlement agreement drafted by the parties. . . . [T]he case effectively was settled upon the signing of the memorandum of understanding, with ongoing negotiations being a process of permissible fine-tuning." The defendants have provided us with neither law nor argument that persuades us that the court was clearly erroneous in its factual findings or incorrect in its legal conclusions.

In particular, the defendants' principal argument that the court ignored their communications, in which they stressed the need for Alexander Leute to obtain financing to complete any settlement and, instead, relied solely on the communications submitted by the plaintiffs, is without merit. As set forth previously in this opinion, the court, in its memorandum of decision, discussed the communications submitted to it by both the plaintiffs and the defendants. Furthermore, it acknowledged that the defendants referenced Alexander Leute's

pursuit of financing in a number of the communications. What it refused to do, though, was infer from those communications an unexpressed intent on the part of the defendants that obtaining financing was a contingency to any settlement. Our law is quite clear—unexpressed intent is not relevant. See *Perruccio* v. *Allen*, 156 Conn. 282, 285, 240 A.2d 912 (1968) ("an unexpressed intent is of no significance"); *Rayhol Co.* v. *Holland*, 110 Conn. 516, 524, 148 A. 358 (1930) ("if . . . documents constitute a complete agreement, we cannot regard any unexpressed intent but only that which in them does find expression"); *Dunn* v. *Etzel*, 166 Conn. App. 386, 399, 141 A.3d 990 (2016) ("the clear, unambiguous language of the release rendered immaterial the plaintiff's unexpressed subjective intent"); see also 15A C.J.S. Compromise and Settlement § 8 (2020 Rev.) ("A compromise agreement must be binding on both parties so that an action may be maintained by either to enforce it. The mutual assent requirement of a settlement agreement cannot be defeated by the unexpressed subjective intent of one of the parties . . . ." (Footnote omitted.)). Consequently, what mattered to the court was what the parties wrote in their settlement agreement, not what they may have intended but never expressed. What they actually wrote was clear.

On February 27, 2017, Alexander Leute filed with the trial court a notice of election to purchase the plaintiffs' shares to which no shareholder had an objection. On October 19, 2018, the defendants signed the memorandum of understanding, which provided that it contained "the essential terms of a settlement agreement between the [plaintiffs] and the [defendants] that will form the basis for a written agreement that will be prepared and will elaborate in fuller detail on all the terms." The memorandum of understanding also contained the payment terms, which were to begin on December 6, 2018, and provided for the transfer of ownership of the plaintiffs'

interests in the company. It contained no contingency for financing. During negotiations of the final settlement agreement, the defendants requested multiple changes, most of which came in sporadically, but all of which were addressed and reconciled by Attorney Order. *None of the requested changes concerned inserting language regarding the ability of the defendants to obtain financing as a contingency of the settlement agreement.* In a November 21, 2018 e-mail, Attorney Order encouraged the defendants to have an attorney review the documents, and stated that they should do so soon so that they could remain on schedule.

On November 26, 2018, after Attorney Order reconciled all of the defendants' requested changes and e-mailed updated settlement documents to the defendants, the defendants, in an e-mail sent at 10:47 a.m., stated that they had one additional small change they wanted regarding the number of shares to be transferred and that they would sign the settlement agreement documents and send them back "ASAP," and forward payment, after that change was made. This particular communication was flatly inconsistent with the defendants' subsequent claim that their execution of the agreement was contingent on obtaining financing. Attorney Order made the requested change and, in an e-mail sent at 1:23 p.m., also on November 26, 2018, sent the final settlement agreement and all supporting documents to the defendants for their signatures and for Alexander Leute's initial $150,000 payment. We agree with the court's conclusion that at that point there was no question that the parties had reached a fully enforceable settlement agreement.

These facts also dispose of the defendants' argument that the settlement agreement was ambiguous as to the existence of a financing contingency. We fail to see how an agreement that the defendants acknowledged was final and ready for execution "ASAP" following one last minor change can be ambiguous as to a term not

included in the agreement. There is nothing in the settlement agreement that remotely suggests that it was contingent on the defendants obtaining financing, and we will not impute ambiguity into an agreement that the defendants acknowledge is otherwise clear and unambiguous. Accordingly, we conclude that the defendants have failed to establish that the court improperly enforced the settlement agreement, which consisted of the signed memorandum of understanding as supplemented by the unsigned settlement document with its attachments.

As to the defendants' final argument that the court improperly revised the settlement agreement by setting forth new payment dates, we conclude that the adjustments were necessary to implement the settlement agreement because at least one of the payment dates already had passed. Furthermore, the adjustments clearly inure to the benefit of Alexander Leute by giving him additional time to pay, rather than ordering him to make up any and all of the missed payments immediately.

The judgment is affirmed.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

The following appeal is assigned for argument in the Supreme Court on January 21, 2021

STEPHANIE O'SHEA *v.* JACK SCHERBAN, IN HIS OFFICIAL CAPACITY AS HEAD MODERATOR et al., SC 20542
Judicial District of Stamford-Norwalk at Stamford

Elections; Mandamus; Whether Trial Court Properly Determined When City Charter Requires Vacated Position on Board of Education to Be on Ballot for Municipal Election. The Charter of the city of Stamford states that an election for municipal officials shall be held on the Tuesday after the first Monday in November, 1953, and biennially thereafter. The Charter further states that, in the event of a vacancy in an elected position, the Board of Representatives shall, within sixty days, elect a successor to fill the vacated position until "the next biennial election." The Charter also provides, with respect to the city's Board of Education, that its nine members are elected for a term of three years and that an election is to be held every year with respect to three of the positions. Frank Cerasoli was elected to the Board of Education in November, 2018. Although Cerasoli's term was to run until November, 2021, he vacated the position in January, 2020. In February 2020, the Board of Representatives elected Rebecca Hamman to fill the position. In early October, 2020, ballots were printed for the November 3, 2020 election, many of which were mailed to absentee voters, that listed a position for the "Board of Education to fill vacancy for one year" without any endorsed candidates. On October 16, 2020, the city's Corporation Counsel issued a legal opinion that the position was included on the ballot in error because, under the Charter, Hamman holds the position until the November, 2021 election. The Secretary of State subsequently sent a letter to the city clerk that enclosed a list of people registered as write-in candidates for offices to be contested at the November 3, 2020 election, including Hamman, Stephanie O'Shea and Joshua Esses as candidates for the one year term on the Board of Education. Following the election, however, the city's Head Moderator, Jack Scherban, submitted a final report and certification of votes to the Secretary of State that did not include any votes for that position. O'Shea then filed this action, claiming that she was the candidate who received the most votes in the election and that Scherban was obligated to certify her as such. The trial court disagreed, holding that the language of the Charter is clear and unambiguous that, when the Board of Representatives elects a successor to fill a vacancy in an elected office, the successor holds the position

until the next biennial election and that biennial elections occur every two years in odd-numbered years. The trial court concluded, therefore, that the Charter requires that an election for the position vacated by Cerasoli be held in November, 2021. O'Shea appeals, claiming that the Charter should be construed as requiring that a vacated position should be on the ballot at the next municipal election so that the voters themselves can choose the person they want to fill the vacancy. O'Shea further claims that the city has, by past practice, established a precedent that vacancy elections for the Board of Education may be held in even-numbered years. O'Shea also argues that the city's act of changing of the rules in the middle of an election violates common-law and constitutional due process rights to fundamental fairness and disenfranchises voters.

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

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice of Declaratory Judgement Complaint

Pursuant to Connecticut Practice Book section 17-56(b), please take notice that on April 28, 2020, Summit Saugatuck, LLC and Garden Homes Management Corporation filed a ''Declaratory Judgment Complaint Pursuant to General Statutes § 4-175'' against the Connecticut Department of Housing and the Town of Westport. *See Summit Saugatuck, LLC v. Dep't of Housing*, HHD-CV20-6127403-S. Specifically, the Complaint alleges that DOH: (1) violated General Statutes § 8-30g(l)(4)(B) and Regs. Conn. State Agencies § 8-30g-6(j)(4), by accepting, but not timely disclosing, letters from Westport dated January 24, 2019 in support of Westport's application for a § 8-30g moratorium; (2) violated General Statutes§ 8-30g(l) and Regs. Conn. State Agencies § 8-30g-6 by granting moratorium points for developments for which Westport did not provide any evidence of on-going compliance with affordability restrictions on household income and maximum rent, from the date of initial residential occupancy or newly-imposed affordability restrictions to the date of the Certificate application; and (3) violated General Statutes § 8-30g(l) and Regs. Conn. State Agencies § 8-30g-6, and/or made a material factual or mathematical error, by granting 30 points for the Hidden Brook development, when Westport had only claimed 6.0 points for that development, based on internal, unidentified, and undisclosed department records. The Court has set deadlines for the parties to file cross-motions for summary judgment: Plaintiffs' motions are due on February 5, 2021; and Defendants' cross-motions are due March 12, 2021. Summit is represented by Timothy Hollister, Shipman & Goodwin LLP (thollister@goodwin.com); Garden Homes is represented by Mark Branse, Halloran & Sage LLP (branse@halloransage.com); DOH is represented by Anthony Famiglietti (anthony.famiglietti@ct.gov); and Westport is represented by Peter Gelderman, Berchem & Moses PC (pgelderman@berchemmoses.com).

NOTICES

DIVISION OF CRIMINAL JUSTICE

(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF NEW LONDON

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of New London (PCN 4861). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position, please go to : **https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.**

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. All applicants must complete division of Criminal Justice application forms. These forms may be downloaded from the Division website at **www.ct.gov/csao.** A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-New London JD (PCN 4861) and must be postmarked no later than **January 7, 2021**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of November 23, 2020:

William S. Grimshaw	Charter Communications, Inc.
Christina Hou	Multiple Myeloma Research Foundation

Certified as of November 30, 2020:

Susan R. Kelley	Clifford Beers Guidance Clinic

Hon. Patrick L. Carroll III
Chief Court Administrator