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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

E. I. DU PONT DE NEMOURS AND COMPANY *v.* CHEMTURA CORPORATION (SC 20329)

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

Syllabus

The plaintiff, D Co., sought, inter alia, to recover damages from the defendant for breach of contract in connection with D Co.'s purchase of the defendant's fluorine chemical business and related equipment. The parties had previously entered into an asset purchase agreement, governed by New York law, pursuant to which the defendant agreed to indemnify D Co. for any losses arising from a breach of the defendant's representations and warranties relating to prior and ongoing compliance with various laws in connection with the operation of the defendant's plant. The agreement's notice provision provided that notice and other communications under the agreement must be sent to the defendant's general counsel with a simultaneous copy to the defendant's outside counsel. Following the purchase of the business, D Co. requested reimbursement, pursuant to the agreement's indemnification provisions, to cure several alleged deficiencies, but the parties ultimately were unable to settle their differences. Thereafter, C Co. was substituted as the plaintiff. At trial, the defendant claimed that D Co. had failed to provide notice in accordance with the provisions of the agreement because D Co. had communicated with the defendant's associate general counsel but not the defendant's general counsel, and New York law required strict compliance with notice provisions in a commercial contract. C Co. claimed that New York law did not require strict compliance and that the communications between the parties to the agreement provided actual notice to the defendant. The trial court rendered judgment for the defendant, concluding, inter alia, that D Co. had failed to provide proper notice in accordance with the agreement, and C Co. appealed. *Held* that the trial court improperly rendered judgment for the defendant on the ground that D Co. had failed to strictly comply with the notice provision of the asset purchase agreement: although a time limitation provision in the

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

This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Chief Justice Robinson was not present when the case was argued before the court, he has read the briefs and appendices and listened to a recording of the oral argument prior to participating in this decision.

agreement provided that the defendant would not be liable for a breach of representations or warranties "unless" D Co. notified the defendant of such a claim in writing within four years of the closing date, that provision merely set a time limitation for bringing a claim for indemnification, as it did not contain unmistakable language conditioning indemnification on compliance with precise notice procedures; moreover, New York law does not require strict compliance with a commercial contract's notice provision when the other party to the contract receives actual notice and is not prejudiced by the lack of strict compliance, and, although D Co. did not strictly comply with the agreement's notice provision, it was clear from the trial court's factual findings and the record, including testimony by D Co.'s plant manager that he had regularly discussed the deficiencies and corresponded with various employees of the defendant on the subject, e-mail correspondence between the parties, and a detailed claims list chart, prepared by the defendant's associate general counsel, summarizing the parties' positions on various deficiencies at the plant, that the defendant was aware that D Co. was seeking indemnification and, thus, had actual notice of D Co.'s claims, and the defendant did not claim that it was prejudiced as a result of D Co.'s failure to strictly comply with the notice provision.

Argued November 19, 2019—officially released July 2, 2020**

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where The Chemours Company FC, LLC, was substituted as the plaintiff; thereafter, the case was tried to the court, *Brazzel-Massaro*, *J.*; judgment for the defendant, from which the substitute plaintiff appealed. *Reversed*; *further proceedings.*

Proloy K. Das, with whom were *Jennifer M. DelMonico* and, on the brief, *Terence J. Brunau*, for the appellant (substitute plaintiff).

Thomas J. Donlon, with whom, on the brief, were *Joseph L. Clasen* and *Brian J. Wheelin*, for the appellee (defendant).

** July 2, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

McDONALD, J. The principal issue in this appeal is whether New York law requires a party to strictly comply with a notice provision in a commercial contract in order to recover for the other party's breach of the contract. The trial court concluded that the plaintiff, E. I. du Pont de Nemours and Company (DuPont),[1] had not strictly complied with the notice provisions of an asset purchase agreement (APA) and rendered judgment in favor of the defendant, Chemtura Corporation. On appeal, the plaintiff contends that the trial court improperly required strict compliance with the APA's notice provisions because New York law distinguishes between public contracts and private commercial contracts, and does not require strict compliance in commercial contracts when the contracting party receives actual notice and suffers no prejudice from the deviation. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record reveals the following relevant facts, as found by the trial court and supplemented by the record, and procedural history. In 2007, the parties, DuPont and the defendant, negotiated the purchase of the defendant's fluorine chemical business and related equipment located in El Dorado, Arkansas. On behalf of DuPont, Brian Engler negotiated the terms of the APA with Arthur Fullerton, the defendant's associate general counsel, and Arthur Wienslaw, the defendant's director of strategy and licensing. The parties ultimately entered into the APA on December 14, 2007. Because the parties were competitors in this field, DuPont's precontractual ability to inspect the defendant's plant and equipment and to conduct other due diligence was limited. Officials of

[1] DuPont was the original plaintiff in this action. Shortly before trial, The Chemours Company, FC, LLC, was substituted as the sole plaintiff. We hereinafter refer to the substitute plaintiff as the plaintiff throughout this opinion.

DuPont conducted only one brief, after-hours tour of the plant prior to signing the APA. As a result, the defendant made certain representations and warranties in the APA, including that the transferred assets were in good repair and condition and were sufficient to conduct business as of the closing date, and that the business had been and was currently being operated in accordance with applicable laws.

To further protect DuPont, given its limited ability to inspect the plant, the parties also entered into a side letter dated January 31, 2008, which confirmed "additional understandings" of the parties. The side letter included the disclosure and discussion of all potential violations of codes and regulations that controlled the operation of the plant and its products, including potential violations of the ozone depleting substances regulations.[2] The side letter primarily addressed any past deficiencies or violations that continued to impact the operation of the plant at the time of closing that DuPont would not have been able to discover given its limited inspection of the plant. The parties closed on the sale on January 31, 2008.

The APA contains two provisions, §§ 3.16 and 3.17, that set forth a number of representations and warranties by the defendant related to the facility's prior and ongoing compliance with various laws in connection with the operation of the plant. Under article 8 of the APA, the defendant agreed to indemnify DuPont from any losses arising from any breach of those representations or warranties.[3] Section 8.4 (a) of the APA provides

[2] The ozone depleting substances regulations regulate the leakage rates of ozone depleting substances, such as chemicals used in industrial process refrigeration equipment. See 40 C.F.R. § 82.156 (2019).

[3] Specifically, § 8.8 of the APA provides: "A claim for indemnification for any matter not involving a third-party claim may be asserted by notice to the party obligated to indemnify under this [a]greement. Such notice must be provided by the [i]ndemnified [p]erson to the [i]ndemnifying [p]erson promptly in writing describing the [l]oss incurred by the [i]ndemnified [p]erson, the amount or estimated amount thereof, if known or reasonably capa-

a four year time period for indemnification as a result of a breach of the representations or warranties contained in §§ 3.16 and 3.17 and requires that DuPont notify the defendant in writing within four years of the closing date, "specifying the amount and factual basis of that claim in reasonable detail to the extent known." The APA's notice provision, § 11.4, provides in relevant part: "All notices, consents, waivers and other communications under this [a]greement must be in writing and will be deemed given to a party when (a) delivered to the appropriate address by hand or by nationally recognized overnight courier service (costs prepaid), (b) sent by facsimile or e-mail with confirmation of transmission by the transmitting equipment or (c) received or rejected by the addressee, if sent by certified mail, return receipt requested, in each case to the following addresses, facsimile numbers or e-mail addresses and marked to the attention of the individual (by name or title) designated below (or to such other address, facsimile number, e-mail address or individual as a party may designate by notice to the other parties) . . . ." To properly notify the defendant, § 11.4 of the APA provides that the notice shall be sent to the defendant's general counsel "with a simultaneous copy" to the defendant's outside counsel, Baker & McKenzie, LLP.

Following the closing, the parties remained in regular contact because DuPont purchased only a portion of the Arkansas facility and the defendant continued to operate the remainder. Specifically, DuPont's plant manager, Donald Kuhlmann, communicated with Fullerton, the defendant's associate general counsel, and Frank DiCristina, one of the defendant's plant managers. DuPont did not communicate with the defendant's general counsel. DuPont subsequently discovered that

ble of estimation, and the method of computation of such [l]oss, all with reasonable specificity and containing a reference to the provisions of this [a]greement in respect of which such [l]oss will have occurred."

certain areas of the plant required repair or replacement, and DuPont requested reimbursement pursuant to the defendant's indemnification obligations. Namely, DuPont asserted that certain refrigeration units were leaking refrigerant at an unacceptable rate, and the fire suppression systems were not operating within applicable laws at the time of the purchase. From the closing in 2008 until 2011, the parties held discussions and corresponded to resolve those deficiencies.[4] During this time, in March, 2009, the defendant filed for Chapter 11 bankruptcy. For the reorganized company to assume the APA, the defendant had to cure any prebankruptcy defaults under the APA. See 11 U.S.C. § 365 (b) (2006). This led to extensive negotiations between the parties over "cure claims."[5] Ultimately, the parties summarized their positions on various items in a claims list, which included, among other things, the refrigeration and fire suppression system claims. These discussions did not resolve all of the claims, and the present action followed.

[4] Specifically, in 2008, a site wide survey of the facility was completed, addressing various compliance issues. A copy of the audit report was forwarded to DiCristina. The report stated that the purpose was to "inform [the defendant] of [a] preliminary estimate of expenses which DuPont plans to incur between now and the end of 2009, which will be invoiced to [the defendant] per the [APA] and the January 31, 2008 [s]ide [l]etter . . . ." (Internal quotation marks omitted.) In August, 2008, Kuhlmann and James Scroggins, one of the defendant's plant managers, also communicated about the refrigeration units. In September, 2008, correspondence between DuPont and the defendant outlined the scope of work required for the refrigeration units. Throughout 2009 and 2010, the parties continued to exchange e-mails and other correspondence about expenditures reimbursable to DuPont.

[5] In an e-mail to DiCristina and Kuhlmann, Fullerton explained what the term "cure claim" meant in the claims list he created: "I've tried to . . . use the following criteria for putting something in the 'cure claim' category for purposes of resolving this: assuming there is a tie-in to a reimbursement obligation under the [APA], has work been done for which either (a) an invoice has been generated and sent to [the defendant] or (b) the issuance of an invoice to [the defendant] is a [pro forma] step at this point [because] the amount that would appear on the invoice is [un]known? . . . [T]he fact that something may not be in the 'cure claim' category does not mean it never gets paid; it just means that the claim is handled per the [APA] terms as if there had never been a [Chapter] 11 filing." (Emphasis omitted.)

DuPont commenced this action in June, 2014, asserting two claims sounding in breach of contract against the defendant. The complaint alleged violations of the side letter and §§ 3.16 and 3.17 of the APA. DuPont alleged that, in accordance with the APA and the side letter, the defendant is obligated to repair or replace refrigeration units that either are not properly working or violate applicable regulations, as well as certain fire suppression systems that did not comply with the applicable laws at the time of the sale. Specifically, in count one, DuPont alleged that the defendant breached the APA because, at the time of closing, the defendant had been operating nine areas of the plant in violation of applicable fire safety laws and regulations. Count two alleged that multiple refrigeration units were leaking refrigerant at rates impermissible under applicable environmental law.

After three and one-half years of pretrial litigation, the case was tried in January, 2018. On the last day of trial, the defendant claimed—for the first time, in a motion for a directed verdict—that DuPont failed to provide notice in accordance with the terms of the APA. The defendant argued that DuPont did not comply with the APA's notice provision because it had been communicating with the defendant's associate general counsel rather than the general counsel. The court requested briefing on the issue, and the plaintiff and the defendant submitted posttrial briefs. The plaintiff and the defendant agreed that, under § 11.16 of the APA, New York law governs this dispute. The defendant argued that New York law requires strict compliance with notice provisions in a contract and that the plaintiff failed to prove all the elements of breach of contract. The plaintiff disagreed and argued that New York law did not require strict compliance, and that the claims list and the correspondence between the parties to the APA satisfied New York law because they provided the defendant actual notice.

The trial court determined that at no time after the closing did DuPont provide notice in accordance with § 11.4 of the APA. The court noted that a number of the plaintiff's exhibits submitted as proof of actual notice did not rise to the level of actual notice of a violation of the contract purchase provisions. The court relied on a New York intermediate appellate court decision, *Fortune Limousine Service, Inc.* v. *Nextel Communications*, 35 App. Div. 3d 350, 826 N.Y.S.2d 392 (2006), appeal denied, 8 N.Y.3d 816, 870 N.E.2d 695, 839 N.Y.S.2d 454 (2007), for the proposition that, when there is a denial of actual notice, the plaintiff must present some evidence of notice. In the present case, the court explained, the plaintiff described an ongoing discussion over a period of years, but at no point "ha[d] the plaintiff been able to demonstrate that the defendant was notified within the applicable four year period that [DuPont] alleged a breach of the provisions of § 3.16 or § 3.17 [of the APA]." The court rejected the plaintiff's contention that the defendant had actual notice of the claims based on various correspondence, namely, the claims list, because these documents were "only discussion for purposes of reimbursement of items pursuant to the [APA]." The court further explained that, based on the claims list, the defendant had determined that DuPont's claim was not valid, and, if it chose to pursue the claim, DuPont was "obligated to follow the contract, which means the notice and the § 8.4 time limitations, as well as the specificity of such a claim." Finally, the court stated that, "[w]ithout a written notice outlining the basis of the defendant's noncompliance, the defendant is prejudiced in that [it] need[s] to determine [whether] the problem is some undisclosed violation or simply the passage of time that has affected the operation of the facility in accordance with the regulations and permits." The trial court concluded that DuPont failed to provide proper and timely notice in accordance with §§ 8.4 and 11.4 of the APA and rendered judgment in

favor of the defendant. The court did not reach the defendant's arguments that the plaintiff failed to prove the other elements of breach of contract.

The plaintiff appealed from the judgment of the trial court to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the plaintiff contends that the trial court incorrectly concluded that New York law requires strict compliance with a notice provision in a commercial contract. In support, the plaintiff asserts that the APA's notice provision is not a condition precedent to indemnification. The plaintiff also asserts that New York case law draws a distinction between public contracts and commercial contracts, and that strict compliance with contractual notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation. Finally, the plaintiff asserts that the defendant's notice claims are barred by estoppel and waiver.

The defendant disagrees and contends that the trial court correctly concluded that lack of notice barred the plaintiff's claims. It asserts that New York courts rigorously enforce provisions in contracts between sophisticated parties, and the notice provision in the APA is a condition precedent to indemnification. The defendant also rejects the plaintiff's distinction between public and commercial contracts and argues that assertions of actual knowledge are insufficient to satisfy a notice provision under New York law. The defendant also argues that neither estoppel nor waiver applies in this case. Finally, the defendant contends that the plaintiff did not prove other elements of its breach of contract claims.

Whether the trial court correctly concluded that New York law requires strict compliance with a notice provision in a commercial contract is a question of law sub-

ject to our plenary review. See, e.g., *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002) (determination of proper legal standard is question of law subject to plenary review); see also 11 R. Lord, Williston on Contracts (4th Ed. 1999) § 30:6, pp. 77–80 ("[t]he interpretation and construction of a written contract present only questions of law, within the province of the court . . . so long as the contract is unambiguous and the intent of the parties can be determined from the agreement's face" (footnotes omitted)). Because § 11.16 provides that the APA will be governed by and construed under the laws of New York, we look to the decisions of New York's appellate courts to resolve this issue.

I

We begin with the plaintiff's contention that the APA's notice provision is not a condition precedent to indemnification. As the New York Court of Appeals has explained, a condition precedent is "an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises . . . ." (Citations omitted; internal quotation marks omitted.) *Oppenheimer & Co.* v. *Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690, 660 N.E.2d 415, 636 N.Y.S.2d 734 (1995). New York courts distinguish between express and constructive conditions. "Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient." Id. One New York intermediate appellate court has explained that "[i]t must clearly appear from the agreement itself that the parties intended a provision to operate as a condition precedent . . . ." (Citation omitted; internal quotation marks omitted.) *Ashkenazi* v. *Kent South Associates, LLC*, 51 App. Div. 3d 611, 611, 857 N.Y.S.2d 693 (2008). In determining whether a particular

agreement makes an event an express or constructive condition, "courts will interpret doubtful language as embodying a promise or constructive condition rather than an express condition. This interpretive preference is especially strong when a finding of express condition would increase the risk of forfeiture[6] by the obligee . . . ." (Citation omitted; footnote added.) *Oppenheimer & Co.* v. *Oppenheim, Appel, Dixon & Co.*, supra, 691. Even express conditions may "yet be excused by waiver, breach or forfeiture. The Restatement [(Second) of Contracts] posits that '[t]o the extent that the [nonoccurrence] of a condition would cause disproportionate forfeiture, a court may excuse the [nonoccurrence] of that condition unless its occurrence was a material part of the agreed exchange' . . . ." (Citation omitted.) Id., quoting 2 Restatement (Second), Contracts § 229, p. 185 (1981); see also *Schweizer* v. *Sikorsky Aircraft Corp.*, 634 Fed. Appx. 827, 829 (2d Cir. 2015) (same).

New York courts look for "unmistakable language of condition," such as "if" and "unless and until," to establish a condition precedent. (Internal quotation marks omitted.) *MHR Capital Partners LP* v. *Presstek, Inc.*, 12 N.Y.3d 640, 645, 912 N.E.2d 43, 884 N.Y.S.2d 211 (2009). For example, the New York Court of Appeals has held that a contract provision that provided that documents were not to be released " 'unless and until' " one party consented to the deal was an express condition precedent. Id., 645–46; see also *Kingsley Arms, Inc.* v. *Sano Rubin Construction Co.*, 16 App. Div. 3d 813, 814, 791 N.Y.S.2d 196 (2005) (contract that stated "no claim can be asserted unless, 'as a condition prece-

[6] "Forfeiture" is defined as "the denial of compensation that results when the obligee loses [its] right to the agreed exchange after [it] has relied substantially, as by preparation or performance on the expectation of that exchange . . . ." (Citation omitted; internal quotation marks omitted.) *Oppenheimer & Co.* v. *Oppenheim, Appel, Dixon & Co.*, supra, 86 N.Y.2d 692 n.2, quoting 2 Restatement (Second), Contracts § 229, comment (b), p. 185 (1981).

dent thereto,' the notice of claim provisions are complied with" was express condition precedent). Similar to the present case, however, the Fifth Circuit, applying New York law, rejected an argument that a contractual notice provision, which provided that one party " 'will have the right to terminate the [a]greement on sixty (60) days prior written notice,' " was an express condition precedent, even when considered with another provision that included "unless" language. *DuVal Wiedmann, LLC* v. *InfoRocket.com, Inc.*, 620 F.3d 496, 501–502 (5th Cir. 2010).

Here, the defendant claims that the word "unless" in § 8.4 of the APA creates an express condition precedent regarding the precise form of notice. Section 8.4 (a) provides that the defendant will have no liability for breaches of the representations or warranties contained in § 3.16 or § 3.17 "unless on or before the four year anniversary of the [c]losing [d]ate, [DuPont] notifies [the defendant] of such a claim in writing specifying the amount and factual basis of that claim in reasonable detail to the extent known." In short, § 8.4—a provision titled "TIME LIMITATIONS"—sets a four year time limitation for bringing a claim for indemnification under § 3.16 or § 3.17; it does not provide the specific requirements for the notice, which are set forth in § 11.4.[7] Indeed, § 8.4 does not even reference § 11.4. Although § 8.4 contains the word "unless," there is no "unmistakable" language conditioning indemnification on compliance with precise notice procedures. Rather, § 8.4 is more properly understood as setting the time limitation for asserting a claim for indemnification. The notice provision, § 11.4, does not contain any conditional language. Therefore, it is not clearly apparent from the language in the APA that the notice provision in § 11.4

[7] Section 8.8, titled "PROCEDURE FOR INDEMNIFICATION—OTHER CLAIMS," also sets forth information to include in the notice. There is no language in § 8.8 that suggests it is a condition precedent to indemnification, and the defendant does not contend otherwise.

is an express condition precedent based solely on the word "unless" in § 8.4. See *DuVal Wiedmann, LLC* v. *InfoRocket.com, Inc.*, supra, 620 F.3d 501–502. Moreover, given that New York courts will "interpret doubtful language as embodying a promise or constructive condition rather than an express condition"; *Oppenheimer & Co.* v. *Oppenheim, Appel, Dixon & Co.*, supra, 86 N.Y.2d 691; even if there is ambiguity as to whether the notice provision was an express condition precedent, New York law favors construing it as a constructive condition for which substantial compliance is sufficient. See id., 690–91.

II

Having concluded that the notice provision in the APA is not an express condition precedent, we must determine whether New York law nevertheless requires strict compliance with the contract's notice provision under the circumstances of this case. We conclude that New York law does not require strict compliance with a commercial contract's notice provision when the other party to the contract receives actual notice and is not prejudiced by the deviation.

As a general matter, the New York Court of Appeals has noted the importance of compliance with contractual provisions. For example, the court has stated that "[c]ourts will give effect to the contract's language and the parties must live with the consequences of their agreement. If they are dissatisfied . . . the time to say so [is] at the bargaining table . . . ." (Citations omitted; internal quotation marks omitted.) *Eujoy Realty Corp.* v. *Van Wagner Communications, LLC*, 22 N.Y.3d 413, 424, 4 N.E.3d 336, 981 N.Y.S.2d 326 (2013). New York courts respect the freedom of contract, especially "in the case of arm's length commercial contracts negotiated by sophisticated and counseled entities . . . ." (Citation omitted.) Id. Additionally, the Court of Appeals

has explained that "[i]t is settled . . . that when a contract requires that written notice be given within a specified time, the notice is ineffective unless the writing is actually received within the time prescribed . . . ." (Citations omitted.) *Maxton Builders, Inc.* v. *Lo Galbo*, 68 N.Y.2d 373, 378, 502 N.E.2d 184, 509 N.Y.S.2d 507 (1986).

The New York Court of Appeals has not squarely addressed the question of whether New York law requires strict compliance with a notice provision in a commercial contract between private entities. In *A.H.A. General Construction, Inc.* v. *New York City Housing Authority*, 92 N.Y.2d 20, 699 N.E.2d 368, 677 N.Y.S.2d 9 (1998), the court required strict compliance with a notice provision of a *public* contract between the New York City Housing Authority and a contractor for the construction of several public buildings and other public works. Id., 24. The court noted that the contractor undeniably failed to satisfy the notice provisions of the contract, which were conditions precedent to recovery, and nothing the housing authority did prevented the contractor from complying with those provisions. Id., 30–33. As such, the court held that the housing authority's summary judgment motion should have been granted because the contractor did not comply with the contract's notice provisions. Id., 23–24, 34.

Significantly, the court explained that important public policy considerations favor scrutiny of claims of bad faith, when offered by contractors to excuse noncompliance with notice and reporting requirements in public contracts. Id., 33. The court emphasized that notice provisions are common in public works projects and "provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense . . . mitigate damages and avoid the waste of public funds." Id., 33–34. Finally,

the court noted that the contractor's accumulation of additional expenses was "precisely the situation" that the notice provisions were intended to prevent. Id., 34.

Although the New York Court of Appeals did not expressly limit its holding in that case to public contracts, several New York intermediate appellate court decisions have implicitly drawn the distinction between public and private commercial contracts.[8] For example, the New York Supreme Court, Appellate Division, has explained that "New York case law recognizes that prompt, written notice requirements in *public works contracts* serve salutary purposes . . . and merit *strict enforcement*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Huff Enterprises, Inc.* v. *Triborough Bridge & Tunnel Authority*, 191 App. Div. 2d 314, 316–17, 595 N.Y.S.2d 178, appeal denied, 82 N.Y.2d 655, 622 N.E.2d 305, 602 N.Y.S.2d 804 (1993). In the context of private commercial contracts, however, New York's intermediate appellate courts have explained that "strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation . . . ." (Citations omitted.) *Fortune Limousine Service, Inc.* v. *Nextel Communications*, supra, 35 App. Div. 3d 353; see also *Suarez* v. *Ingalls*, 282 App. Div. 2d 599, 600, 723 N.Y.S.2d 380 (2001); *Baker* v. *Norman*, 226 App. Div. 2d 301, 304, 643 N.Y.S.2d 30, appeal dismissed, 88 N.Y.2d 1040, 673 N.E.2d 1240, 651 N.Y.S.2d 13 (1996); *Dellicarri* v. *Hirschfeld*, 210 App. Div. 2d 584, 585, 619 N.Y.S.2d 816

[8] This court has similarly drawn a distinction between public and private contracts and imposed special requirements for enforcing contracts involving public funds. See, e.g., *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 440–41, 54 A.3d 1005 (2012) (state's ability to sue for breach of construction contract was not barred by contractual limitations period); *C.R. Klewin Northeast, LLC* v. *Fleming*, 284 Conn. 250, 253, 932 A.2d 1053 (2007) (sovereign immunity barred enforcement of public works contract that had not followed statutory procedure).

(1994).[9] Relevant to the present case, in which DuPont communicated with the defendant's associate general counsel and not the general counsel, in *Iskalo Electric Tower LLC* v. *Stantec Consulting Services, Inc.*, 79 App. Div. 3d 1605, 916 N.Y.S.2d 373 (2010), the intermediate appellate court explained that, "[a]lthough . . . [the] plaintiffs provided such notice by facsimile transmission to [the] defendant's corporate counsel and did not provide such notice to [the] defendant's chief executive officer, we nevertheless conclude that strict compliance with the notice provision of the lease was not required inasmuch as [the] defendant does not contend that it did not receive actual notice . . . [or] that it was prejudiced by the deviation . . . ." (Citations omitted.) Id., 1607.[10]

Finally, we note that several federal courts, applying New York law, have also concluded that strict compli-

[9] Trial courts in New York have similarly drawn such a distinction between public and private commercial contracts when construing notice provisions. See, e.g., *J.C. Studios, LLC* v. *TeleNext Media, Inc.*, Docket No. 30606/10, 2011 WL 2651857, *7 (N.Y. Sup. July 6, 2011) ("[s]trict compliance with contract notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation") (decision without published opinion, 32 Misc. 3d 1211 (A), 932 N.Y.S.2d 760 (2011)).

[10] We acknowledge that at least two New York intermediate appellate court decisions have required strict compliance with notice provisions in a private contract. See, e.g., *AXA Mediterranean Holding, S.P.* v. *ING Ins. International, B.V.*, 106 App. Div. 3d 457, 457, 965 N.Y.S.2d 89 (2013) (contract provided claims for breach that expire after one year unless plaintiff provides defendant notice in accordance with notice provision of contract); *Morelli Masons, Inc.* v. *Peter Scalamandre & Sons, Inc.*, 294 App. Div. 2d 113, 113, 742 N.Y.S.2d 6 (2002) (although notice provision did not contain traditional conditional language, contract "specifically provided that the failure to comply with such provision would constitute a waiver of the subcontractor's claim for damages"). At least one of these cases, however, turned on the fact that the notice provision was an express condition precedent to indemnification. See *Morelli Masons, Inc.* v. *Peter Scalamandre & Sons, Inc.*, supra, 113. We decline to adopt the reasoning in these cases given that the majority of the New York intermediate appellate court decisions this court has reviewed did not require strict compliance in commercial contracts.

ance with a notice provision in a private commercial contract is not required. For example, the Second Circuit has opined that, "[u]nder New York law, strict compliance with contractual notice provisions need not be enforced where the adversary party does not claim the absence of actual notice or prejudice by the deviation."[11] (Internal quotation marks omitted.) *Schweizer* v. *Sikorsky Aircraft Corp.*, supra, 634 Fed. Appx. 829; see also *Thor 725 8th Avenue LLC* v. *Goonetilleke*, 138 F. Supp. 3d 497, 509 (S.D.N.Y. 2015), aff'd, 675 Fed. Appx. 31 (2d Cir. 2017). The United States District Court for the District of Columbia has explained that, "[u]nder New York law, strict compliance with written notice provisions is required for public contracts, with limited exceptions. . . . But because the contract at issue in this action is a commercial agreement between two sophisticated, private parties, the rigid [strict construction] rule [the defendant] incorrectly argues for clearly does not apply." (Citation omitted.) *Intelsat USA Sales*

[11] Following oral argument, the defendant filed a notice of supplemental authorities pursuant to Practice Book § 67-10. The defendant cites two recent cases from the Second Circuit and the United States District Court for the Southern District of New York that it claims are relevant to the parties' contrary positions on the appropriate sources of New York law. During oral argument, the plaintiff argued that, in the absence of any recent New York Court of Appeals decision, this court should follow the Second Circuit's summary of New York law in *Schweizer*. The defendant contends that this court should follow the decisions of New York intermediate appellate courts. The supplemental authorities recognize that, in the absence of a Court of Appeals decision, courts rely on, among other things, New York intermediate appellate court cases. See *Ray* v. *Ray*, 799 Fed. Appx. 29, 30 (2d Cir. 2020); *Fica Frio, Ltd.* v. *Seinfeld*, 434 F. Supp. 3d 80, 88 (S.D.N.Y. 2020). The plaintiff responded and argued that the defendant's letter was procedurally improper and that the supplemental authorities do not undermine *Schweizer*. The Second Circuit's statement of New York law in *Schweizer* is consistent with many of the decisions of the New York intermediate appellate courts. Moreover, the supplemental cases do not stand for the proposition that the court can look only to intermediate appellate court authority. See, e.g., *Fica Frio, Ltd.* v. *Seinfeld*, supra, 87 ("[b]ecause the New York Court of Appeals has not explicitly addressed this question, this [c]ourt must review available sources—including . . . state and federal case law—to predict how that court would resolve the issue").

LLC v. *Juch-Tech*, *Inc.*, 52 F. Supp. 3d 52, 60 n.6 (D.D.C. 2014).

In short, the majority of New York intermediate appellate court opinions have concluded that strict compliance with a notice provision in a private commercial contract is not required. See, e.g., *Iskalo Electric Tower LLC* v. *Stantec Consulting Services*, *Inc.*, supra, 79 App. Div. 3d 1607; *Fortune Limousine Service*, *Inc.* v. *Nextel Communications*, supra, 35 App. Div. 3d 353; *Suarez* v. *Ingalls*, supra, 282 App. Div. 2d 600; *Baker* v. *Norman*, supra, 226 App. Div. 2d 304; *Dellicarri* v. *Hirschfeld*, supra, 210 App. Div. 2d 585. Moreover, the most analogous Court of Appeals decision, which required strict compliance with a notice provision in a public contract, concluded that the notice provision was a condition precedent and emphasized that public policy considerations favored requiring strict compliance because public contract notice provisions were designed to prevent the accumulation of additional expenses and to avoid the waste of public funds. See *A.H.A. General Construction*, *Inc.* v. *New York City Housing Authority*, supra, 92 N.Y.2d 33–34. These concerns are not implicated in commercial contracts between private parties. As such, we conclude that New York law does not require strict compliance with a commercial contract's notice provision when the adversary party receives actual notice and is not prejudiced by the deviation.[12]

[12] This conclusion is consistent with the decisions of New York's intermediate appellate courts, which hold that "a contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties . . . ." (Citation omitted.) *Cole* v. *Macklowe*, 99 App. Div. 3d 595, 596, 953 N.Y.S.2d 21 (2012). Moreover, if a contract interpretation "depends on formalistic literalism . . . ignores common sense, and could lead to absurd results that would leave [another portion of the contract] without meaning"; (citation omitted; internal quotation marks omitted) *Greenwich Capital Financial Products*, *Inc.* v. *Negrin*, 74 App. Div. 3d 413, 415, 903 N.Y.S.2d 346 (2010); the court may reject such a reading and adopt a construction that "produces a commercially reasonable and practical result . . . ." (Citation omitted.) Id. Here, the purpose of the representations and warranties and the side letter was to allow

III

Turning to the facts of the present case, we note that the plaintiff acknowledges that DuPont did not strictly comply with the APA's notice provisions but contends that the defendant received actual notice that DuPont was seeking reimbursement under the APA and the side letter in connection with the refrigeration units and fire suppression systems. Specifically, the plaintiff notes that Kuhlmann engaged in regular discussions and correspondence regarding these claims with the defendant's employees, including Fullerton and DiCristina. The plaintiff also points to the claims list and a series of e-mail correspondence between the parties to the APA that it asserts memorialize the parties' communications regarding plant deficiencies involving the refrigeration units and fire suppression systems. The defendant argues that none of the correspondence between the parties to the APA formally states that it is a notice of a claim for indemnification or breach, none was sent to the contractually specified individuals designated to receive notice, and none contains the information required by § 8.8 of the APA. The defendant does not claim that it was prejudiced as a result of DuPont's failure to strictly comply with the notice provision.

The trial court's factual findings and the record make clear that the defendant—through its associate general counsel and plant manager—was aware that DuPont was seeking indemnification for the refrigeration and fire protection systems. Specifically, Kuhlmann testified that he engaged in regular discussions and correspondence with various employees of the defendant, includ-

DuPont to submit claims for indemnification, given its limited ability to inspect the plant. It would be unreasonable to prevent the plaintiff from recovering despite the defendant's actual knowledge of the claims when it is not apparent from the APA that notice was an express condition precedent to indemnification and the defendant does not claim any prejudice from DuPont's failure to strictly comply with the notice provision.

ing Fullerton and DiCristina, regarding the deficiencies at the plant. Additionally, various e-mail correspondence memorialize the parties' communications regarding the fire safety equipment and refrigeration units. The record contains at least four groups of e-mail correspondence between the parties over a three year period discussing the following: problems with the refrigeration and fire protection systems; estimates for repair of that equipment; and requests by DuPont for reimbursement from the defendant.

Moreover, after the defendant filed for bankruptcy, Fullerton created a detailed claims list chart that summarized the parties' positions on various deficiencies at the plant, which confirmed that the defendant had actual knowledge of DuPont's claims. As previously discussed, for the reorganized company to assume the APA, the defendant had to cure any defaults. This led to extensive negotiations between the parties over "cure claims," which Fullerton described: "assuming there is a tie-in to a reimbursement obligation under the [APA], has work been done for which either (a) an invoice has been generated and sent to [the defendant] or (b) the issuance of an invoice to [the defendant] is a [pro forma] step at this point [because] the amount that would appear on the invoice is [un]known? . . . [T]he fact that something may not be in the 'cure claim' category does not mean it never gets paid; it just means that the claim is handled per the [APA] terms as if there had never been a [Chapter] 11 filing." (Emphasis omitted.)

The claims list included the refrigeration and fire protection claims, in addition to other claims for which DuPont requested reimbursement pursuant to the APA and the side letter.[13] Item 9, which was related to the fire

[13] In addition to the refrigeration and fire protection claims, the claims list included claims for, among other things, "[national electric code] upgrades, pharma," for which the proposed resolution was: "General agreement that the [national electric code] items . . . *should all be viewed as grounded in the contract* (Closing Side Letter), and in principle considered part of a

protection equipment, provided: "General agreement that, regardless of how this item might be tied to obligations under the contract, no work has been done to date and it is therefore not possible to establish an amount that could be considered a 'cure claim' amount. Accordingly, this item should be taken off the 'cure claim' list." The estimated cost of the work was listed as $1.6 million. Similarly, item 12, which was related to the refrigeration equipment, provided: "*General agreement that this item is grounded in the contract ([c]losing [s]ide [l]etter references to '[p]otential [ozone depleting substances regulations] [v]iolations')*, and that there is likely disagreement as to the nature, scope and extent of work required, but that a minimal amount of work has been done to date. . . . [T]here is no agreement on this point, and the parties desire to handle this item by: (a) not deeming the work done to date as giving rise to a 'cure claim' and (b) preserving the right of DuPont to seek reimbursement for this item (including as to any work performed as of the current date) from [the defendant] under the terms of the contract, and (c) preserving the right of [the defendant] to invoke its rights under the contract as well. In other words, both parties will reserve all rights they have under the contract, including as applied to any work that may have been performed as of the current date. On that basis, this item should be taken off the 'cure claim' list." (Emphasis added.) The estimated cost of the claim was listed as $250,000.

Based on the foregoing, we agree with the trial court and the defendant that DuPont did not strictly comply with the APA's notice provisions. DuPont did not send notice to the defendant's general counsel and Baker & McKenzie, LLP, as required by § 11.4, and, in the various correspondence between the parties, DuPont did not

'cure claim' . . . . [T]he parties will use their best effort to come up with a 'cure' amount for the [national electric code] work to date." (Emphasis added.) Thereafter, the defendant paid DuPont the amounts due under the APA and the side letter for the national electric code claims.

reference under which sections of the APA it was seeking indemnification, as required by § 8.8. As the trial court noted, "at no point has the plaintiff been able to demonstrate that the defendant was notified within the applicable four year period that [DuPont] alleged a breach of the provisions of § 3.16 or § 3.17 [of the APA]." Strict compliance, however, was not required because the defendant was aware that DuPont was seeking indemnification for the refrigeration and fire protection systems, and the defendant does not claim that it was prejudiced by the deviation. The various correspondence took place over the course of several years, as part of the ongoing business relationship between the parties, and included descriptions of the deficiencies with the equipment, as well as cost information then available to DuPont. These claims were brought to the defendant's attention within four years of the closing date.

The defendant contends that the trial court not only concluded that DuPont failed to strictly comply with the notice provision but also found that DuPont failed to provide actual notice. The plaintiff argues that the trial court applied the wrong legal standard and incorrectly concluded that DuPont did not provide actual notice based on its failure to provide notice in accordance with the terms of the APA. We agree with the plaintiff.

Throughout the trial court's memorandum of decision, the court equates actual notice with strict compliance with the contractual notice provisions of the APA. For example, the court stated that, "at no time after the closing on January 31, 2008, was a notice provided *in accordance with § 11.4* . . . ." (Emphasis added.) The trial court also rejected the plaintiff's contention that the claims list provided the defendant with actual notice of the claims because the "document clearly conveys that the defendant has determined that the claim of [DuPont] is not valid, and, if [DuPont] [chooses] to

pursue [the claim, DuPont is] obligated to follow the contract . . . .'' Because strict compliance was not required, DuPont did not have to strictly ''follow the contract'' to provide notice. Additionally, if the defendant determined that DuPont's claims were not valid, then it necessarily had actual notice of those claims. Finally, the trial court concluded that ''[t]he interplay of these contracts, [the] side letter and site services created a complicated process for the parties to address. The list of items to be assessed was extensive. This is precisely why the notice provisions, [which] requir[e] the writing [of notice] . . . to specific individuals and . . . that the writing outline the 'factual basis of the claim in reasonable detail,' *require strict compliance with the notice criteria*.'' (Emphasis added.) As such, to the extent that the trial court purports to conclude that DuPont failed to provide actual notice to the defendant, it applied the wrong legal standard and improperly limited actual notice to the technical notice requirements of the APA.

For the reasons previously discussed, applying the proper legal standard to the undisputed facts found by the trial court, we conclude that there is ample evidence in the record to establish that the defendant had actual notice of the claims. See, e.g., *State* v. *Donald*, 325 Conn. 346, 354, 157 A.3d 1134 (2017) (''[w]hen the facts underlying a claim on appeal are not in dispute . . . that claim is subject to de novo review'' (internal quotation marks omitted)); *Tuxis-Ohr's, Inc.* v. *Gherlone*, 76 Conn. App. 34, 39, 818 A.2d 799 (In contract cases, ''[t]he trial court's legal conclusions are subject to plenary review. [W]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . .'' (Internal quotation marks omitted.)), cert. denied, 264 Conn. 907, 826 A.2d 179 (2003).

Significantly, the defendant does not contend that it was prejudiced in any way as a result of DuPont's failure

to strictly comply with the APA's notice provision. We acknowledge that the trial court stated that, "[w]ithout a written notice outlining the basis of the defendant's noncompliance, the defendant is prejudiced in that [it] need[s] to determine [whether] the problem is some undisclosed violation or simply the passage of time that has affected the operation of the facility in accordance with the regulations and permits." The trial court, however, did not properly evaluate prejudice because it did not determine that there was prejudice to the defendant as required by New York law. Rather, the trial court appears to conclude that there is prejudice to the evaluation of the case. There is no question that, within four years of the closing, the defendant was aware of the various issues at the plant, including the problems with the refrigeration and fire suppression systems, and that the parties were reaching agreement on certain claims, such as the national electric code claim. See footnote 13 of this opinion. Given the absence of any argument by the defendant that it was prejudiced by the deviation, DuPont was not required to strictly comply with the notice provision.

Because New York law does not require strict compliance with a notice provision in a commercial contract, the trial court improperly rendered judgment in favor of the defendant on the basis that DuPont failed to strictly comply with the notice provision of the APA.[14] See, e.g., *Iskalo Electric Tower LLC* v. *Stantec Consulting Services, Inc.*, supra, 79 App. Div. 3d 1607 (notice provided by facsimile only to defendant's corporate counsel was effective even though contract required notice to defendant's chief executive officer); *Suarez* v. *Ingalls*, supra, 282 App. Div. 2d 599–600 (notice was effective, even though it was not sent by

[14] Given our conclusion that the trial court improperly required strict compliance with the APA's notice provision, we need not address the plaintiff's contention that the defendant's notice claims are barred by estoppel and waiver.

certified mail, as required by contract, because plaintiff received actual notice); *Huff Enterprises, Inc.* v. *Triborough Bridge & Tunnel Authority*, supra, 191 App. Div. 2d 317 (even in context of public contracts, "failure to give notice compliant in every technical respect has been excused on occasion . . . when there is an extensive record of timely written correspondence between the contractor and agency addressing the disputed subject matter" (citations omitted; internal quotation marks omitted)); *Whitmyer Bros., Inc.* v. *New York*, 63 App. Div. 2d 103, 107, 406 N.Y.S.2d 617 (1978) ("in cases [in which] the [s]tate is apprised of the contractor's claim that extra work beyond the contract was being performed, the [s]tate has been precluded from insisting [on] strict compliance with the notice provisions" (internal quotation marks omitted)), aff'd, 47 N.Y.2d 960, 393 N.E.2d 1027, 419 N.Y.S.2d 954 (1979).

Given that the trial court required strict compliance with the APA's notice provision and failed to make any other factual findings regarding the plaintiff's breach of contract claims, we decline to address the defendant's remaining contention that the plaintiff failed to prove the other elements of its breach of contract claim. See, e.g., *St. Joseph's Living Center, Inc.* v. *Windham*, 290 Conn. 695, 766–67, 966 A.2d 188 (2009) (*Schaller, J.*, concurring in part and dissenting in part) (when trial court did not make factual findings, "the appropriate remedy is to remand the case to the trial court for further proceedings"); see also *Deroy* v. *Estate of Baron*, 136 Conn. App. 123, 127, 43 A.3d 759 (2012) ("[w]hen an incorrect legal standard is applied, the appropriate remedy is to reverse the judgment of the trial court and to remand the matter for further proceedings").

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 336

JOHN STANLEY KAMINSKI *v.* COMMISSIONER OF CORRECTION

The petitioner John Stanley Kaminski's petition for certification to appeal from the Appellate Court, 202 Conn. App. 902 (AC 43787), is denied.

Robert T. Rimmer, assigned counsel, in support of the petition.

Kathryn W. Bare, senior assistant state's attorney, in opposition.

Decided February 9, 2021

IN RE JOSIAH D. ET AL.

The petition by the respondent father for certification to appeal from the Appellate Court, 202 Conn. App. 234 (AC 44096), is denied.

Karen Oliver Damboise, assigned counsel, in support of the petition.

Kim Mathias and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided February 9, 2021

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Vol. 202

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE KAMERON N.*
(AC 44079)

Lavine, Moll and Cradle, Js.**

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child, K, who had previously been adjudicated neglected. The father was a member of the Rosebud Sioux Tribe, and K was eligible for enrollment in the tribe on that basis. The petitioner, the Commissioner of Children and Families, and the Department of Children and Families, sent multiple letters to the tribe pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) regarding K's involvement with the department. These letters included, inter alia, one sent by registered mail, return receipt requested, informing the tribe that a trial on the termination of parental rights was scheduled, with the dates, times and location of the trial. A social worker representing the tribe signed for that letter. The tribe sent multiple letters to the petitioner indicating, inter alia, that K qualified for enrollment, and it exercised its statutory (25 U.S.C. § 1911 (c)) right to intervene in the termination trial, but it did not appear. On

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

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

appeal, the father claimed that the tribe had not received proper notice as required by federal law (25 U.S.C. § 1912 (a)) that the nature of the termination proceedings was involuntary. *Held* that the trial court properly determined that the notice provided to the tribe complied with the requirements of 25 U.S.C. § 1912 (a); the plain and unambiguous language of the statute requires that notice be given in any involuntary proceeding but does not require the petitioner explicitly to state that a termination proceeding is involuntary, the fact that the petitioner had sent notice to the tribe at all was indicative that the proceeding was involuntary, as tribes are not entitled by statute to intervene in voluntary proceedings, and the letter the petitioner sent to the tribe identified the proceeding as a termination of parental rights, which indicated the involuntary nature of the proceeding.

Argued November 10, 2020—officially released February 16, 2021***

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, where the Rosebud Sioux Tribe intervened; thereafter, the matter was tried to the court, *Woods*, *J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (respondent father).

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

Opinion

CRADLE, J. The sole issue in this appeal from the judgment of the trial court terminating the parental rights of the respondent father, David N., with respect to his minor child, Kameron N., is whether the Rosebud Sioux

*** February 16, 2021, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Tribe (tribe) received proper notice, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 et seq., of the termination of parental rights proceedings involving the child, who is enrollable as a member of the tribe. We reject the claim of the respondent that the tribe did not receive adequate notice of the termination proceedings and, accordingly, affirm the judgment of the trial court.[1]

The following procedural history, set forth by the trial court, is relevant to the respondent's claim. The child was born to the respondent father and Brooke C. (mother) on December 19, 2009. The respondent and his mother, the child's paternal grandmother, are natives of the tribe. The Department of Children and Families (department) has been involved with this family since 2011, resulting in three substantiated allegations of neglect arising from issues of ongoing substance abuse, intimate partner violence, and inadequate supervision of the child. "On August 5, 2016, [the petitioner, the Commissioner of Children and Families] filed a neglect petition on behalf of [the child]. On November 10, 2016, [the child] was adjudicated neglected and placed under protective supervision. While [the child] was under protective supervision and under [his] mother's care, [the mother] continued to struggle with maintaining sobriety, which impacted her ability to properly parent [the child]. On May 19, 2017, [the petitioner] filed an [order for temporary custody] on behalf of [the child], which was sustained on May 26, 2017. On May 19, 2017, [the child] was placed in a nonrelative foster home where he continues to reside at this time. On June 15, 2017, [the child] was committed to [the care and custody of the petitioner]. On April 12, 2018, a permanency plan for [termination of parental rights] and adoption was approved by the

[1] The parental rights of the child's mother also were terminated. She has challenged the trial court's judgment in a separate appeal. See *In re Kameron N.*, 202 Conn. App. 637, A.3d (2021). Therefore, any reference to the respondent herein is to the father.

court. A [termination] trial on this matter commenced on April 22, 2019, with subsequent trial dates of April 25, May 1, May 2, May 21, and June 17 of 2019."

On January 31, 2020, the trial court issued a memorandum of decision terminating the parental rights of the respondent and the child's mother. The court found that the petitioner had made the requisite efforts under ICWA to prevent the breakup of the family by providing remedial services and rehabilitative programs to both parents, but those efforts were unsuccessful. The court determined that the child had previously been adjudicated neglected and that neither parent had achieved a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i). The court further concluded that terminating their parental rights was in the child's best interest. This appeal followed.

For the first time on appeal, the respondent challenges the adequacy of the notice of the termination proceedings afforded to the tribe pursuant to ICWA.[2] The following additional facts, which are undisputed, are relevant to the respondent's claim. At trial, the petitioner introduced into evidence the department's correspondence with the tribe pertaining to the child protection proceedings involving the child. The record reflects that, by way of a letter dated July 14, 2017, the department notified the tribe that a neglect petition had been filed on behalf of the child on August 9, 2016. On May 22, 2018, the department sent a letter to the tribe informing it that a permanency plan recommending the termination of parental rights and adoption, which was attached to the letter, had been filed on behalf of the child on February 22, 2018. On June 21, 2018, the department sent

[2] It is well settled that such a claim may properly be raised for the first time on appeal. See *In re Marinna J.*, 90 Cal. App. 4th 731, 739, 109 Cal. Rptr. 2d 267 (2001). Additionally, ICWA specifically confers standing on a parent to petition a court to invalidate a termination proceeding upon showing that notice requirements have not been satisfied. See 25 U.S.C. § 1914 (2018).

another letter to the tribe, referencing the prior neglect petition and a previous order for temporary custody and neglect adjudication, and informing the tribe that the permanency plan recommending termination had been granted by the court on April 12, 2018. All three of these letters were sent pursuant to ICWA, indicated that the department had information to believe that the child might be a member of the tribe, and advised the tribe of its right to intervene in the proceedings. The respondent does not claim that the tribe did not receive these notices.

On June 28, 2018, the tribe responded to the department, indicating that the child qualified for enrollment in the tribe on the basis of the respondent's enrollment. On July 6, 2018, the tribe sent another letter to the department indicating that it had determined that the child met the definition of "Indian Child" pursuant to 25 U.S.C. § 1903 (4). In that letter, the tribe stated: "If this is an involuntary child custody proceeding, we intend to intervene in the above named matter as a legal party. Send a copy of petition with names and addresses of all parties."

On September 19, 2018, the department sent a letter to the tribe notifying it of a "court date scheduled on behalf of [the child] on [November 13, 2018] at 9:30 a.m." The letter contained the address of the court, but did not indicate the purpose of the "court date."

On January 17, 2019,[3] the department sent a letter to the tribe informing it of a hearing date of April 9, 2019, to address pretrial motions, and notifying the tribe that the termination of parental rights trial was scheduled for April 22, April 25, and April 29, 2019. This letter included the times of the trial on each date and the address of the court. It was sent by registered mail with return receipt requested and was signed for by Shirley Bad Wound, a social worker representing the tribe.

[3] Although this letter is dated January 17, 2018, the parties stipulate that it was actually sent on January 17, 2019.

On January 28, 2019, the tribe filed with the trial court, inter alia, a "Notice of Intervention by the Rosebud Sioux Tribe" stating that it was "invok[ing] its rights to intervene in this child custody proceeding pursuant to 25 U.S.C. § 1911 (c) . . . ."

On March 27, 2019, David Mantell, a clinical and forensic psychologist who was asked by the department to review this matter, called Bad Wound. Bad Wound acknowledged receipt of the documents sent by the department but told Mantell that she knew very little about the proceedings involving the child. After Mantell summarized the proceedings for Bad Wound, she indicated that the tribe's plan at that time was to enroll him as a tribal member. Despite exercising its right to intervene, the tribe took no further action and did not appear at the termination trial.

The trial court found that the respondent was a member of the tribe, and, accordingly applied the substantive law of ICWA in weighing the evidence presented at trial. The trial court also found that "notice of the court hearing dates were sent to the Rosebud Sioux tribe by the [department] . . . [but] [n]o representative of the tribe ever appeared in court." The respondent does not challenge the court's adjudicative or dispositional findings underlying the termination judgment. On appeal, the respondent claims only that notice to the tribe of the termination proceedings was deficient in that it did not indicate that the proceedings were involuntary. On that basis, the respondent argues that the judgment of termination should be reversed because the tribe did not receive proper notice of the termination proceedings under ICWA.[4] We are not persuaded.

We begin by noting that "Congress enacted ICWA in 1978 to address the [f]ederal, [s]tate, and private agency policies and practices that resulted in the wholesale

[4] The attorney for the child filed a letter with this court, pursuant to Practice Book §§ 67-13 and 79a-6 (c), adopting the brief of the petitioner.

separation of Indian children from their families. . . . Congress found that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . . Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that [s]tate agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. . . . To address this failure, ICWA establishes minimum [f]ederal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over [child custody] proceedings involving Indian children." (Footnotes omitted; internal quotation marks omitted.) United States Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Bureau of Indian Affairs, "Guidelines for Implementing the Indian Child Welfare Act," (2016), p. 5, available at bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (last visited February 10, 2021).

With the foregoing principles in mind, we turn to the respondent's claim on appeal. The respondent contends that the notice afforded to the tribe of the termination proceedings involving the child did not comply with ICWA. To resolve the respondent's claim, we must apply the principles of statutory interpretation to the notice requirements of ICWA, set forth in 25 U.S.C. § 1912 (a). The interpretation of ICWA, like the interpretation of any statute, is a question of law that we review de novo. See *In re N.B.*, 199 P.3d 16, 18 (Colo. App. 2007). "Our interpretation of federal and state statutes is guided by the plain meaning rule. See, e.g., *Cambodian Buddhist*

Society of Connecticut, Inc. v. *Planning & Zoning Commission*, 285 Conn. 381, 400–401, 941 A.2d 868 (2008) ('With respect to the construction and application of federal statutes, principles of comity and consistency require us to follow the plain meaning rule for the interpretation of federal statutes because that is the rule of construction utilized by the United States Court of Appeals for the Second Circuit. . . . If the meaning of the text is not plain, however, we must look to the statute as a whole and construct an interpretation that comports with its primary purpose and does not lead to anomalous or unreasonable results.' . . .) . . . ." *State* v. *Peters*, 287 Conn. 82, 88, 946 A.2d 1231 (2008).

Section 1912 (a) of ICWA provides in relevant part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . ." 25 U.S.C. § 1912 (a) (2018).

The respondent challenges the adequacy of the notice afforded to the tribe solely on the ground that the tribe was not informed of the involuntary nature of the termination proceedings.[5] The plain and unambiguous language of 25 U.S.C. § 1912 (a), however, does not require the department explicitly to tell the tribe that the proceeding was involuntary. It requires that notice be given "in any involuntary proceeding," and it sets forth the

[5] We note that "[t]he requisite notice to the tribe serves a twofold purpose: (1) it enables the tribe to investigate and determine whether the minor is an Indian child; and (2) it advises the tribe of the pending proceedings and its right to intervene or assume tribal jurisdiction." (Internal quotation marks omitted.) *In re N.R.*, 242 W. Va. 581, 590, 836 S.E.2d 799 (2019), cert. denied sub nom. *Rios* v. *West Virginia Dept. of Health & Human Resources*, U.S. , 140 S. Ct. 1550, 206 L. Ed. 2d 385 (2020).

information that must be contained in that notice, such as the identities of the parties to the proceeding and the tribe's right to intervene. It does not require notification of the voluntary or involuntary nature of the proceedings. Moreover, because the tribe is not entitled to intervene in voluntary proceedings; *Catholic Social Services, Inc.* v. *C.A.A.*, 783 P.2d 1159, 1160 (Alaska 1989) (under ICWA, child's tribe is not entitled to notice of proceeding for voluntary termination of parental rights), cert. denied, 495 U.S. 948, 110 S. Ct. 2208, 109 L.Ed.2d 534 (1990); the fact that notice was sent to the tribe was indicative of the involuntary nature of the termination proceedings in this case. The January 17, 2019 letter sent by the department to the tribe, which provided notice of the three scheduled trial dates in what was identified as a termination of parental rights proceeding also was indicative of the involuntary nature of those proceedings. Because the plain and unambiguous language of 25 U.S.C. § 1912 (a) does not require the notice sent in an involuntary proceeding explicitly to indicate the involuntary nature of the proceedings, we cannot conclude, as the respondent contends, that the notice afforded to the tribe failed to comply with ICWA on that basis.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

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[6] The petitioner argues, in the alternative, that the notice sent to the tribe substantially complied with ICWA, and that any alleged deficiency with it was harmless. Because we conclude that the notice complied with the requirements set forth by the plain and unambiguous language of ICWA, we need not address the petitioner's alternative arguments. It is worth noting, however, that it is undisputed that the tribe had actual notice of the termination proceedings but took no action in them beyond intervening.

IN RE KAMERON N.*
(AC 44086)

Lavine, Moll and Cradle, Js.**

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child, K, who had previously been adjudicated neglected. K was eligible for enrollment in the Rosebud Sioux Tribe on the basis of his father's tribal membership. The petitioner, the Commissioner of Children and Families, and the Department of Children and Families, sent multiple letters to the tribe pursuant to the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) regarding K's involvement with the department. These letters included, inter alia, one sent by registered mail, return receipt requested, informing the tribe that a trial on the termination of parental rights was scheduled, with the dates, times and location of the trial. A social worker representing the tribe signed for that letter. The tribe sent multiple letters to the petitioner indicating, inter alia, that K qualified for enrollment, and it exercised its statutory (25 U.S.C. § 1911 (c)) right to intervene in the termination trial, but it did not appear. On appeal, the mother claimed that the tribe did not receive proper notice of the termination proceedings as required by federal law (25 U.S.C. § 1912 (a)) and that the court erred in denying her motion to open the evidence and in finding that termination was in K's best interest. *Held*:

1. The respondent mother's claims that the tribe received inadequate notice of the termination proceedings were unavailing: although the petitioner's letters to the tribe did not strictly follow guidelines for implementing the Indian Child Welfare Act that the mother referenced in her challenge to the notice, those guidelines were not mandatory and did not expand the notice requirements set forth in the plain language of the act; moreover, although the letter sent by registered mail informing the tribe of the details of the termination trial did not advise the tribe of its right to intervene, the tribe previously had been advised of and acknowledged this right, thus, the notice complied with the requirements of 25 U.S.C. § 1912 (a).

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

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

2. The trial court did not abuse its discretion in denying the respondent mother's motion to open the evidence for the purpose of introducing new evidence regarding the placement of K; contrary to the mother's assertion, the court did not rely on the willingness of K's foster family to adopt him in determining that termination of her parental rights was in K's best interest, thus, the mother's purported new evidence was irrelevant to the issues before the court.

3. The trial court's determination that termination of the respondent mother's parental rights was in the child's best interest was not clearly erroneous; the court was entitled to determine, based on the evidence, that the benefit of K's bond with his mother and the potential loss he would suffer from its removal were outweighed by his need for stability and consistency, which she could not provide.

Argued November 10, 2020—officially released February 16, 2021***

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, where the Rosebud Sioux Tribe intervened; thereafter, the matter was tried to the court, *Woods*, *J.*; subsequently, the court denied the respondent mother's motion to open the evidence; judgment terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Karen Oliver Damboise, assigned counsel, for the appellant (respondent mother).

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

Opinion

CRADLE, J. The respondent mother, Brooke C., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child,

*** February 16, 2021, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Kameron N.[1] On appeal, she claims that (1) the Rosebud Sioux Tribe (tribe) did not receive proper notice, pursuant to the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 et seq., of the termination of parental rights proceedings involving the child, who is enrollable as a member of the tribe,[2] (2) the trial court erred in denying her motion to open the evidence "for the purpose of introducing new evidence, which was discovered after the close of evidence, regarding placement of the child," and (3) the trial court erred in finding that termination was in the child's best interest. We affirm the judgment of the trial court.

The following procedural history, set forth by the trial court, is relevant to the respondent's claims. The child was born to the respondent and David N. (collectively, parents) on December 19, 2009. David N. and his mother, the child's paternal grandmother, are natives of the tribe. The Department of Children and Families (department) has been involved with this family since 2011, resulting in three substantiated allegations of neglect arising from issues of ongoing substance abuse, intimate partner violence, and inadequate supervision of the child. "On August 5, 2016, [the petitioner, the Commissioner of Children and Families] filed a neglect petition on behalf of [the child]. On November 10, 2016, [the child] was adjudicated neglected and placed under protective supervision. While [the child] was under protective supervision and under [the respondent's] care, [the respondent] continued to struggle with maintaining sobriety, which impacted her ability to properly parent [the child]. On May 19, 2017, [the petitioner] filed an

[1] The parental rights of the child's father also were terminated. He has challenged the trial court's judgment in a separate appeal. See *In re Kameron N.*, 202 Conn. App. 628, A.3d (2021). Therefore, any reference to the respondent is to the mother.

[2] In the father's appeal, he also challenged the adequacy of the notice afforded to the tribe. In that appeal, the attorney for the child filed a letter with this court, pursuant to Practice Book §§ 67-13 and 79a-6 (c), adopting the brief of the petitioner.

[order for temporary custody] on behalf of [the child], which was sustained on May 26, 2017. On May 19, 2017, [the child] was placed in a nonrelative foster home where he continues to reside at this time. On June 15, 2017, [the child] was committed to [the care and custody of the petitioner]. On April 12, 2018, a permanency plan for [termination of parental rights] and adoption was approved by the court. A [termination] trial on this matter commenced on April 22, 2019, with subsequent trial dates of April 25, May 1, May 2, May 21, and June 17 of 2019."

On January 31, 2020, the trial court issued a memorandum of decision terminating the parental rights of the parents. The court found that the petitioner had made the requisite efforts under ICWA to prevent the breakup of the family by providing remedial services and rehabilitative programs to both parents, but those efforts were unsuccessful. The court determined that the child had previously been adjudicated neglected and that neither parent had achieved a sufficient degree of personal rehabilitation within the meaning of General Statutes § 17a-112 (j) (3) (B) (i). The court further concluded that terminating their parental rights was in the child's best interest. This appeal followed.

We begin by noting that "Congress enacted ICWA in 1978 to address the [f]ederal, [s]tate, and private agency policies and practices that resulted in the wholesale separation of Indian children from their families. . . . Congress found that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions . . . . Although the crisis flowed from multiple causes, Congress found that non-Tribal public and private agencies had played a significant role, and that [s]tate agencies and courts had often failed to recognize the essential Tribal relations of Indian people and the cultural and

social standards prevailing in Indian communities and families. . . . To address this failure, ICWA establishes minimum [f]ederal standards for the removal of Indian children from their families and the placement of these children in foster or adoptive homes, and confirms Tribal jurisdiction over [child custody] proceedings involving Indian children." (Footnotes omitted; internal quotation marks omitted.) United States Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Bureau of Indian Affairs, "Guidelines for Implementing the Indian Child Welfare Act," (2016) (Guidelines), p. 5, available at bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf (last visited February 10, 2021). With the foregoing principles in mind, we turn to the respondent's claims on appeal.

I

The respondent first challenges the adequacy of the notice of the termination proceedings afforded to the tribe pursuant to ICWA.[3] The following additional facts, which are undisputed, are relevant to the respondent's claim. At trial, the petitioner introduced into evidence the department's correspondence with the tribe pertaining to the child protection proceedings involving the child. The record reflects that, by way of a letter dated July 14, 2017, the department notified the tribe that a neglect petition had been filed on behalf of the child on August 9, 2016. On May 22, 2018, the department sent a letter to the tribe informing it that a permanency plan recommending the termination of parental rights and adoption, which was attached to the letter, had been filed on behalf of the child on February 22,

[3] It is well settled that such a claim challenging compliance under ICWA in an involuntary proceeding such as the termination of parental rights may properly be raised for the first time on appeal. See *In re Marinna J.*, 90 Cal. App. 4th 731, 739, 109 Cal. Rptr. 2d 267 (2001). Additionally, ICWA specifically confers standing on a parent to petition a court to invalidate a termination proceeding upon showing that notice requirements have not been satisfied. See 25 U.S.C. § 1914 (2018).

2018. On June 21, 2018, the department sent another letter to the tribe, referencing the prior neglect petition and a previous order for temporary custody and neglect adjudication, and informing the tribe that the permanency plan recommending termination had been granted by the court on April 12, 2018. All three of these letters were sent pursuant to ICWA, indicated that the department had information to believe that the child might be a member of the tribe, and advised the tribe of its right to intervene in the proceedings. The respondent does not claim that the tribe did not receive these notices.

On June 28, 2018, the tribe responded to the department, indicating that the child qualified for enrollment in the tribe based on enrollment of the child's father. On July 6, 2018, the tribe sent another letter to the department indicating that it had determined that the child met the definition of "Indian Child" pursuant to 25 U.S.C. § 1903 (4). In that letter, the tribe stated: "If this is an involuntary child custody proceeding, we intend to intervene in the above named matter as a legal party. Send a copy of petition with names and addresses of all parties."

On September 19, 2018, the department sent a letter to the tribe notifying it of a "court date scheduled on behalf of [the child] on [November 13, 2018] at 9:30 a.m." The letter contained the address of the court, but did not indicate the purpose of the "court date."

On January 17, 2019,[4] the department sent a letter to the tribe informing it of a hearing date of April 9, 2019, to address pretrial motions, and notifying the tribe that the termination of parental rights trial was scheduled for April 22, April 25, and April 29, 2019. This letter included the times of the trial on each date and the address of the court. It was sent by registered mail with return receipt requested and was signed for by Shirley Bad Wound, a social worker representing the tribe.

[4] Although this letter is dated January 17, 2018, the parties stipulate that it was actually sent on January 17, 2019.

On January 28, 2019, the tribe filed with the trial court, inter alia, a "Notice of Intervention by the Rosebud Sioux Tribe" stating that it was "invok[ing] its rights to intervene in this child custody proceeding pursuant to 25 U.S.C. § 1911 (c) . . . ." Despite exercising its right to intervene, the tribe took no further action, and did not appear at the termination trial.

On March 27, 2019, David Mantell, a clinical and forensic psychologist who was asked by the department to review this matter, called Bad Wound. Bad Wound acknowledged receipt of the documents sent by the department but told Mantell that she knew very little about the proceedings involving the child. After Mantell summarized the proceedings for Bad Wound, she indicated that the tribe's plan at that time was to enroll him as a tribal member. Despite exercising its right to intervene, the tribe took no further action and did not appear at the termination trial.

The trial court found that the child was a member of the tribe, and, accordingly applied the substantive law of ICWA in weighing the evidence presented at trial. The trial court also found that "notice of the court hearing dates were sent to the Rosebud Sioux tribe by the [department] . . . [but] [n]o representative of the tribe ever appeared in court."

The respondent now challenges the adequacy of the notice afforded to the tribe of the termination proceedings. The notice requirements of ICWA are set forth in 25 U.S.C. § 1912 (a), which provides in relevant part: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . ." 25 U.S.C. § 1912 (a) (2018).

The respondent's challenge to the adequacy of the notice afforded to the tribe is twofold.[5] First, the respondent relies on the Guidelines in arguing: "The department should have sent a letter, via certified or registered mail, on or about July 5, 2018, informing the tribe that a termination of parental rights petition had been filed, include a copy of the [termination] petition, as well as the date, time and location of the [termination] plea; and contain[ing] the name, birthdate and birthplace of the Indian child [and] his tribal affiliation; all known parents; the parents' birthdates, birthplace[s] and tribal enrollment information; the name, birthdates, birthplaces and tribal information of maternal and paternal grandparents; the name of each Indian tribe in which the child is a member or eligible for membership; the petitioner's name; a statement of the right of the tribe to intervene; the right to counsel; the right to request up to a twenty day extension; [the] right to transfer the proceeding to tribal court; [the] address and telephone contact information of the court and potential legal consequences of the proceedings; and confidentiality. 25 C.F.R. § 23.111 (d); [Guidelines], pp. 32–33."

As the respondent aptly notes, however, the Guidelines are not mandatory or binding. The Guidelines state in relevant part: "While not imposing binding requirements, these guidelines provide a reference and resource for all parties involved in child custody proceedings involving Indian children. These guidelines explain the statute and regulations and also provide examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of ICWA. These guidelines replace the 1979

[5] We note that "[t]he requisite notice to the tribe serves a twofold purpose: (1) it enables the tribe to investigate and determine whether the minor is an Indian child; and (2) it advises the tribe of the pending proceedings and its right to intervene or assume tribal jurisdiction." (Internal quotation marks omitted.) *In re N.R.*, 242 W. Va. 581, 590, 836 S.E.2d 799 (2019), cert. denied sub nom. *Rios* v. *West Virginia Dept. of Health & Human Resources*, U.S. , 140 S. Ct. 1550, 206 L. Ed. 2d 385 (2020).

and 2015 versions of the [Department of the Interior's] guidelines." Guidelines, supra, p. 4. Therefore, although instructive, these guidelines are not mandatory and do not expand the notice requirements set forth in ICWA, but, rather, simply guide practitioners on how best to comply with those requirements. Thus, although the notices sent by the department in this case did not contain all of the information recommended in the guidelines, the omission of that information did not render the notice to the tribe deficient under 25 U.S.C. § 1912 (a).

The respondent also argues that the notice of the termination proceedings was deficient because it was not sent to the tribe by registered mail with return receipt requested as required by the plain language of 25 U.S.C. § 1912 (a). As noted herein, the department sent notice to the tribe on January 17, 2019, of the dates of the hearing on pretrial motions for the termination trial and the dates of the termination trial itself by registered mail, which was signed for by Bad Wound. Although that particular correspondence did not advise the tribe of its right to intervene, the tribe had already acknowledged that it had received that advisement from the department and had already stated its intention to intervene. It was therefore unnecessary for the department to again advise the tribe of its right to intervene. In other words, because the tribe had already acknowledged its right to intervene in the termination proceedings, and stated its intention to do so, in its July 6, 2018 correspondence to the department, the January 17, 2019 notice to the tribe, which informed the tribe of the termination trial dates, and was sent by registered mail, adequately complied with the requirements of 25 U.S.C. § 1912 (a).[6]

[6] The petitioner argues, in the alternative, that the notice sent to the tribe substantially complied with ICWA, and that any alleged deficiency with it was harmless. Because we conclude that the notice complied with the requirements set forth by the plain and unambiguous language of ICWA, we need not address the petitioner's alternative arguments. It is worth noting, however, that it is undisputed that the tribe had actual notice of the termination proceedings but took no action in them beyond intervening.

On the basis of the foregoing, we conclude that the respondent's challenges to the adequacy of the notice afforded to the tribe of the termination proceedings on the grounds that it did not comply with the Guidelines and that it was not sent by registered mail are unavailing.

II

The respondent next claims that the trial court erred in denying her motion to open the evidence "for the purpose of introducing new evidence, which was discovered after the close of evidence, regarding placement of the child." We disagree.

"We review a trial court's decision to reopen evidence under the abuse of discretion standard. In any ordinary situation if a trial court feels that, by inadvertence or mistake, there has been a failure to introduce available evidence upon a material issue in the case of such a nature that in its absence there is a serious danger of a miscarriage of justice, it may properly permit that evidence to be introduced at any time before the case has been decided. . . . Whether or not a trial court will permit further evidence to be offered after the close of testimony in a case is a matter resting in the sound discretion of the court. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only [when] an abuse of discretion is manifest or [when] injustice appears to have been done." (Citation omitted; internal quotation marks omitted.) *Antonucci* v. *Antonucci*, 164 Conn. App. 95, 123, 138 A.3d 297 (2016).

The respondent moved to open the evidence on the basis of "information obtained at an [administrative case review] concerning the placement of the subject child."[7] Her motion does not reveal the substance or

[7] The respondent fails to indicate in her brief to this court when she filed her motion to open evidence, whether the petitioner filed an objection to

source of this evidence. In her brief to this court, the respondent hints that the purportedly new evidence that she sought to introduce would show that the child's foster family was no longer "an adoptive resource" or "long-term resource" for the child. She argues: "Clearly, the trial court was anticipating the foster parents to adopt [the child] and relied upon that evidence in making its decision to terminate."

First, we disagree with the respondent's assertion that the trial court relied on the foster family's willingness to adopt when it determined that termination of her parental rights was in the child's best interest. In concluding that termination was in the best interest of the child, the court reasoned: "The court has . . . balanced the child's need for stability and permanency against the distant and uncertain benefit of maintaining a connection with [the parents]. The court has noted throughout this decision that the parents have not demonstrated a willingness or ability to provide consistent, competent, safe, and nurturing parenting to their child. The parents have never successfully cared for or supported [the child], or met his needs on a consistent basis. The parents have not successfully taken advantage of available services in order to improve their circumstances so they can assume a responsible role in [the child's] life. They have been unavailable for services due to lack of interest and concern for [the child]. Further, the father has been incarcerated. The parents have not been able to put the child's interests ahead of their own interests.

"The child needs a permanent and stable living environment in order to grow and develop in a healthy manner. There is no reasonable possibility that the . . . parents will be able to serve a meaningful role as a parent

her motion, or when the court denied it. She has not provided any record citations facilitating our review of this claim. It is not clear from the respondent's brief whether the court heard oral argument on her motion or decided it on the papers. She also failed to provide the citation to the motion to open that she included in her appendix.

within a reasonable period of time. The child seeks his foster parents out for daily comfort and support. The court finds that the child is bonded to his foster family and enjoys a significant degree of mental and emotional stability in their care.

"The best interest of the child will be served by terminating the parental rights of the [parents] so that the child can be provided with the love, care, permanency, and the stability that he requires."

Although the court referred to the child's foster family, it is clear that the court's decision was based on the parents' demonstrated inability to meet the child's needs. Moreover, because the questions of where the child should reside and with whom are not questions that relate to whether it is in the child's best interest to terminate his relationship with his parents; see *In re Denzel A.*, 53 Conn. App. 827, 834, 733 A.2d 298 (1999); the respondent's purported new evidence was irrelevant to the issues before the trial court. We therefore conclude that the trial court did not abuse its discretion in denying the respondent's motion to open the evidence.

III

Finally, the respondent claims that the court erred in concluding that termination was in the child's best interest. Specifically, the respondent also argues that the court's finding that the benefit to the child of maintaining a connection with her was "distant and uncertain" was clearly erroneous and not supported by the evidence."[8] We are not persuaded.

"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

[8] The respondent also argues that "there is a discrepancy between the court finding that the foster parents were willing to adopt and the representation from the department that they wanted to continue to foster him." For the reasons set forth in part II of this opinion, we need not address this argument further.

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Budrawich* v. *Budrawich*, 200 Conn. App. 229, 246, 240 A.3d 688 (2020).

The respondent contends that the court erred in characterizing the benefit of the child maintaining a connection with her as "distant and uncertain." She argues that the court's finding was inconsistent with Mantell's testimony that the child had a close bond with her and that the child's loss of that bond would be a significant loss to him. The court's characterization of the benefit to the child of his bond with the respondent is not inconsistent with Mantell's testimony. The court so characterized the respondent's relationship with the child relative to his need for stability and consistency, which the respondent has been unwilling or unable to provide. Thus, while the child's loss of his relationship with the respondent might, as Mantell testified, be a significant loss, the court determined that the risk of that loss was outweighed by the needs of the child. It is within the court's discretion to credit all, part, or none of the testimony elicited at trial, to weigh the evidence presented, and to determine the effect to be given the evidence. See *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015). The court here determined, on the basis of the respondent's history as a mother, that the risk of the potential loss of the child's relationship with her was outweighed by his need for consistency and stability. The court emphasized the repeated efforts of the department to rehabilitate the respondent and reunify her with the child and the respondent's consistent inability or unwillingness to cooperate with the department's efforts. There is ample evidence of the respondent's shortcomings against which the court was entitled to weigh the benefit of the child's relationship with her. The court did not err in engaging in that thoughtful analysis.

The judgment is affirmed.

In this opinion the other judges concurred.

DEREK J. DELEO *v.* EQUALE & CIRONE, LLP, ET AL.
(AC 42383)

Alvord, Bright and Norcott, Js.*

Syllabus

The plaintiff, a certified public accountant, was a partner at the defendant accounting firm, where the defendant C was a managing partner. After the plaintiff left the partnership, he brought an action against the defendants, claiming, inter alia, a breach of fiduciary duty. The defendants filed a counterclaim, alleging, inter alia, damages under a noncompete provision in the partnership agreement. Following the trial court's judgment in favor of the defendants on the complaint and on the counterclaim, the plaintiff appealed to this court, which reversed the judgment of damages pursuant to the noncompete provision and directed the trial court to determine whether the noncompete provision constituted a reasonable restraint of trade. The trial court thereafter concluded that the noncompete provision constituted an unreasonable restraint of trade and was therefore unenforceable and rendered judgment for the plaintiff, and the defendants appealed to this court. *Held* that the trial court properly determined that, under the specific facts found, which were not clearly erroneous, the noncompete provision unreasonably restrained trade and was unenforceable: although the parties had equal bargaining power and entered into the partnership agreement voluntarily, that was not determinative of whether the noncompete provision was a reasonable restraint of trade, the court's conclusion was legally correct based on the factual circumstances in this case, weighed in totality and balancing the factors the Supreme Court determined in *Scott* v. *General Iron & Welding Co.* (171 Conn. 132), as the noncompete provision was not reasonably necessary to protect the defendants' business interests, as the court found that the noncompete provision imposed a significant financial hardship on the plaintiff that was so disproportionate to what was necessary to protect the defendants' business interests that it instead constituted a windfall to the defendants and would prevent the plaintiff from practicing his profession, the plaintiff did not obtain specialized knowledge or trade secrets from his work with the partnership that would have given him a competitive advantage with clients, and the noncompete provision imposed the same financial burden on the plaintiff regardless of how or when the client was developed and how much work was performed for the client; moreover, complete enforcement of the provision would have effectively restrained the public's rights to

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

the plaintiff's services, barring clients' ability to hire the plaintiff and leaving them without the ability to engage the accountant of their choice; furthermore, the duration of the noncompete provision was unreasonable, as five years was longer than necessary to protect the defendants' interests and was longer than the period the plaintiff had been subjected to the partnership agreement, and any of the plaintiff's business with a former partnership client would trigger the penalty, regardless of the circumstances.

Argued March 10, 2020—officially released February 23, 2021

Procedural History

Action to recover damages for, inter alia, alleged breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendants filed a counterclaim; thereafter, the matter was tried to the court, *Truglia*, *J.*; judgment for the defendants on the complaint and in part on the counterclaim, from which the plaintiff appealed to this court, *Lavine*, *Prescott* and *Bright*, *Js.*, which reversed in part the trial court's judgment and remanded the case for further proceedings; subsequently, the court, *Krumeich*, *J.*, rendered judgment for the plaintiff on the counterclaim, and the defendants appealed to this court. *Affirmed.*

Daniel J. Krisch, with whom, on the brief, was *Kevin J. Green*, for the appellants (defendants).

Michael S. Taylor, with whom was *Brendon P. Levesque*, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendants, Equale & Cirone, LLP (partnership), and Anthony W. Cirone, Jr., appeal from the judgment of the trial court rendered in favor of the plaintiff, Derek J. DeLeo, on the defendants' counterclaim for damages under the noncompete provision of the parties' partnership agreement (noncompete provision). The defendants claim that the trial court erred in concluding that the noncompete provision constitutes an unreasonable restraint of trade and, therefore, is unenforceable. We affirm the judgment of the trial court.

This case returns to us after our decision in *DeLeo* v. *Equale & Cirone, LLP*, 180 Conn. App. 744, 184 A.3d 1264 (2018) (*DeLeo I*). In *DeLeo I*, this court reversed the judgment of the trial court, which had awarded damages in the amount of $740,783 to the defendants on the basis of the defendants' counterclaim under the parties' noncompete provision, and remanded the case with direction that the trial court determine whether the noncompete provision constitutes a reasonable restraint of trade under existing law. Id., 751, 765. Following our remand, the court, in its memorandum of decision dated November 28, 2018, determined that the noncompete provision is unreasonable and, therefore, unenforceable. This appeal challenges the court's determination.

Our opinion in *DeLeo I* sets forth the following relevant facts and procedural history. "The partnership, an accounting firm, is a limited liability partnership located in Bethel. Joseph A. Equale, Jr., and Cirone formed the partnership in 1999. In 2005, the plaintiff, a certified public accountant, joined the partnership as an equity partner. The partnership operated under an oral partnership agreement until January, 2009, when Equale, Cirone, and the plaintiff executed a written partnership agreement (partnership agreement). Pursuant to the partnership agreement, Cirone held a 40 percent interest, Equale held a 35 percent interest, and the plaintiff held a 25 percent interest. The partnership agreement was intended to govern all aspects of the partnership.

"In January, 2012, the partnership purchased the assets of Allen & Tyransky, an accounting firm located in Danbury. As a result of the acquisition, Jack Tyransky became a nonequity 'contract' partner of the partnership. Shortly after the acquisition of Allen & Tyransky, several of the partnership's employees began to suspect that the plaintiff was involved in a romantic relationship with a female staff accountant at the partnership. In October, 2012, Cirone learned about the suspicions regarding the plaintiff's relationship with the staff accoun-

tant. Thereafter, Cirone confronted the plaintiff about the alleged relationship, but the plaintiff denied any such relationship. Later, Cirone approached Equale, who was preparing to retire from the partnership at the end of 2012, to discuss the plaintiff's alleged relationship. Both Equale and Cirone decided to believe the plaintiff's denial, and they did not take any further action at that time.

"Equale retired, effective January 1, 2013, but he continued to work for the partnership through the end of the 2013 tax season. Pursuant to the partnership agreement, Equale's shares were acquired by the partnership upon his retirement. Cirone and the plaintiff agreed that following Equale's retirement Cirone would own 62 percent of the partnership and the plaintiff would own the remaining 38 percent.

"On April 26, 2013, after the completion of the 2013 tax season, Cirone, Tyransky, and the plaintiff met at a diner to discuss the future of the partnership in light of the plaintiff's suspected relationship with the staff accountant. At this meeting,[1] Cirone told the plaintiff that they needed to fire the staff accountant and terminate their partnership. The court credited Cirone's testimony regarding this meeting, finding that 'given [Cirone's] position as managing partner of the firm and also given the risks that [the plaintiff's] actions posed to the firm, [Cirone] had no choice but to separate [the plaintiff] from the partnership.' The plaintiff and Cirone agreed that their business relationship had to end, and they acknowledged that any plan for the plaintiff's departure would begin with the partnership agreement.

"Following their meeting, Cirone and the plaintiff exchanged several e-mails during May and June, 2013, regarding the plaintiff's departure from the partnership. In these e-mails, the plaintiff did not deny that he was

[1] "The plaintiff secretly recorded this meeting on his cell phone and the parties agreed to enter a transcript of the recording into evidence." *DeLeo I*, supra, 180 Conn. App. 748 n.1.

leaving the partnership, and there was no indication that he believed that the partnership was being dissolved. Following these exchanges, Cirone sent an e-mail to the partnership's employees informing them that the plaintiff would be 'transitioning out of the firm' beginning on June 17, 2013. The plaintiff retained his 38 percent partnership interest through June 30, 2013, and, after leaving the partnership, he continued to provide accounting services in New Milford. Following the plaintiff's departure, Cirone first transferred the plaintiff's interest in the partnership to himself, and then he transferred a 1 percent interest to Tyransky.

"In September, 2013, approximately two months after leaving the partnership, the plaintiff commenced the present action against the defendants. The operative amended complaint was filed on September 29, 2014, and contained seven counts alleging, inter alia, that the plaintiff held a 38 percent interest in the partnership, and that Cirone had excluded him from the daily operations of the partnership. He further alleged that Cirone's conduct had frustrated the economic purpose of the partnership such that it was no longer reasonably practicable to continue the partnership's business in accordance with the partnership agreement. Additionally, the plaintiff alleged claims of breach of fiduciary duty and conversion. The plaintiff sought, inter alia, a dissolution and winding up of the partnership pursuant to General Statutes §§ 34-339 (b) (2) (C) and 34-372 (5); restoration of his partnership rights pursuant to § 34-339 (b) (1); an accounting and access to the partnership's books and records pursuant to General Statutes §§ 34-337 and 34-338; appointment of a receiver pursuant to General Statutes § 52-509; and money damages.

"On January 6, 2015, the defendants filed an answer denying the plaintiff's allegations or leaving him to his proof, asserted various special defenses and a claim for setoff. . . .

"The defendants also filed a four count counterclaim against the plaintiff, claiming that the partnership had terminated the plaintiff's partnership interest for cause, or, in the alternative, that the plaintiff had terminated his partnership interest voluntarily. In both counts the defendants claimed that the value of the plaintiff's partnership interest was limited to the accrual basis capital value,[2] as defined in the partnership agreement. Additionally, the defendants claimed that the plaintiff is subject to the noncompete provision in the partnership agreement, requiring him to compensate the partnership for any former clients of the partnership for whom the plaintiff had provided accounting services following his departure.[3] In counts three and four, the defendants

[2] "Section II E of the partnership agreement defines accrual basis capital value as 'the cash basis financial statement prepared by the [partnership] on a monthly basis modified for inclusion of accounts receivable as defined in [Item F] and work in process in [Item G] with the appropriate adjustments for liabilities and expense accruals including but not limited to payroll accruals, malpractice accruals, and other operating expenses.' " *DeLeo I*, supra, 180 Conn. App. 750 n.2.

[3] Section III F 3 of the partnership agreement, which contains the noncompete provision, provides: "If during the five (5) year period after any retirement/withdrawal/termination [the plaintiff] provides any accounting, auditing, tax or consulting services for a client that was represented by [the partnership] during the two (2) year period prior to his termination, he will pay to [the partnership] as compensation for the goodwill and know-how of [the partnership] relating to such client an amount equal to [150 percent] of the total average annual fees billed to such client or to any related persons or entities by [the partnership] during the two (2) year period prior to such termination. Such amount shall be payable to the partnership in equal monthly installments over the [thirty-six] month period commencing with the date of termination. At the option of [the partnership], such installments may be recovered by [the partnership] by set-off against any payments that may be due to such [p]artner by [the partnership]. A [p]artner, after termination, may serve as a director of a past or present client of [the partnership] without being obligated to make any payment to [the partnership], provided that the [p]artner does not provide accounting, auditing, tax or consulting services to such client. Any [p]artner who violates the noncompete provisions of this section is not entitled to any [deferred income amount] payments. All remaining [deferred income amount] payments will cease and he will be required to return any payments he has received." (Emphasis omitted.)

alleged that the plaintiff breached his fiduciary duty pursuant to the partnership agreement and/or pursuant to §§ 34-338 and 34-339.

"The plaintiff denied all the allegations as set forth in the defendants' special defenses and claim for setoff. He also denied the allegations in the defendants' counterclaim and, by way of special defense, asserted that the defendants had waived the enforcement of the noncompete provision.

"The case was tried to the court over the course of six days in September, 2015. In its memorandum of decision dated October 22, 2015, the court rendered judgment in favor of the defendants on the plaintiff's complaint and the defendants' special defenses. The court did not credit the plaintiff's testimony, finding that the plaintiff, 'through his words and actions, starting with the April 26 meeting through July of 2013, voluntarily withdrew as a partner of [the partnership].' The court credited Cirone's testimony, finding that Cirone did not waive the partnership's right to enforce the noncompete provision in the partnership agreement, and that the plaintiff had agreed to terminate his partnership interest as of June 30, 2013. The court further found that the voluntary termination provision[4] in the partnership agreement determined the amount due to the plaintiff. Accordingly, the court rendered judgment in favor of the defendants on their counterclaim and on the plaintiff's special defense. The court awarded the defendants $740,783. The court credited the testimony of the defendants' expert witness with respect to the calculation of

[4] "Section III D 1 of the partnership agreement provides in relevant part: 'Any Partner may terminate his interest in the [partnership] at any time provided that the Partner gives the partnership at least one hundred eighty (180) days prior notice in writing of his intention to terminate his interest. . . . The only amounts that will be due to such Partner will be his [accrual basis capital], unless, at the discretion of the remaining Partners, they choose to provide any additional payments. . . . As noted in part F 3 of Section III of this Agreement, the withdrawing partner is subject to the [noncompete provision] of that section.' " *DeLeo I*, supra, 180 Conn. App. 751 n.3.

the plaintiff's accrual basis capital as of June 30, 2013, and the amount owed by the plaintiff to the partnership, pursuant to the noncompete provision in the partnership agreement. The court found that the plaintiff was overdrawn in his partnership income account by $143,496 as of June 30, 2013, and that his accrual basis capital as of June 30, 2013, was $165,079. The court also found that the plaintiff owed $762,366 to the partnership pursuant to the noncompete provision." (Footnotes in original; footnote added.) Id., 747–52.

The plaintiff appealed from the judgment of the trial court rendered in favor of the defendants on the plaintiff's complaint and the defendants' special defenses, claim of setoff, and counterclaim, claiming that the court "(1) committed plain error when it failed to order the dissolution of the partnership; (2) improperly estopped [the plaintiff] from challenging the noncompete provision in the partnership agreement; (3) improperly found that the defendants did not waive the enforcement of the noncompete provision; and (4) improperly concluded that the noncompete clause in the partnership agreement was enforceable." Id., 747. This court affirmed in part and reversed in part the judgment of the trial court; we rejected all of the plaintiff's claims except his fourth claim—which concerned count two of the defendants' counterclaim—regarding the enforceability of the noncompete provision in the partnership agreement. Id. Specifically, this court determined that the court improperly treated the noncompete provision as a liquidated damages clause and, instead, should have considered the reasonableness of the noncompete provision under the same standard used for covenants not to compete. Id., 761–65. Accordingly, we remanded the case to the trial court with direction to consider the reasonableness of the noncompete provision. Id., 765.

Following our remand, the trial court, in its memorandum of decision dated November 28, 2018, determined

that the restrictions imposed by the noncompete provision in the parties' partnership agreement constitute an unreasonable restraint of trade and, therefore, are unenforceable. In reaching its conclusion, the trial court made the following subordinate factual findings: (1) the requirements of the noncompete provision, and particularly the five year restriction, exceed what would be necessary to protect the defendants' business interests; (2) the noncompete provision interferes with the plaintiff's ability to pursue his occupation as a certified public accountant; and (3) enforcement of the noncompete provision would affect adversely the public's ability to retain the accounting services of its choice. This appeal followed. Additional facts will be set forth as necessary.

The defendants claim that the trial court erred by concluding that the noncompete provision is unenforceable. Specifically, the defendants argue that (1) the parties, as partners, had equal bargaining power and the plaintiff entered into the partnership agreement voluntarily, (2) the partnership has a legitimate interest in restricting the plaintiff from servicing former and existing clients, (3) the noncompete provision has a reasonable duration, and (4) the noncompete provision does not harm the public interest. For these reasons, the defendants argue that the noncompete provision is a reasonable restraint of trade and is enforceable. We are not persuaded.

I

As a preliminary matter, we address first the applicable standard of review. The defendants maintain that the court's findings as to the reasonableness and enforceability of the noncompete provision must be evaluated under the plenary standard of review. Specifically, the defendants state at the outset of their principal appellate brief that this appeal challenges "the propriety of the trial court's 'application of the legal standards to

[its] historical fact determinations, [which] are not facts in this sense.' "[5] Conversely, the plaintiff argues that this court should apply the clearly erroneous standard of review because a determination as to the reasonableness of a covenant not to compete is a fact driven inquiry.

"The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. To the extent that the trial court has made findings of fact, our review is limited to deciding whether such findings were clearly erroneous. When, however, the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts as they appear in the record. . . .

"[W]hen the resolution of a question of law . . . depends on underlying facts that are in dispute, that question becomes, in essence, a mixed question of fact and law. Thus, we review the subsidiary findings of historical fact, which constitute a recital of external events and the credibility of their narrators, for clear error, and engage in plenary review of the trial court's application of . . . legal standards . . . to the underlying historical facts." (Citation omitted; internal quotation marks omitted.) *Saggese* v. *Beazley Co. Realtors*, 155 Conn. App. 734, 751–52, 109 A.3d 1043 (2015).

We agree with the defendants that the court's ultimate conclusion as to the enforceability of the noncompete provision presents a question of law that requires our plenary review. However, the court reached that conclusion only after it heard the parties' evidence on the effects that enforcement of the noncompete provision

[5] Notwithstanding their contention that our appellate review should be plenary, the defendants maintain that, even under the clearly erroneous standard of review, this court should reach the same result because "[t]he invalidation of a contract made by sophisticated commercial parties with equal bargaining power because one of them regrets the consequences should leave the [c]ourt 'with the definite and firm conviction that a mistake has been made.' "

would have on them and third parties. The court's factual findings on the basis of that evidence are what led it to conclude that the noncompete provision constitutes an unreasonable restraint of trade. To that end, our plenary review is constrained by the court's factual findings, and we are bound to accept those findings "absent a showing that they are clearly erroneous in light of the evidence." *Prestige Management, LLC* v. *Auger*, 92 Conn. App. 521, 525, 886 A.2d 458 (2005). As this court recently stated in *National Waste Associates, LLC* v. *Scharf*, 183 Conn. App. 734, 745, 194 A.3d 1 (2018), "[a]nalysis of the validity and enforceability of such covenants entails a *fact-specific inquiry*." (Emphasis added.) This is not to say that a question as to the enforceability of a noncompete provision presents *only* an issue of fact but, rather, that the ultimate legal conclusion as to a covenant's enforceability is predicated on specific facts that, if challenged, must be reviewed for clear error. [6] Consequently, we first must evaluate the court's

[6] The plaintiff relies on *National Waste Associates, LLC*, to argue that the ultimate conclusion of whether a noncompete provision is enforceable is a question of fact to be resolved pursuant to the clearly erroneous standard of review. It is true that this court stated in that case: "The parties submit, and we agree, that the clearly erroneous standard of review governs the finding of the trial court as to the enforceability of a restrictive covenant in an employment agreement." *National Waste Associates, LLC* v. *Scharf*, supra, 183 Conn. App. 746. A thorough reading of the opinion though makes clear that the issue the court was reviewing was not whether the noncompete provision was reasonable as a matter of law but, rather, whether the plaintiff had proved a breach of the provision as to specific prospective customers. "Contrary to the plaintiff's contention, the record demonstrates that the court did not apply a blanket rule in its May 9, 2016 decision that the provision was unenforceable as to prospects. Rather, in its decision, the court examined whether the plaintiff proved causation and damages with respect to any improper solicitation of the plaintiff's prospects and concluded that it had not." Id., 748–49. Although the court concluded that "the court's finding that the nonsolicitation provision in the plaintiff's employment agreements with [the former employee defendants] was unenforceable as to prospects was not clearly erroneous"; id., 750; we read the opinion as concluding merely that the trial court's findings that the plaintiff had failed to prove its claims as to certain prospective customers were not clearly erroneous. We also find it significant that the parties in *National*

subordinate factual findings challenged by the defendants in order to determine whether they were clearly erroneous.

II

The court made factual findings in its November 28, 2018 memorandum of decision that can be grouped in the following manner: (1) the requirements of the noncompete provision, and particularly the five year restriction, exceed what would be necessary to protect the defendants' business interests; (2) the noncompete provision interferes with the plaintiff's ability to pursue his occupation as a certified public accountant; and (3) enforcement of the noncompete provision would adversely affect the public's ability to retain the accounting services of its choice.[7]

"It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses. . . . We afford great weight to the trial court's findings because of its function to weigh the evidence and determine credibility. . . . Thus, those findings are binding upon this court unless they are clearly erroneous in light of the

Waste Associates, LLC, agreed that the clearly erroneous standard of review governed their dispute, further confirming the fact specific nature of the issues raised on appeal in that case. See id., 746.

[7] The court also determined that the geographic area covered by the noncompete provision—the second criterion for determining the reasonableness of such a provision under *Scott* v. *General Iron & Welding Co.*, 171 Conn. 132, 138, 368 A.2d 111 (1976)—was irrelevant to its reasonableness analysis because "the reasonable geographic limitation implied in the agreement is wherever the former [partnership] client is located. That the work may concern matters in other parts of the state or out of state is irrelevant to the restricted competition for [the partnership's] clients." Because neither party challenges this finding and, moreover, because the geographic area covered by the noncompete provision did not affect the court's analysis as to the reasonableness or enforceability of the noncompete provision, we do not consider it on appeal.

evidence and the pleadings in the record as a whole. . . . 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." (Internal quotation marks omitted.) *Abrams* v. *PH Architects, LLC*, 183 Conn. App. 777, 787–88, 193 A.3d 1230, cert. denied, 330 Conn. 925, 194 A.3d 290 (2018).

After a careful review of the record, we conclude that the court's factual findings were not clearly erroneous. We begin with the court's finding that the restraints of the noncompete provision exceed what would be necessary to protect the defendants' business interests, both in terms of the length of the restriction and of the clients covered. As to the duration of the restriction, the court explained that "[t]he five year term is considerably longer than the one to two year terms usually considered reasonable if needed to protect an established business interest. . . . The length of the restriction exceeds the duration of the period when [the plaintiff] was subject to the agreement. Moreover, the lengthy time period means that any business for a former or present [partnership] client during the five year period would trigger the penalty even if that client had not been [a partnership] client during most of the restricted period, or had left [the partnership] for reasons unrelated to [the plaintiff], or had stayed with [the partnership] but used [the plaintiff] for only part of the work during the period or had only come to [the plaintiff] years after the client left [the partnership] for other reasons without any solicitation by [the plaintiff]." (Citations omitted.)

The court further explained specifically that the partnership agreement and, in particular, the noncompete provision, "does not distinguish between clients brought into the firm by [the plaintiff] and those he serviced while at [the partnership] who were integrated firm

clients or clients developed and/or referred to [the plaintiff] by others at the firm." This fact was of particular significance to the court's reasoning because the plaintiff, upon joining the partnership in 2005, brought with him approximately 250 to 300 clients, which represented approximately 25 to 30 percent of the partnership's total client base at the time.

The court also found credible the plaintiff's testimony that 60 percent of his clients at the partnership were clients that he had brought to the partnership from his previous practice, while 40 percent were developed by him at the partnership through networking. Consequently, the court concluded that "[t]his also was not a case where a long-standing relationship made it difficult to disentangle client relationships and to allocate goodwill between the withdrawing partner and the [partnership]. . . . [The partnership] was formed in 1999 when two sole proprietorships merged. In 2005 [the plaintiff] joined the [partnership] as an equity partner when his sole proprietorship merged with [the partnership]. His existing clients became clients of [the partnership] and represented roughly 25 [to] 30 [percent] of [the partnership's] client base at the time he joined the firm. There is no evidence that [the partnership] purchased his practice and paid [the plaintiff] for his client base or that after the merger, his practice became fully integrated into [the partnership] so that his clients ceased to be his primary client relationship and they became [partnership] clients. Nor is there evidence that [the partnership] was the source of [the plaintiff's] acquaintance with the customers so that his employment was the primary source of client relationships and he was in an unfair position to compete with [the partnership] after termination of his partnership [interest]. Rather it appears even after the merger, [the plaintiff's] former sole proprietorship clients and those he developed by his efforts at [the partnership], and not through referrals from other partners, remained

identified with him and the client relationship was primarily with him, not [with the partnership]. When he left nearly 100 percent of his clients at [the partnership] followed him to his new firm. This is compelling evidence the clients did not consider themselves [partnership] clients." (Citation omitted; footnotes omitted.)

The court also addressed whether the plaintiff had access to proprietary information of the partnership when he started his competing business. The court found: "Any customer list would be a list of [the plaintiff's] own clients. There is no evidence of any specialized knowledge or trade secrets [the plaintiff] acquired from [the partnership]. His familiarity with the clients and their needs would not alone suffice as specialized knowledge of [the partnership] to uphold the restrictions as that information could easily have been obtained from the clients themselves when they engaged [the plaintiff's] services." On the basis of this evidence, the court found that the plaintiff's employment with the partnership did not provide him with an unfair advantage in competing for clients after leaving the partnership.

In light of the fact that the plaintiff had not obtained any specialized knowledge or trade secrets through his employment with the defendants, the court found that the benefits the defendants would receive from the noncompete provision "far [exceed] any contributions [the partnership] may have provided to generate goodwill in [the plaintiff's] clients." In reaching that determination, the court noted: "There is no evidence that [the partnership] did anything special to generate goodwill in [the plaintiff's] client base other than to pay the ordinary overhead attributable to providing accounting services (i.e., staff, technology, fixed costs, etc.), and that was funded by fees generated by the services provided to these clients, which according to Cirone generated profits to [the partnership] of 25 [to] 35 percent so 65 [to] 75 percent of revenues covered overhead. The partnership agreement in Section F 3 characterizes the

payment required for competing with [the partnership] measured by 150 [percent] of [the plaintiff's] billings 'as compensation for the goodwill and know-how of [the partnership] relating to such client,' yet it appears that [the plaintiff] was the one who primarily provided such 'know-how' . . . and it was [the plaintiff] who maintained and developed the client relationships." On the basis of this evidence, the court reasoned that the disproportionate effect that enforcement of the noncompete provision would have on the plaintiff exceeds what would be necessary to protect the defendants' business interests.

The court further found that the restriction exceeds what would be necessary to protect the defendants' business interests by such a degree that it would result in a "windfall"[8] to the defendants that is "disproportionate to the goodwill of the former [partnership's] clients who followed [the plaintiff] to his new practice." The court found that if the plaintiff violated the noncompete provision as written, he would be required to pay $762,366 to the defendants, which is based on a fee of 150 percent of his share of goodwill. Because the fee is not dependent on how much the plaintiff earned from a former client or what services he performed for a client during the five year period, the court found that "[i]f [the plaintiff] performed any services for a former [partnership] client during the five year period, it would trigger a fee of 150 [percent] of that client's revenues received by [the partnership] for the most recent two years thereby paying [the partnership] a premium above any firm contribution to goodwill."

The court relied on, and cited to, evidence in the record that supports the finding that the noncompete provision exceeds what is necessary to protect the

[8] Black's Law Dictionary defines a windfall as: "An unanticipated benefit, [usually] in the form of a profit and not caused by the recipient." Black's Law Dictionary (11th ed. 2019) p. 1917. Because a windfall is an unexpected benefit, irrespective of fairness or reasonableness, we conclude that this finding is also a subordinate factual finding and not a conclusion of law.

defendants' interests. This evidence is sufficient to support the court's factual findings. The plaintiff testified that he brought an established base of 250 to 300 clients to the partnership, this was 25 to 30 percent of the partnership's client base, he maintained control over this client pool, he brought new clients into the partnership on his own, and when he left the partnership nearly all of his clients followed him. Additionally, we agree with the court that there is no evidence that the plaintiff received specialized knowledge or trade secrets from the defendants, and there is no evidence that the partnership did anything to generate goodwill in the plaintiff's client base.

The defendants contend that the court's findings are contradictory to the extent that the court recognized that the "obvious aim" of the noncompete provision was to "dissuade [the plaintiff] from servicing existing clients after he left [the partnership] by imposing financial burdens that would make competition unfeasible and expensive," but, nevertheless, concluded that the partnership's clients' "future goodwill clearly was not expected to remain with [the partnership]" because the plaintiff could provide former clients with his accounting services in his new practice. (Internal quotation marks omitted.) Consequently, the defendants maintain that the noncompete provision, in fact, does protect the partnership's legitimate business interest in retaining its clients' goodwill, and the evidence in the record supports such a conclusion.[9] We are not persuaded.

The court did not find that the noncompete provision did not protect the defendants' business. To the contrary, the court found that the noncompete provision provides greater protection than the defendants legitimately need. It is obvious that the more onerous a noncompete provision is to a former partner, the greater

[9] Both parties agree that the "goodwill" protected by the noncompete provision concerns the value of the partnership's interest in retaining its former clients' patronage.

the benefit to the partnership he is leaving. Finding that a noncompete provision benefits the partnership is, therefore, very different than finding that the covenant's restrictions are needed to protect the partnership's business interests. Thus, the defendants' argument does not address the actual finding of the court that the covenant is *more restrictive than necessary* to protect the defendants' business interests. Because there is evidence in the record that supports the court's factual findings as to the necessity of the reach of the noncompete provision, we cannot conclude that its findings were clearly erroneous. See *Gorelick* v. *Montanaro*, 119 Conn. App. 785, 808, 990 A.2d 371 (2010).

We next consider the court's factual finding that the noncompete provision interferes with the plaintiff's ability to pursue his occupation as a certified public accountant. In support of their contention that "the facts belie [the court's] conclusion," the defendants argue: "The . . . court's legal conclusion is wrong, even if its finding that the plaintiff's only option was to work for former [partnership] clients is correct. However, the record does not support the finding, either. The plaintiff did not so testify. He claimed only that he 'wouldn't be able to operate as an accountant, as a professional,' if he had 'to make the compensation payment . . . required by the noncompete provision.' . . . Though '[n]early 100 percent' of the clients that the plaintiff took to his new company were former [partnership] clients . . . his own testimony belies the inference that he had no choice except to service those clients. The plaintiff found 100 [to] 120 new clients in his seven plus years at [the partnership]. . . . The court credited the plaintiff for having generated goodwill through those 'efforts,' but ignored his acumen in terms of his post [partnership] options." (Citations omitted.)

In its November 28, 2018 memorandum of decision, the court discussed at length the "easily quantifiable"

effects that the noncompete provision would have on the plaintiff. The court stated: "If these provisions are enforceable, [the plaintiff] would owe $762,366 under the noncompete provision in Section III F 3 of the partnership agreement and would lose $144,826 in [deferred income amount] payment that would have been paid if he had not continued to practice public accounting in Connecticut.[10] Moreover, [the plaintiff] would have been entitled to receive accrual based capital of $21,583 that was netted out to calculate the $740,783 damages awarded. If the $762,366 attributable to the noncompete provision [were] paid out over the thirty-six month period called for in the agreement, [the plaintiff] would have had to pay $21,177 per month.[11] According to the balance sheet of [the plaintiff's new firm] for year-end December 31, 2017, the company had revenues of $1,278,087 and expenses of $1,239,197, which resulted in a net profit of only $32,803. Even if you add the profits to the $200,000 salary paid to [the plaintiff] for pretax profits of $232,803, his monthly pretax income of $19,400.25 would be insufficient to make the monthly payments to [the partnership], with a shortfall each month of $1777. Not only would [the plaintiff] be working for free but he would have to come up with another $21,324 each year for three years (using 2017 results as a baseline) and pay taxes on his income." (Footnotes in original.)

On the basis of the evidence regarding the financial implications that enforcement of the noncompete provision would have on the plaintiff, the court found credible the plaintiff's testimony that he would be unable to continue his accounting practice if he were required to

[10] "[The plaintiff's] share of goodwill would have amounted to $579,305 upon retirement; when he withdrew he was entitled to 25 [percent] of his [deferred income amount] or $144,826 if he had not practiced public accountancy in Connecticut. The forfeiture of [deferred income amount] is part of the anticompetitive consequences of the noncompete provisions in the partnership agreement."

[11] "Because the net award was $740,000, the parties calculated the actual payout to be $20,500 per month for thirty-six months."

pay the fees called for under the noncompete provision. The court also rejected the defendants' argument that the plaintiff would have "sufficient cash flow with $41,175.75 in monthly revenue from former [partnership] clients to pay [the partnership] $20,500 per month for thirty-six months, leaving him $20,675 in additional revenue from former [partnership] clients to meet his other obligations," because there was no evidence that the plaintiff's profit margin was consistent with what the defendants' expert witness testified to as the industry average.[12] The court, instead, relied on the plaintiff's testimony that his profit margin was 18 percent, finding that it was not reasonable "to expect [the plaintiff] each month to pay an amount equal to one half of revenues from [the partnership's] former clients under the circumstances here." Ultimately, on the basis of these subordinate findings, the court found that "[the plaintiff's] livelihood and welfare would be jeopardized if he had no access to the client base he developed . . . ."

In making these findings, the court relied on, and cited to, evidence in the record that supports the factual findings that the noncompete provision would jeopardize the plaintiff's livelihood and welfare. Specifically, the court's finding is supported by the evidence regarding the plaintiff's pretax income since leaving the partnership, his firm's profit margin and the resulting monthly shortfall he would face for three years were he to pay the noncompete provision's fee. Further, we cannot disturb the court's credibility determination regarding the plaintiff's testimony that he could not afford to practice if required to pay the competition fee under the agreement. See *Abrams* v. *PH Architects*, supra, 183 Conn. App. 787–88. Consequently, the court's finding that the noncompete provision "would interfere with [the plaintiff's] ability to pursue his profession" was not clearly erroneous.

[12] The defendants' expert witness testified that the industry profit margin was somewhere between 50 and 60 percent. Cirone testified that the partnership's profit margin was between 25 and 35 percent.

Finally, the court found that the noncompete provision's restrictions adversely affect the public's interest in freely engaging with the certified public accountant of its choice. The court stated: "[The plaintiff's] relationship of trust and knowledge of the clients' affairs and businesses would be difficult to recreate elsewhere if [the plaintiff] [were] not available to continue to service their needs. . . . The public's interest, including the clients' interests, in having [the plaintiff's] professional services would not be served by denying him access to his existing client base without forfeiture of significant income. As a practical matter, if he wanted to continue to practice public accounting, [the plaintiff] would be required to purchase the right to service his own clients from [the partnership] by paying the competition fee and forfeiting his [deferred income amount] payment where the [partnership] deserves little credit for client recruitment and development and the fee is disproportionate to any [partnership] contribution toward development of those clients." (Footnote omitted.)There is support in the record for this conclusion. The plaintiff testified that he would be forced to stop practicing accounting and file for bankruptcy if he were required to pay the entire amount of the forfeiture. Further, Antonio Capanna, a client of the plaintiff for more than fifteen years, testified that the plaintiff knew his business so well that it would have a significant impact on his business if the plaintiff could not practice anymore, and, due to the size and complexity of his business, it would take a new accountant years to learn the business and gain Capanna's trust. On the basis of the record before us, we cannot conclude that it was clear error for the court to conclude that the clients' interest in freely engaging the certified public accountant of their choice would be impeded by enforcement of the noncompete provision. See *Gorelick* v. *Montanaro*, supra, 119 Conn. App. 808.

III

Having found no clear error in the court's subordinate findings of fact, we turn next to its legal conclusion that the noncompete provision amounts to an unreasonable restraint of trade and, therefore, is unenforceable. The defendants argue that the noncompete provision is valid and enforceable because (1) the parties, as partners, had equal bargaining power and the plaintiff entered into the partnership agreement voluntarily, (2) the partnership has a legitimate interest in restricting the plaintiff from servicing former and existing clients, (3) the noncompete provision has a reasonable duration, and (4) the noncompete provision does not harm the public interest. In light of the court's factual findings, we disagree with each of the defendants' arguments and, for the reasons that follow, conclude that the court did not err by concluding that the noncompete provision amounts to an unreasonable restraint of trade and, therefore, is unenforceable.

As stated previously in this opinion, we apply our plenary standard of review to the court's ultimate conclusion that the noncompete provision amounts to an unreasonable restraint of trade and, therefore, is unenforceable. See *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221, 435 A.2d 24 (1980) ("where the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision").

The following legal principles are relevant to our resolution of the defendants' claim. "In order to be valid and binding, a covenant which restricts the activities of an employee following the termination of his employment must be partial and restricted in its operation in respect either to time or place . . . and must be reasonable—that is, it should afford only a fair protec-

tion to the interest of the party in whose favor it is made and must not be so large in its operation as to interfere with the interests of the public. . . . The interests of the employee himself must also be protected, and a restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family." (Citations omitted; internal quotation marks omitted.) *Scott* v. *General Iron & Welding Co.*, 171 Conn. 132, 137, 368 A.2d 111 (1976).

"A covenant that restricts the activities of an employee following the termination of his employment is valid and enforceable if the restraint is reasonable. . . . There are five criteria by which the reasonableness of a restrictive covenant must be evaluated: (1) the length of time the restriction is to be in effect; (2) the geographic area covered by the restriction; (3) the degree of protection afforded to the party in whose favor the covenant is made; (4) the restrictions on the employee's ability to pursue his occupation; and (5) the extent of interference with the public's interests. . . . The five prong test of *Scott* is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable." (Citations omitted.) *New Haven Tobacco Co.* v. *Perrelli*, 18 Conn. App. 531, 533–34, 559 A.2d 715, cert. denied, 212 Conn. 809, 564 A.2d 1071 (1989).

A

The defendants first argue that the court should not have invalidated the noncompete provision because the parties had equal bargaining power and entered into the partnership agreement voluntarily. Conversely, the plaintiff argues that, although voluntary agreements between partners with equal bargaining power may be more readily enforced than involuntary agreements between an employer and an employee, that legal princi-

ple is irrelevant to our analysis of whether the noncompete provision is an unreasonable and unenforceable restraint of trade. We agree with the plaintiff.

The defendants place significant weight on the circumstances under which the parties entered into the partnership agreement, arguing that the parties' equal bargaining power and sophisticated knowledge of the industry are compelling reasons to uphold the enforcement of the noncompete provision. We are not persuaded. The trial court correctly concluded that the defendants' argument that the parties entered into the partnership agreement voluntarily "does not resolve the question of whether the restraint [the plaintiff] agreed to [is] reasonable and enforceable under all [of] the circumstances." The defendants maintain, however, that the freedom to contract should not be impaired, particularly in this instance, when "[t]he very nature of professional partnerships weighs heavily in favor of enforcement."

We recognize the strong public policy favoring freedom of contract and the principle that the court should not rescue sophisticated commercial parties from the terms of their bargain. See *Schwartz* v. *Family Dental Group, P.C.*, 106 Conn. App. 765, 772–73, 943 A.2d 1122, cert. denied, 288 Conn. 911, 954 A.2d 184 (2008); *Yellow Page Consultants, Inc.* v. *Omni Home Health Services, Inc.*, 59 Conn. App. 194, 199, 756 A.2d 309 (2000). Nevertheless, our Supreme Court has long recognized that a court's deference to the rights of parties to enter into contracts as they see fit does not extend to contracts that violate public policy. For example, the Supreme Court, in evaluating a covenant not to compete, stated more than 100 years ago: "The public [has] an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But

there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and, indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned, and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favor it is imposed, while at the same time it is in no way injurious to the public." (Internal quotation marks omitted.) *Samuel Stores, Inc.* v. *Abrams*, 94 Conn. 248, 252, 108 A. 541 (1919); see also *Beit* v. *Beit*, 135 Conn. 195, 198–99, 63 A.2d 161 (1948). These principles were delineated further by our Supreme Court in *Scott*, which sets forth the test that guides our analysis of whether the noncompete provision is enforceable irrespective of the parties' equal bargaining power and sophistication. *Scott* v. *General Iron & Welding Co.*, supra, 171 Conn. 137.

Accordingly, we reject the defendants' contention that the circumstances under which the parties entered into the partnership agreement is determinative of whether the noncompete provision in the agreement is reasonable.[13]

[13] The defendants, for the first time on appeal, also argue that, notwithstanding the established precedent that the reasonableness factors under *Scott* are disjunctive—i.e., a finding of unreasonableness as to any one factor renders the noncompete provision unenforceable—this court should apply the conjunctive analysis purportedly applied by our Supreme Court in *Styles* v. *Lyon*, 87 Conn. 23, 86 A. 564 (1913), and *Cook* v. *Johnson*, 47 Conn. 175 (1879). The defendants' argument is untenable.

Neither case the defendants rely on applies the approach they ask this court to consider. The courts in both *Styles* and *Cook* stated that a restriction that is indefinite as to its duration does not, on its own, necessarily invalidate a noncompete provision if the restrictions therein are limited as to geographic scope and are reasonable in all other respects. *Styles* v. *Lyon*, supra, 87 Conn. 26–27; *Cook* v. *Johnson*, supra, 47 Conn. 178. Consequently, *Styles* and *Cook* simply hold that an indefinite duration in a noncompete provision is not necessarily unreasonable. We fail to see how such a conclusion is inconsistent with the disjunctive approach set forth in *Scott*. See *New Haven Tobacco Co.* v. *Perrelli*, supra, 18 Conn. App. 534.

B

Before turning to the defendants' remaining three arguments, we discuss briefly our analytical framework in determining the reasonableness and enforceability of the noncompete provision. In their principal brief before this court, the defendants address separately each of the factors established in *Scott*, analogizing the factual circumstances of the present case to those in purportedly similar cases in furtherance of their claim that the court erred in reaching its findings as to the reasonableness of the noncompete provision. The fatal flaw in the defendants' analysis, however, is that it ignores the fact intensive nature of the reasonableness inquiry.[14] We reiterate that a balancing of the *Scott* factors is what informs the court's legal conclusion as to

[14] Most notably, the defendants rely on the five year covenant not to compete that our Supreme Court upheld in *Mattis* v. *Lally*, 138 Conn. 51, 56, 82 A.2d 155 (1951), for the proposition that a restriction of that duration is not violative of public policy. Additionally, the defendants rely on *Mattis* to assert that, contrary to the court's determination that the partnership did not do "anything special" to generate goodwill in the plaintiff's clients, the "beneficiary of goodwill does not have to be the creator of it." The facts in *Mattis* differ greatly from those in the present case.

In *Mattis*, the defendant owned and operated a barbershop, which he sold to the plaintiff "together with all goodwill" for $1500. (Internal quotation marks omitted.) *Mattis* v. *Lally*, supra, 138 Conn. 53. The bill of sale contained a restrictive covenant, which stated that the seller would not "engage in the barbering business for a period of five years" in Rockville. (Internal quotation marks omitted.) Id. At the time of the sale, both parties were aware of the fact that the defendant was fifty-eight years old, was in poor health, and was unfamiliar with other lines of work. Id. Because of his limited work experience in other fields, the defendant continued to work as a barber in the plaintiff's shop for nine months before he elected to operate a one chair barbershop out of his own home. Id. The defendant's home business was within 300 yards of the shop he had sold to the plaintiff, thereby constituting a breach of the restrictive covenant. Id.

On appeal, the court was faced with the question of whether the restrictive covenant at issue constituted an unenforceable restraint of trade. Id., 54. The court reasoned that "[h]aving paid for goodwill, the plaintiff was entitled to have reasonable limitations placed upon the activities of the defendant to protect his purchase," and the durational and geographical limitations under the covenant, having been "fairly and justly calculated to protect the business" were not unreasonable. Id., 54–55. After considering the factual

the noncompete provision's enforceability, and, therefore, the court must weigh these factors in their totality on the basis of the factual circumstances before it. See *Mattis* v. *Lally*, 138 Conn. 51, 56, 82 A.2d 155 (1951) ("[e]quity under some circumstances will hold invalid contracts which are so broad in their application that they prevent a party from carrying on his usual vocation and earning a livelihood, thus working undue hardship"). Thus, we address the defendants' remaining arguments together, in the context of the court's factual findings in the present case, to determine if the court's conclusion was legally and logically correct.

The following legal principles are relevant to our resolution of the defendants' claim. "In order for such

findings of the trial court, namely, the fact that the defendant was not an invalid and could work as a barber outside of Rockville, and that he and his wife would face only minor financial strain if the covenant were enforced, concluded that the covenant was not unreasonable under the circumstances. Id., 56–57.

The distinguishable factual circumstances in *Mattis* illustrate why the defendants' reliance on them is unpersuasive. Unlike in *Mattis*, the defendants in the present case did not purchase the goodwill of the plaintiff's clients at the time of the merger. The trial court found that the noncompete provision's failure to distinguish between the plaintiff's clients that followed him to the partnership and the integrated partnership clients was compelling evidence of an unreasonable restraint, particularly in light of the fact that the plaintiff generated those clients' goodwill through his own individual efforts and business acumen. Moreover, the trial court found, and the evidence supports its finding, that the plaintiff would face significant financial hardship were he to continue servicing the clients that comprised approximately 100 percent of his client base. Although the defendants are correct that the court in *Mattis* upheld the enforceability of a five year covenant not to compete; see id., 56; it reached that conclusion on the basis of the trial court's factual findings that the covenant's geographic restrictions were narrowly tailored such that the defendant was not precluded from earning a livelihood. Id. In light of the trial court's factual findings, the court correctly weighed the impact that enforcement of the covenant would have on the defendant and the public, and determined that, under the circumstances, it would be reasonable to afford the plaintiff's new business some degree of protection because the plaintiff "had purchased the business for a substantial consideration" in reliance on the protections called for under the restrictive covenant. Id., 55.

The fact specific analysis employed by the court in *Mattis* is the approach we apply in the present case.

interference to be reasonable, it first must be determined that the employer is seeking to protect a legally recognized interest, and then, that the means used to achieve this end do not unreasonably deprive the public of essential goods and services. . . .

"In determining whether a restrictive covenant unreasonably deprives the public of essential goods and services, the reasonableness of the scope and severity of the covenant's effect on the public and the probability of the restriction's creating a monopoly in the area of trade must be examined." (Citation omitted.) *New Haven Tobacco Co.* v. *Perrelli*, supra, 18 Conn. App. 536.

"[W]hen the character of the business and the nature of the employment are such that the employer requires protection for his established business against competitive activities by one who has become familiar with it through employment therein, restrictions are valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights . . . . Especially if the employment involves . . . [the employee's] contacts and associations with clients or customers it is appropriate to restrain the use, when the service is ended, of the knowledge and acquaintance, so acquired, to injure or appropriate the business which the party was employed to maintain and enlarge." (Internal quotation marks omitted.) *Robert S. Weiss & Associates, Inc.* v. *Wiederlight*, 208 Conn. 525, 533, 546 A.2d 216 (1988).

In their remaining three arguments, the defendants contend that (1) the partnership has a legitimate interest in protecting its goodwill in its former clients, and restricting the plaintiff from servicing the partnership's client base reasonably achieves that interest, (2) the noncompete provision has a reasonable duration, and (3) the noncompete provision does not harm the public interest. We are not persuaded.

Although it is true that an employer has a legally recognized right to protect its business interest in retaining former and potential future clients; see id.; the defendants' analysis fails to consider whether the means used to achieve that end are reasonably necessary and whether they unreasonably deprive the plaintiff of his right to make a living and the public's right to access the free market.

The court's factual findings as to the disproportionate effect that enforcement of the noncompete provision would have on both the plaintiff and the public undermine the defendants' contention that the noncompete provision "does nothing more than protect [the partnership's] goodwill against piracy by a mutinous partner." (Internal quotation marks omitted.) To the contrary, the court found that the covenant imposes a significant financial hardship on the plaintiff that is so disproportionate to what is needed to protect the defendants from the plaintiff's so-called "piracy" that the court concluded that enforcement of the noncompete provision would result in a windfall to the defendants. The court further found that enforcement of the covenant essentially would prevent the plaintiff from practicing his profession. As set forth in part II of this opinion, the court's findings were not clearly erroneous. Thus, the court did not err in concluding that the scope of the noncompete provision goes beyond what is reasonably necessary to protect the defendants' interests and that enforcement of the noncompete provision would impose a significant financial hardship on the plaintiff by unreasonably impeding his ability to practice his profession.[15]

[15] The defendants also attempt to analogize the factual circumstances in the present case to those in *Scott* in furtherance of their position that the noncompete provision did not deprive the plaintiff of an opportunity to earn a livelihood through his continued practice of public accounting. The defendants' argument is unpersuasive because, like *Mattis*, the facts in *Scott* are distinguishable from the facts in the present case.

In *Scott*, the plaintiff worked for the defendant as a welder until he ultimately became the chief engineer of the defendant corporation. *Scott* v.

In addition, the absence of any specialized knowledge or trade secrets obtained by the plaintiff through his employment with the defendants is compelling evi-

General Iron & Welding Co., supra, 171 Conn. 134. As chief engineer, the plaintiff had access to the company's entire customer list and was tasked with soliciting business for the defendant. Id., 135. After a salary dispute, however, the plaintiff gave up his management position and eventually left the company voluntarily. Id. The agreement between the parties contained a covenant not to compete, which prohibited the plaintiff from "disclosing confidential information not generally known in the industry and acquired by him concerning the defendant's products, processes and services, research, inventions, manufacturing, purchasing, accounting, engineering, marketing, merchandising and selling; and from disclosing the list of the defendant's customers to any person or other entity." Id., 135–36. The covenant also contained durational and geographical restrictions, which provided that the plaintiff "for a period of five years after the termination of his employment," would not "within the [s]tate of Connecticut, directly or indirectly, own, manage, operate, control, act as agent for, participate in or be connected in any manner with the ownership, management, operation, or control of any business similar to the type of business conducted by the [defendant] at the time of the termination of his employment." (Internal quotation marks omitted.) Id., 136. Our Supreme Court was faced with the question of whether the covenant constituted an unreasonable restraint of trade. Id.

The court weighed the competing interests of the plaintiff, the defendant, and the public, and determined, inter alia, that the plaintiff's interests properly were protected under the terms of the agreement. Id., 140. Specifically, the court concluded that the covenant was reasonable because the agreement precluded the plaintiff from participating in the metals business only as a manager, not as an employee. Id. The court stated: "At the time of trial, the plaintiff was employed as a welder and was earning $200 per week. Thus, the plaintiff is not being deprived of the opportunity to earn a livelihood for himself and his family or of employment at his trade." Id.

Unlike in *Scott*, the court found that the noncompete provision in the present case does not afford the plaintiff with the same opportunity to make a living practicing his profession. In the present case, the plaintiff is precluded from servicing former partnership clients, which, effectively, forecloses his access to his entire client base. The defendants' argument that the plaintiff could have worked for another firm or pursued other clients ignores the court's factual findings, fully supported by the plaintiff's testimony, to the contrary. The defendants point to no evidence, nor are we aware of any, that suggests that the plaintiff actually would have been able to make a living by servicing a significantly limited client pool or that he had other actual employment opportunities. Although on cross-examination the plaintiff testified that he technically could still practice accounting, and he could find new clients or could work at another accounting firm, the defendants presented no evidence of the likelihood that the plaintiff could find alternative employment or make a living doing so. Furthermore, the defendants' assertion that the plaintiff could have found new clients ignores the harm that would befall his former clients, virtually all of whom preferred the plaintiff's services to other accountants, as evidenced by the fact that all but three of the plaintiff's clients followed him from the partnership.

dence that the noncompete provision is not reasonably necessary to protect the defendants' interest in retaining the goodwill of the former clients brought to the partnership by the plaintiff. See *Robert S. Weiss & Associates, Inc.* v. *Wiederlight*, supra, 208 Conn. 533 ("restrictions are valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights" (internal quotation marks omitted)). The plaintiff, on his termination from the partnership, did not take with him any sensitive information that would give him an advantage in competing with the partnership and retaining the services of his former clients. The only advantage that the plaintiff had in retaining his former clients was his preexisting relationships with them, which, as the trial court found, did not derive from his employment with the partnership. In an effort to protect the goodwill of those clients, however, the defendants now seek to impose onerous financial consequences on the plaintiff's ability to practice his profession, which, given the factual findings of the court, constitute an unreasonable restraint of trade. Notably, the defendants still have the opportunity to retain the clients at issue without the noncompete provision. Moreover, the defendants still have access to approximately 70 percent of their clients, as the plaintiff's clients comprised only 30 percent of the partnership's entire client base.

Furthermore, the court's factual finding that virtually all of the plaintiff's client base was comprised of clients he personally developed, the majority of whom followed him to the partnership from his sole proprietorship, coupled with the fact that the noncompete provision imposes the same financial burden on the plaintiff on a client by client basis regardless of how or when the client was developed and regardless of how much work the plaintiff is currently performing for the client, supports the conclusion that the covenant is not reasonably necessary to protect the defendants' interests and

is, therefore, an unreasonable restraint of trade. See *Domurat* v. *Mazzaccoli*, 138 Conn. 327, 330, 84 A.2d 271 (1951) ("[a covenant not to compete] made in connection with the sale of the [goodwill] of a business . . . is valid only when the restraint imposed is no greater than is necessary for the fair and just protection of the business and *does not impose unnecessary hardship on the covenantor*" (emphasis added)).

As to the noncompete provision's effect on the public, the defendants argue that the public interest is not adversely affected because the plaintiff "is not the only competent [certified public accountant] in the Danbury area—nor is [the partnership] the only other available firm. The plaintiff's clients would have had little difficulty finding an alternative to him." The court's factual findings, in which we find no error, belie the defendants' contention. The court acknowledged that "accounting and auditing services are otherwise available to [the plaintiff's] clients" but, stressing the importance of their right to choose an accountant, specifically found that complete enforcement would effectively bar their ability to hire the plaintiff: "[T]he clients' interest in freely engaging the accountant of [their] choice and the clients' ability to obtain timely and efficient service will be affected if [the plaintiff] were to refrain from representing former [partnership] clients for fear of economic forfeiture and diversion of revenues. . . . That the [noncompete] provision does not bar outright [the plaintiff] servicing former [partnership] clients does not detract from the severe penalty he would incur if the forfeiture of benefits and payment provision were enforceable and the powerful disincentive to service those clients if the restriction were enforced." The fact that there are other accounting services available to the public is relevant to the reasonableness of the noncompete provision. Certainly, the restriction does not create a monopoly for the defendants. Nevertheless, the plaintiff's former clients would be left without the

services of the accountant who they had trusted and worked with for several years prior to the plaintiff's departure from the partnership. There being other accountants available in the Danbury area does not detract from Capanna's testimony that it would take him years to feel confident that a new accountant knew his business and to establish a relationship of trust. The adverse effect on the public is reinforced by the fact that the plaintiff's client base followed him to the partnership at the time of the merger and continued to seek his services after his departure therefrom. Although such a negative impact on competition might be reasonable in another case, we conclude, on the basis of the facts as found by the court in this case, particularly that the restraint is greater than is necessary to protect the defendants' interests, that the noncompete provision constitutes an unreasonable restraint of the public's rights to the plaintiff's services.

Finally, we agree with the trial court that, on the facts of this case, the duration of the noncompete provision is unreasonable. The court found that "[t]he length of the restriction exceeds the duration of the period when [the plaintiff] was subject to the [partnership] agreement. Moreover, the lengthy time period means that any business for a former or present [partnership] client during the five year period would trigger the penalty even if that client had not been [a partnership] client during most of the restricted period, or had left [the partnership] for reasons unrelated to [the plaintiff], or had stayed with [the partnership] but used [the plaintiff] for only part of the work during the period, or had only come to [the plaintiff] years after the client left [the partnership] for other reasons without any solicitation by [the plaintiff]." The defendants point to cases in which five year restrictions were upheld, but we agree with the plaintiff that *Scott* calls for a fact specific inquiry and it cannot be said that there is a default number of

years that is uniformly reasonable. See *Robert S. Weiss & Associates, Inc.* v. *Wiederlight*, supra, 208 Conn. 530 (holding that time restrictions in restrictive covenant are valid "if they are reasonably limited and fairly protect the interests of both parties"); see also footnote 15 of this opinion.[16] Having found no error in the court's factual findings regarding the effect of the five year restriction, particularly that five years is longer than necessary to protect the defendants' interests, we similarly find no error in the court's subsequent conclusion that five years is an unreasonable duration.

Accordingly, we conclude that the court properly determined that, under the specific facts found, the noncompete provision unreasonably restrains trade and, therefore, is unenforceable.

The judgment is affirmed.

In this opinion the other judges concurred.

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[16] In *DeLeo I*, we cited *Holloway* v. *Faw, Casson & Co.*, 319 Md. 324, 572 A.2d 510 (1990), explaining that "[t]he facts of this case are also remarkably similar to those in [*Holloway*], which our Supreme Court cited with approval in *Deming* [v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 767, 905 A.2d 623 (2006)]. In *Holloway*, the plaintiff, a former partner of an accounting firm, challenged provisions in the partnership agreement that required him to forfeit certain deferred income payments and pay the partnership '100 [percent] of the prior year's fees for any clients' for whom the departing partner continued to provide accounting services." *DeLeo I*, supra, 180 Conn. App. 763. The Court of Appeals of Maryland, applying a similar inquiry based on "the facts of a particular case and the interest of the employer sought to be protected," agreed with the trial court that the five year restriction was longer than needed to protect the firm's relationship with its clients. *Holloway* v. *Faw, Casson & Co.*, supra, 319 Md. 348–50. In this case, the noncompete provision is even more onerous because, in addition to the five year restriction, it requires the payment of "[*150 percent*] of the total average annual fees billed to such client or to any related persons or entities by [the partnership] during the *two (2) year* period prior to such termination." (Emphasis added.) See footnote 3 of this opinion.

ROBERT C. GODFREY *v.* COMMISSIONER OF CORRECTION (AC 42890)

Bright, C. J., and Prescott and Suarez, Js

Syllabus

The petitioner, who had pleaded guilty to murder, appealed to this court from the judgment of the habeas court, which denied his petition for a writ of habeas corpus. The petitioner alleged, inter alia, that his guilty plea should be vacated pursuant to the doctrine of frustration of purpose because the subsequent abolishment of the death penalty in Connecticut frustrated his principal purpose in accepting the plea agreement, namely, to avoid the death penalty. The relief he sought was a judgment vacating the original plea agreement and the remand of his case for resentencing in accordance with a plea that would have been negotiated had the death penalty been unavailable. The habeas court, after a trial at which both of the petitioner's trial counsel testified, concluded that the petitioner failed to prove that his principal purpose for agreeing to enter a guilty plea was substantially frustrated by the subsequent abolition of the death penalty and that he had assumed the risk that the death penalty subsequently might be abolished. On the granting of certification, the petitioner appealed to this court. *Held* that the petitioner cannot prevail on his claim that he was entitled to relief under the frustration of purpose doctrine because, even if this court assumed that the frustration of purpose doctrine applied to plea agreements, by accepting the plea agreement, contract principles dictate that the petitioner assumed the risk that at some point the death penalty could be abolished: the record demonstrated that the terms of the agreement were unambiguous, that the petitioner was fully aware of the consequences of his bargain, and the parties, having been made aware of the potential for future favorable changes to the law, intended for the plea agreement to remain enforceable notwithstanding any future changes to the law, including the subsequent abolition of the death penalty in Connecticut, which did not change the petitioner's expectations under the agreement, namely, that he serve a full sixty year sentence and not be permitted to appeal or withdraw his guilty plea after the court imposed the agreed upon sentence; moreover, although the petitioner may have miscalculated the likely penalties attached to alternative courses of action, an individual cannot withdraw a guilty plea merely because a subsequent change in the law rendered the maximum penalty for the crime in question less than was reasonably assumed at the time the plea was entered, even when the maximum penalty at issue was death, and any such miscalculation did not provide a basis to grant habeas relief to the petitioner regarding his guilty plea;

furthermore, as our Supreme Court unequivocally has rejected the amelioration doctrine, which provides that amendments to statutes that lessen their penalties are applied retroactively, it would be improper to vacate the petitioner's guilty plea pursuant to the frustration of purpose doctrine, which in this instance is the functional equivalent of applying the amelioration doctrine and which would work a substantial injustice on the state in new plea negotiations as the petitioner would enjoy a much greater degree of leverage than in the first negotiation because of the numerous difficulties attendant to securing a conviction at trial nearly twenty years after the crime was committed, including evidence that has become stale, memories that have faded, and witnesses that may no longer be available.

Argued October 8, 2020—officially released February 23, 2021

Procedural History

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

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

Tamara Grosso, assistant state's attorney, with whom, on the brief, were *Laurie N. Feldman*, deputy assistant state's attorney, and *Gail P. Hardy*, former state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. This appeal presents the important question of whether, under the common-law contractual "frustration of purpose" doctrine, a habeas petitioner who had been charged with a capital felony and pleaded guilty to murder in order to avoid the imposition of the death penalty is entitled to withdraw his guilty plea sixteen years later because the death penalty has since been abolished. We conclude that, even if the frustration of purpose doctrine applies to criminal plea agreements, the petitioner, Robert C. Godfrey, is not entitled to relief under that doctrine because by entering into

the plea agreement, he assumed the risk that the death penalty might be abolished at some point while he was serving his sentence of sixty years of incarceration.

The petitioner appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the court improperly concluded that he was not entitled to habeas relief with respect to a collateral attack on his guilty plea because (1) he failed to prove that his principal purpose for entering into a guilty plea with an agreed upon sixty year sentence was substantially frustrated by the subsequent abolition of the death penalty and (2) he had assumed the risk that the law might change in his favor.[2] We conclude that the habeas court properly determined that the petitioner had assumed the risk that the death penalty might be abolished at some point while he was serving his sixty year sentence, and, therefore, we do not reach his first claim. Accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our disposition of the petitioner's claims.[3] On November 9, 2001, the East Hartford police responded to apartment 209 of an apartment complex on a report that a woman was found dead. Upon arrival, the police observed the woman's nude body, with a large open wound to the back of her head, lying face down next to the bed. There were large amounts of blood on the walls, the bed, and the floors of the apartment. In the kitchen, there were what appeared to be bloody footprints. The footprints led from apartment 209, up the

[1] The habeas court granted the petitioner certification to appeal from the judgment.

[2] Specifically, the petitioner challenges the habeas court's conclusion that he failed to satisfy two of the four prongs of the frustration of purpose test: (1) the event substantially frustrated his principal purpose for entering into the plea agreement; and (2) he did not assume the risk that the event would occur.

[3] We rely on the facts as found and as set forth by the habeas court in its memorandum of decision as well as on undisputed facts disclosed in the record.

outer staircase, to the door of apartment 309, which is where the petitioner lived. When the petitioner first was interviewed by the police, he indicated that he knew the victim, and that they may have had a few beers together, but he did not know how the bloody footprints could have ended up outside of his doorway. The petitioner consented to the taking of a DNA sample, which later was determined by the medical examiner to match the semen found in the victim. The cause of the victim's death was cranial cerebral trauma, caused by ten to fifteen blows from a sharp instrument. A search warrant was executed at the petitioner's apartment, where the police found bloody footprints inside, which later were determined to match the petitioner's own footprints, and clothes stained with the victim's blood.

On November 27, 2001, the petitioner was charged with capital felony in violation of General Statutes (Rev. to 2001) § 53a-54b (7), murder in violation of General Statutes § 53a-54a, felony murder in violation of General Statutes § 53a-54c, two counts of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1) (2), and two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). Thereafter, the petitioner entered into a plea agreement with the state. Pursuant to the agreement, the state filed a substitute information charging the petitioner with one count of murder in violation of § 53a-54a (a), to which he agreed to plead guilty in exchange for a sentence of sixty years of incarceration. On March 11, 2004, the court canvassed the petitioner regarding his guilty plea. Through that canvass, the court determined, inter alia, that the petitioner understood that (1) the guilty plea was "for keeps," meaning that he would not be permitted to "change his mind later and take it back," (2) he could not withdraw his guilty plea "unless the court doesn't impose a sentence agreed upon," (3) he was "giving up any rights to an appeal," and (4) the sentencing statute required that he serve the sixty years "day

for day." The court found that there was a factual basis for the petitioner's guilty plea and that it was knowingly and voluntarily made. The court then accepted the plea and later sentenced the petitioner, consistent with the plea agreement, to a term of sixty years of imprisonment.

On April 25, 2012, No. 12-5 of the 2012 Public Acts (P.A. 12-5) was signed into law, prospectively repealing the death penalty for all crimes committed on or after that date, and retaining the death penalty for capital felonies committed prior to that date. Three years later, our Supreme Court, in *State* v. *Santiago*, 318 Conn. 1, 119, 122 A.3d 1 (2015), held that the imposition of the death penalty on offenders who committed capital crimes prior to the enactment of P.A. 12-5 would violate article first, §§ 8 and 9, of the Connecticut constitution, thus effectively abolishing the death penalty in Connecticut.

Following the release of the *Santiago* decision, the petitioner filed a petition for a writ of habeas corpus. On April 17, 2018, the petitioner filed an amended petition that alleged ineffective assistance of trial counsel in count one and, in count two, that his guilty plea should be vacated pursuant to the doctrine of frustration of purpose because the abolishment of the death penalty in Connecticut frustrated his principal purpose in accepting the plea agreement, namely, to avoid the death penalty. The relief sought in the petition is a judgment vacating the original plea agreement and the remand of his case for resentencing "in accordance with the plea that would have been negotiated had the death penalty been unavailable." The respondent, the Commissioner of Correction, filed a return on May 21, 2018, in which he asserted that the petitioner failed to state a ground on which relief can be granted, and raised the defense of procedural default. Thereafter, the respondent filed a motion to dismiss count two of the petition on the same grounds alleged in the return.

At the habeas trial, on September 4, 2018, the petitioner withdrew count one of the petition and three witnesses testified, including the petitioner and both of his trial counsel, as to count two.

Specifically, both trial counsel testified, inter alia, that they recommended to the petitioner that he plead guilty because there was a significant likelihood that he would receive the death penalty if the case went to trial because of the "horrific" nature of the crime and the weakness of evidence regarding any mitigating factors that might persuade the jury to decline to vote in favor of the death penalty.[4] One of the petitioner's trial

[4] The law in existence at the time was as follows: "Capital felony trials are divided into two phases: the guilt phase and the penalty phase. . . . In the penalty phase . . . the jury is charged with both fact-finding and nonfact-finding tasks. . . . Its fact-finding task involves determining whether the state has established the facts of an aggravant beyond a reasonable doubt and whether the defendant has established the facts of a mitigant by a preponderance of the evidence. . . . Its nonfact-finding task involves determining, based on its reasoned and moral judgment, whether: (1) the factually established mitigant is mitigating in nature; and (2) the aggravant outweighs the mitigant. . . . Following this weighing process, the jury must ultimately determine whether the defendant shall live or die, which requires the jury to make a reasoned moral and individualized determination that death is the appropriate punishment in the case." (Citations omitted; internal quotation marks omitted.) *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 664 n.6, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

Moreover, the sentencing statute for capital felonies committed prior to April 25, 2012, General Statutes § 53a-46a, provides in relevant part: "(d) In determining whether a mitigating factor exists concerning the defendant's character, background or history, or the nature and circumstances of the crime . . . the jury or, if there is no jury, the court shall first determine whether a particular factor concerning the defendant's character, background or history, or the nature and circumstances of the crime, has been established by the evidence, and shall determine further whether that factor is mitigating in nature, considering all the facts and circumstances of the case. Mitigating factors are such as do not constitute a defense or excuse for the capital felony of which the defendant has been convicted, but which, in fairness and mercy, may be considered as tending either to extenuate or reduce the degree of his culpability or blame for the offense or to otherwise constitute a basis for a sentence less than death." In addition, the aggravating factors to be considered include, inter alia, whether "the defendant commit-

counsel, Attorney Barry Butler, stated that he advised the petitioner that a sixty year sentence, which he would be required to serve in full, thereby rendering him ineligible for release until he is approximately ninety years old, was more favorable than a life sentence without the possibility of parole because of the potential for future changes to the law that would make someone with a finite sentence eligible for early release.[5] Attorney Butler also stated that he had discussed with the petitioner the possibility that one day the state might abolish the death penalty, although he did not have a specific expectation at that time that it would be abolished. The petitioner testified, inter alia, that avoiding the death penalty was "somewhat important" to him, that he was scared of the death penalty, and that he would not have pleaded guilty and agreed to a sixty year sentence if the death penalty had been unavailable. In addition, he stated that he did not want to plead guilty to a sexual assault, which was consistent with Attorney Butler's testimony that pleading guilty to sexual assault was a "deal breaker" for the petitioner. The habeas court rendered judgment on March 8, 2019, denying the amended habeas petition.[6] Specifically, the court concluded that, as a matter of first impression, the frustration of purpose doctrine, which is typically applied in

ted the offense in an especially heinous, cruel or depraved manner . . . ." General Statutes § 53a-46a (i) (4).

[5] The petitioner was thirty years old when he was arrested. Attorney Butler noted that, in light of his age, a sixty year sentence is effectively a life sentence.

[6] The court denied the respondent's motion to dismiss in the same decision, finding that there was no procedural default on the petitioner's part. In addition, with regard to habeas jurisdiction, the court determined that because the petitioner is seeking a judgment vacating his conviction, if he proves his claim "it may warrant habeas relief." The court also suggested that habeas review is proper because the petitioner's claim, like claims of ineffective assistance of counsel, requires further record development, including testimony about the intent of the parties in entering into the agreement and their assumptions of risk while doing so, and "this cannot be discerned from the record of the trial proceedings below." Specifically, the court reasoned "our courts have a well established practice of deferring

civil cases alleging breach of contract, also applies to criminal plea agreements. The court then applied that doctrine and found that the petitioner failed to prove that (1) his principal purpose for agreeing to enter a guilty plea was substantially frustrated by the subsequent abolition of the death penalty,[7] and (2) he did not assume the risk that the death penalty subsequently might be abolished.[8] On March 18, 2019, the habeas court granted the petitioner certification to appeal the habeas court's judgment. This appeal followed. Additional facts will be set forth as needed.

On appeal, the petitioner claims that the habeas court properly determined that the frustration of purpose doctrine applies to plea agreements, but improperly concluded that he was not entitled to habeas relief because (1) he failed to prove that his principal purpose for entering into a guilty plea was substantially frustrated by the subsequent abolition of the death penalty and (2) he had assumed the risk that the law might change in his favor. In response, the respondent argues that this court need not decide whether the frustration of purpose doctrine applies to plea agreements in general or in all circumstances because, even assuming arguendo

review . . . to collateral review by habeas corpus in order to allow for necessary record development." (Internal quotation marks omitted.) On appeal, the respondent does not contend that the habeas court improperly determined that it had jurisdiction over the amended petition, therefore, we do not address this issue further.

[7] Specifically, the court found that "the [petitioner's] purposes for entering into this plea were to avoid the death penalty *and to avoid a conviction on a sexual assault charge*." (Emphasis added.) Moreover, the court reasoned that performance of the agreement "is not worthless" to the petitioner because "he still avoids a sexual assault conviction and a potential sentence of up to 100 years."

[8] The court concluded that the petitioner had satisfied the other two prongs of the test, namely (1) the nonoccurrence of the supervening event was a basic assumption on which the contract was made, and (2) the frustration resulted without the fault of the party seeking to be excused. See *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 315 Conn. 596, 605, 109 A.3d 473 (2015).

that it does apply, the petitioner has failed to satisfy all four factors required for its applicability. We agree with the respondent.

We begin by setting forth certain governing principles of law as well as our standard of review. "It is well settled that [p]rinciples of contract law and special due process concerns for fairness govern our interpretation of plea agreements. . . . As has previously been explained in the context of plea agreements, [t]he primary goal of contract interpretation is to effectuate the intent of the parties . . . . In ascertaining that intent, we employ an objective standard and look to what the parties reasonably understood to be the terms of the plea agreement on the basis of their words and conduct, and in light of the circumstances surrounding the making of the agreement and the purposes they sought to accomplish. . . . [T]he threshold determination as to whether a plea agreement is ambiguous as to the parties' intent is a question of law subject to plenary review." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Kallberg*, 326 Conn. 1, 14–16, 160 A.3d 1034 (2017).

"The doctrine of frustration of purpose . . . excuses a promisor in certain situations where the objectives of the contract have been utterly defeated by circumstances arising after the formation of the agreement. . . . Excuse is allowed under this rule even though there is no impediment to actual performance. . . . A party claiming that a supervening event or contingency has frustrated, and thus excused, a promised performance must demonstrate that: (1) the event substantially frustrated his principal purpose; (2) the nonoccurrence of the supervening event was a basic assumption on which the contract was made; (3) the frustration resulted without the fault of the party seeking to be excused; and (4) the party has not assumed a greater obligation than the law imposes." (Citation omitted; internal quotation marks omitted.) *Howard-Arnold*,

Inc. v. *T.N.T. Realty, Inc.*, 315 Conn. 596, 605, 109 A.3d 473 (2015). Moreover, "[t]he establishment of the defense requires convincing proof of a changed situation so severe that it is not fairly regarded as being within the risks assumed under the contract." (Footnote omitted.) 17A Am. Jur. 2d, Contracts § 640 (2020). "The doctrine of frustration of purpose is given a narrow construction so as to preserve the certainty of contracts . . . ." (Footnote omitted.) Id., § 641.[9]

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citation omitted; internal quotation marks omitted.) *Brooks* v. *Commissioner of Correction*, 105 Conn. App. 149, 153, 937 A.2d 699, cert. denied, 286 Conn. 904, 943 A.2d 1101 (2008). "The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012). "The excuse of frustration [of purpose] is a question of law, to be determined by the court from the facts of the case." 17A Am. Jur. 2d, supra, § 640. Accordingly, we apply a plenary standard of

[9] The paradigmatic example of an instance in which a party is entitled to relief under the frustration of purpose doctrine is *Krell* v. *Henry*, 2 K.B. 740 (1903), the case in which this doctrine was first recognized. See *DDS Wireless International, Inc.* v. *Nutmeg Leasing, Inc.*, 145 Conn. App. 520, 526, 75 A.3d 86 (2013). In *Krell*, a spectator entered into a contract to rent an apartment for the purpose of viewing the procession for the coronation of King Edward VII. See id. The king became ill, the procession was cancelled, and the spectator refused to pay for the rental. See id. When the apartment owner sued for breach of contract, the court excused the spectator's breach, holding that the coronation procession was the foundation of the contract. See id. "The court implicitly determined that had the parties contemplated the possibility of the coronation being cancelled, they would have included a provision in the contract allowing the spectator to terminate the contract under those circumstances." Id.

review to the present case, and will not disturb the underlying facts found by the habeas court unless they are clearly erroneous.

I

As the respondent correctly recognizes, we do not need to determine definitively whether the frustration of purpose doctrine applies to plea agreements in Connecticut because, even if we assume, consistent with the conclusion of numerous state and federal courts, that it does, the petitioner would not be entitled to relief under the doctrine because, by accepting the plea agreement, contract principles dictate that he assumed the risk that at some point the death penalty could be abolished. See *United States* v. *Morgan*, 406 F.3d 135, 137 (2d Cir. 2005) ("the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements"), cert. denied, 546 U.S. 980, 126 S. Ct. 549, 163 L. Ed. 2d 465 (2005); see also *United States* v. *Bradley*, 400 F.3d 459, 464 (6th Cir. 2005) ("Plea bargains always entail risks for the parties . . . [including] risks relating to future developments in the law. The salient point is that a plea agreement allocates risk between the two parties as they see fit. If courts disturb the parties' allocation of risk in an agreement, they threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts . . . with the knowledge that the agreement will be immune from challenge on appeal."), cert. denied, 546 U.S. 862, 126 S. Ct. 145, 163 L. Ed. 2d 144 (2005).

Here, the record is clear that the terms of the agreement were unambiguous and that the petitioner was fully aware of the consequences of his bargain. In other words, he knew precisely what he was gaining and what he was giving up when he opted for the certainty of

pleading guilty to a single count of murder in exchange for a sixty year sentence, as opposed to standing trial for capital felony, murder, felony murder, burglary in the first degree, and sexual assault in the first degree and facing a potential sentence of (1) death, (2) life in prison without the possibility of parole, or (3) a sentence of 100 years or more of incarceration. See *United States* v. *Roque*, 421 F.3d 118, 123 (2d Cir. 2005) ("Viewing this plea agreement as a contract, we agree that certain conditions have changed since the bargain was struck. We further acknowledge that, had the parties known what they know now . . . they might have bargained differently and might even have reached a different bargain. This is simply not relevant to whether [the defendant's] plea is enforceable, however. [The defendant] understood fully the consequences of his bargain, both in terms of what he was gaining and what he was giving up. . . . [I]n opting for certainty, both parties accepted the risk that conditions relevant to their then-contemporary bargain, including [the law], might change." (Citations omitted; internal quotation marks omitted.)), cert. denied sub nom. *Delahoz* v. *United States*, 546 U.S. 1120, 126 S. Ct. 1094, 163 L. Ed. 2d 908 (2006).

Specifically, Attorney Butler advised the petitioner that a sixty year sentence, which he would be required to serve in full, is preferable to a life sentence without the possibility of parole because of the potential for future changes to the law that would make someone with a finite sentence eligible for early release. Attorney Butler likewise discussed with the petitioner the possibility that one day the state might abolish the death penalty. In addition, both of the petitioner's trial counsel recommended to him that he take the plea deal in view of what they perceived to be a significant likelihood that he would be convicted at trial and sentenced to death. With this knowledge, the petitioner elected to limit his criminal exposure, forgo a lengthy capital trial

and its attendant stress for himself and his family,[10] and accept a sixty year sentence, which left open the potential for him to be released at age ninety or earlier if he became eligible for parole because of a favorable change in our parole eligibility laws. Moreover, as the trial court's thorough canvass illustrates, the petitioner understood that under the terms of the agreement (1) his guilty plea was "for keeps" in that he would not be permitted to "change his mind later and take it back," (2) he was waiving "any rights to an appeal," (3) he could not withdraw his guilty plea unless the court did not impose the agreed upon sentence, and (4) he would serve a sixty year sentence "day for day." See *United States* v. *Roque*, supra, 421 F.3d 123 ("In no circumstances . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless." (Internal quotation marks omitted.)), quoting *United States* v. *Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir.), cert. denied, 509 U.S. 931, 113 S. Ct. 3060, 125 L. Ed. 2d 742 (1993). That the petitioner agreed to these unambiguous terms, after having been made aware of the potential for future favorable changes to the law, indicates that the parties intended for the plea agreement to remain enforceable notwithstanding any future changes to the law.[11] See *State* v. *Kallberg*, supra, 326 Conn.

[10] The petitioner's trial counsel, Attorney Fred DeCaprio, testified, and the habeas court made a factual finding, that one of the petitioner's considerations with regard to pleading guilty included avoiding the stress of a capital trial on himself and his family.

[11] The petitioner argues that he did not assume the risk of the abolition of the death penalty because this topic was not explicitly discussed during the court's canvass of him. In essence, the petitioner argues that, in the absence of a specific provision of his plea agreement that required him to serve the agreed upon sentence even if the death penalty was later abolished, he cannot be deemed to have assumed that risk. We disagree.

"[A] voluntary and intelligent guilty plea operates as a waiver of all nonjurisdictional defects. . . . A plea of guilty is, in effect, a conviction, the equivalent of a guilty verdict by a jury. . . . In choosing to plead guilty, the

15 ("An unambiguous agreement is presumptively an accurate reflection of the parties' intent. Thus, [when] the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.)). In addition, because the petitioner's counsel

defendant is waiving several constitutional rights . . . . The . . . constitutional essentials for the acceptance of a plea of guilty are included in our rules and are reflected in Practice Book §§ [39-19 and 39-20]. . . . The failure to inform a defendant as to all possible indirect and collateral consequences does not render a plea unintelligent or involuntary in a constitutional sense." (Citation omitted; internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 780, 894 A.2d 963 (2006).

Specifically, "[t]he rules governing the acceptance of guilty pleas, set forth in Practice Book §§ 39-19 and 39-20, provide that the trial court must not accept a guilty plea without first addressing the defendant personally in open court and determining that the defendant fully understands the items enumerated in § 39-19, and that the plea is made voluntarily pursuant to § 39-20. There is no requirement, however, that the defendant be advised of every possible consequence of such a plea. . . . Although a defendant must be aware of the direct consequences of such a plea, the scope of direct consequences is very narrow. . . . In Connecticut, the direct consequences of a defendant's plea include only the mandatory minimum and maximum possible sentences; Practice Book § [39-19 (2) and (4)]; the maximum possible consecutive sentence; Practice Book § [39-19 (4)]; the possibility of additional punishment imposed because of previous conviction(s); Practice Book § [39-19 (4)]; and the fact that the particular offense does not permit a sentence to be suspended. Practice Book § [39-19 (3)] . . . ." (Internal quotation marks omitted.) *State* v. *Greene*, 274 Conn. 134, 145, 874 A.2d 750 (2005), cert. denied, 548 U.S. 926, 126 S. Ct. 2981, 165 L. Ed. 2d 988 (2006). Here, the court's canvass was more than adequate. The canvass went beyond apprising the petitioner of the direct consequences of his plea, even though it was not required to do so.

Moreover, the authority on which the petitioner premises his argument does not set forth the stringent standard for which he advocates. It merely requires the state, "as the drafting party wielding disproportionate power, [to] memorialize any and all obligations for which it holds the defendant responsible. . . . The terms of the agreement should be stated clearly and unambiguously, so that the defendant . . . knows what is expected of him and what he can expect in return." *State* v. *Kallberg*, supra, 326 Conn. 23. *Kallberg* also is factually distinguishable, in that the terms of the plea agreement at issue there were ambiguous. See id., 19. In contrast, the terms of the agreement here unambiguously set forth the petitioner's obligations, specifically that once the court accepted the petitioner's guilty plea and sentenced him to the agreed upon sixty year term of incarceration, he was waiving his right to appeal, prohibited from withdrawing his plea regardless of whether he later changed his mind, and required to serve every day of his sixty year sentence. The state is not required to specifically address all possible contingencies in a plea agreement, particularly when the terms of the agreement make clear that the parties intended for any such future events to not affect the petitioner's obligations.

specifically discussed with the petitioner the possibility that one day the state might abolish the death penalty, the fact that this ultimately happened cannot be considered "a change so severe that it is unfair to regard it as being within the risks assumed under the contract."[12] See 17A Am. Jur. 2d, supra, § 640.

Furthermore, the subsequent abolition of the death penalty in Connecticut did not change the petitioner's expectations under the agreement, namely, that he serve a full sixty year sentence and not be permitted to appeal or withdraw his guilty plea after the court imposed the agreed upon sentence. See *United States* v. *Archie*, 771 F.3d 217, 222 (4th Cir. 2014) ("[A]lthough the law changed after [the defendant] [pleaded] guilty, his expectations (as reflected in the plea agreement) did not. . . . A plea agreement, like any contract, allocates risk. . . . And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea." (Citations omitted; internal quotation marks omitted.)), cert. denied, 575 U.S. 925, 135 S. Ct. 1579, 191 L. Ed. 2d 660 (2015). The petitioner struck a deal, the terms of which were unambiguous, and he is now seeking to retain the benefits of the bargain while reneging on his commitments to not withdraw his guilty plea and serve a sixty year sentence. See *United States* v. *Bradley*, supra, 400 F.3d 465 ("[h]aving voluntarily and knowingly bargained for a decrease in the number of counts charged against him and for a decreased sentence, [the defendant] cannot now extract two components of that bargain . . . on the basis of changes in the law after that

[12] That Attorney Butler discussed this possibility with the petitioner is one of the habeas court's findings of fact. The court went on to conclude, with regard to the second prong of the frustration of purpose doctrine, that the abolition of the death penalty was not reasonably foreseeable, was not contemplated, and could not have been anticipated by the parties. We do not need to address the propriety of those conclusions in light of our determination that the petitioner has not satisfied the assumption of risk prong of the frustration of purpose doctrine.

bargain was struck"). As succinctly stated by the United States Court of Appeals for the Second Circuit, "contract principles [simply] do not support [the petitioner's] attempt to have his cake and eat it, too." (Internal quotation marks omitted.) *United States* v. *Roque*, supra, 421 F.3d 124.

II

We next turn to a discussion of factually related precedent from other jurisdictions that informs our application of the frustration of purpose doctrine to the petitioner's plea agreement. We begin by addressing two lines of cases in which courts have excused a party's performance under a plea agreement pursuant to the frustration of purpose doctrine. In the first line of cases, the frustrating event at issue was a change in the law subsequent to a criminal defendant's guilty plea. These cases are fundamentally distinguishable, however, because the change in the law affected the criminality of the conduct for which the defendant pleaded guilty. For instance, in *United States* v. *Bunner*, 134 F.3d 1000 (10th Cir.), cert. denied, 525 U.S. 830, 119 S. Ct. 81, 142 L. Ed. 2d 64 (1998), after the defendant had served three years of a five year sentence, the United States Supreme Court issued a decision; *Bailey* v. *United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995); under which the facts supporting the defendant's plea no longer constituted a crime. The defendant successfully moved to vacate his sentence pursuant to 28 U.S.C. § 2255.[13] See *United States* v. *Bunner*, supra, 1002. The government then moved to reinstate the counts of the

[13] Title 28 of the United States Code, § 2255, provides in relevant part: "(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without justification to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

original indictment that it had dismissed in exchange for the defendant's guilty plea. The United States Court of Appeals for the Tenth Circuit ruled that it was proper for the District Court to allow the government to reinstate the counts previously dismissed because the vacatur frustrated the government's principal purpose for entering the plea agreement. Id., 1003; see also *United States* v. *Moulder*, 141 F.3d 568, 572 (5th Cir. 1998) ("[T]he parties' assumptions and obligations were altered by *Bailey* and the subsequent successful [28 U.S.C.] § 2255 challenges. As a result of those events the underlying purpose of the [plea] agreement [was] frustrated and the basis of the government's bargain [was] destroyed. Thus, under the frustration of purpose doctrine, the government's plea agreement obligations became dischargeable." (Internal quotation marks omitted.)); *United States* v. *Samuels*, 454 F. Supp. 3d 595, 602–603 (E.D. Va. 2020) ("[U]nder the frustration of purpose doctrine, the [g]overnment's obligations under the plea agreement would become dischargeable should [the d]efendant successfully vacate his . . . convictions by way of his [28 U.S.C.] § 2255 [m]otion. . . . Then . . . the [g]overnment could move to reinstate the [i]ndictment . . . ." (Citations omitted.)), cert. pending, United States Court of Appeals, Docket No. 20-6894 (4th Cir. June 17, 2020). The subsequent change in the law that forms the basis for the petitioner's claim in the present case did not render legal the conduct for which the petitioner pleaded guilty.

In a second line of cases in which the frustration of purpose doctrine has been applied to plea agreements, courts have held that the principal purpose of the agreement was substantially frustrated when the specific terms of the agreement were not actually imposed. See *United States* v. *Thompson*, 237 F.3d 1258, 1260–61 (10th Cir.) (federal government charged defendant with crime and defendant entered into plea agreement with

government to plead guilty in Oklahoma state court and be sentenced to ten years of imprisonment, but when state failed to charge defendant within applicable statute of limitations, government no longer bound by plea agreement), cert. denied, 532 U.S. 987, 121 S. Ct. 1637, 149 L. Ed. 2d 497 (2001); *United States* v. *Jureidini*, 846 F.2d 964, 965 (4th Cir. 1988) (parties agreed that for purposes of parole consideration defendant would be classified as having committed category six offense but parole board placed him in category eight); see also *United States* v. *Torres*, 926 F.2d 321, 322, 325–26 (3d Cir. 1991) (parties agreed that defendant's sentencing range was to be based on lesser quantity of drugs than that which court ultimately relied when sentencing defendant); *United States* v. *Kemper*, 908 F.2d 33, 37 (6th Cir. 1990) (same). These cases are readily distinguishable because, here, the court imposed the agreed upon sentence, and there is no claim that the agreement has been breached.

The cases that are most instructive to our analysis of the assumption of risk prong of the frustration of purpose doctrine involve defendants charged with a capital felony, who pleaded guilty to avoid capital punishment, and, after a subsequent change in the law that would have rendered them ineligible for the death penalty if the new law was in place at the time they were charged, sought to withdraw the guilty plea.[14]

For example, in *Dingle* v. *Stevenson*, 840 F.3d 171, 172–73 (4th Cir. 2016), cert. denied, U.S. , 137 S. Ct. 2094, 197 L. Ed. 2d 897 (2017), the defendant, who was seventeen years old when he pleaded guilty to several charges to avoid the death penalty, sought to

[14] The defendants in these cases did not base their claims on the frustration of purpose doctrine. Instead, they all argued that their guilty pleas were rendered involuntary by a subsequent change in the law that made the death penalty inapplicable to them. Here, the petitioner makes no such claim regarding the voluntariness of his plea. Nevertheless, the reasoning underlying these cases applies with equal force here.

invalidate his plea after the United States Supreme Court held, in *Roper* v. *Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005), that imposing capital punishment on juvenile offenders was a violation of the eighth amendment to the United States constitution. The United States Court of Appeals for the Fourth Circuit rejected the defendant's claim, holding that *Roper* could not be applied retroactively to invalidate the defendant's guilty plea. *Dingle* v. *Stevenson*, supra, 175.

In reaching this conclusion, the court reasoned: "Contracts in general are a bet on the future. Plea bargains are no different: a classic guilty plea permits a defendant to gain a present benefit in return for the risk that he may have to [forgo] future favorable legal developments. [The defendant] received that present benefit—avoiding the death penalty and life without parole—under the law as it existed at the time. Although *Roper*, in hindsight, altered the calculus underlying [the defendant's] decision to accept a plea agreement, it does not undermine the voluntariness of his plea. . . . [T]he tradeoff between present certainty and future uncertainty is emblematic of the process of plea bargaining. *Brady* [v. *United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)] makes all that exceptionally clear . . . ." *Dingle* v. *Stevenson*, supra, 840 F.3d 175–76; see also *Brant* v. *State*, 830 S.E.2d 140, 142 (Ga. 2019) (rejecting claim by defendant, who was seventeen years old when he entered plea agreement to avoid possibility of receiving death penalty, that his plea was rendered involuntary by *Roper*).

Indeed, in *Brady*, the Supreme Court ruled that the petitioner, who was charged with kidnapping pursuant to 18 U.S.C. § 1201 (a), and had pleaded guilty to avoid the death penalty, was not entitled to withdraw his guilty plea in light of the court's subsequent holding in *United States* v. *Jackson*, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), that 18 U.S.C. § 1201 (a) was

unconstitutional. *Brady* v. *United States*, supra, 397 U.S. 743–45. The court reasoned, inter alia: "Often the decision to plead guilty is heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted. Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time. . . .

"A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the [s]tate's case or the likely penalties attached to alternative courses of actions. More particularly, absent misrepresentation or other impermissible conduct by state agents . . . a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." (Citation omitted.) Id., 756–57. In other words, "[a] plea of guilty triggered by the expectations of a competently counseled defendant that the [s]tate will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered." Id., 757.

As *Dingle*, *Brant*, and *Brady* illustrate, an individual cannot withdraw a guilty plea merely because a subsequent change in the law renders the maximum penalty for the crime in question less than was reasonably assumed at the time the plea was entered—even when the maximum penalty at issue was death. The natural

implication of these cases is that a criminal defendant who negotiates a plea agreement "in the shadow of the death penalty" assumes the risk that the law subsequently could change such that the death penalty is no longer a permissible punishment for the crime(s) for which the defendant originally was charged. *Dingle* v. *Stevenson*, supra, 840 F.3d 174.

As in *Brady*, the petitioner here may have miscalculated the likely penalties attached to alternative courses of action. Despite being aware that it was possible that the state someday might abolish the death penalty, the petitioner and his counsel possibly misjudged the likelihood of this happening at some point while he was serving his sixty year sentence. Any such miscalculation, however, does not provide a basis to grant habeas relief to the petitioner regarding his guilty plea. See *State* v. *Reid*, 277 Conn. 764, 788–89, 894 A.2d 963 (2006) ("[I]mperfect knowledge of future developments in the law has no bearing on the validity of a [guilty plea]. . . . More than [thirty] years later the Supreme Court reaffirmed *Brady* and explained that the [c]onstitution . . . permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor." (Citation omitted; internal quotation marks omitted.)), citing *Brady* v. *United States*, supra, 397 U.S. 742, and *United States* v. *Ruiz*, 536 U.S. 622, 630, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002). Accordingly, we conclude that the petitioner has failed to satisfy the assumption of risk prong of the frustration of purpose doctrine and, therefore, is not entitled to any relief.

III

Finally, our conclusion that the petitioner's guilty plea cannot be withdrawn pursuant to the frustration of purpose doctrine is buttressed by two policy rationales: (1) fundamental fairness; and (2) our Supreme

Court's refusal to adopt the amelioration doctrine. We address each of these in turn.

Our habeas corpus statute, General Statutes § 52-470 (a), requires that "the court or judge hearing any habeas corpus shall . . . dispose of the case as law and justice require." See *Summerville* v. *Warden*, 229 Conn. 397, 415, 641 A.2d 1356 (1994). Here, if we were to hold that the petitioner is entitled to vacate his plea agreement, it would work a substantial injustice on the state. That is, the case would be returned to the criminal trial court for plea negotiations, in which the petitioner would enjoy a much greater degree of leverage than in the first negotiation because of the numerous difficulties attendant to securing a conviction at trial nearly twenty years after the crime was committed. During this time, evidence has become stale, memories have faded, and witnesses may no longer be available. See *State* v. *Coleman*, 202 Conn. 86, 91, 519 A.2d 1201 (1987) (noting that unduly delayed trial creates "potential for *inaccuracy* and *unfairness* that stale evidence and dull memories may occasion" (emphasis in original; internal quotation marks omitted)). Requiring the state to negotiate at such a disadvantage, and actually proceed to trial if the plea negotiations were unsuccessful, would be fundamentally unfair to the state, which, according to the petitioner's own trial counsel, had a significant likelihood of securing a conviction against the petitioner in 2004. This concern about fundamental fairness to both sides further supports our decision to leave undisturbed the parties' original allocation of risk in the plea agreement and to require the petitioner to perform his obligations accordingly.

In addition, because our Supreme Court repeatedly has refused to adopt the amelioration doctrine, it would be improper to vacate the petitioner's guilty plea pursuant to the frustration of purpose doctrine in this instance where it would accomplish the same objective.

In *State* v. *Kalil*, 314 Conn. 529, 107 A.3d 343 (2014), our Supreme Court discussed that doctrine and declined to adopt it, stating: "In criminal cases, to determine whether a change in the law applies to a defendant, we generally have applied the law in existence on the date of the offense . . . . This principle is derived from the legislature's enactment of saving statutes such as General Statutes § 54-194, which provide that [t]he repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect . . . . The amelioration doctrine, [however], provides that amendments to statutes that lessen their penalties are applied retroactively . . . . [T]his court has not previously held that ameliorative changes to criminal statutes apply retroactively . . . and we decline to do so in the present case because the doctrine is in direct contravention of Connecticut's savings statutes." (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 552–53; see also *State* v. *Bischoff*, Conn. , A.3d (2021) (declining invitation to overrule *Kalil* and adopt amelioration doctrine).

By holding that the petitioner cannot withdraw his guilty plea and be resentenced in accordance with the plea that would have been negotiated if the death penalty had been unavailable, we are effectively requiring adherence to the law that was in existence on the date of the offense. Stated differently, to allow the petitioner to be resentenced, in accordance with the plea that would have been negotiated if the death penalty was not available at the time of the offense, would be the functional equivalent of applying the amelioration doctrine because it would allow the petitioner to benefit from the retroactive application of a law that lessened the penalty for the crimes for which he originally was

charged. Because our Supreme Court unequivocally has rejected the amelioration doctrine, it likewise is proper for us to decline the petitioner's invitation to reach the same result by virtue of the frustration of purpose doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

MSW ASSOCIATES, LLC *v.* PLANNING & ZONING DEPARTMENT OF THE CITY OF DANBURY (AC 43052)

Lavine, Suarez and Devlin, Js.*

Syllabus

The defendant Planning and Zoning Department of the City of Danbury appealed from the judgment of the trial court sustaining the appeal filed by the plaintiff property owner. The plaintiff, which had been issued a permit to construct and operate a solid waste transfer station and volume reduction plant on its property by the Commissioner of Energy and Environmental Protection, filed a site plan with the defendant, which the defendant denied. The plaintiff appealed to the trial court alleging that the defendant acted arbitrarily, capriciously, unlawfully, and in abuse of its discretion when it determined the site plan was not a use permitted by the city's zoning regulations, and that its site plan denial was in violation of the statute (§ 22-208b (b)) providing that no zoning regulation shall have the effect of prohibiting the construction and operation of a volume reduction plant and transfer station. The court sustained the plaintiff's appeal and remanded the case with direction to grant the site plan, and the defendant appealed to this court. *Held*:

1. The trial court did not err by holding that the regulations' limitation of solid waste facilities only to those in a certain zone and in existence as of a certain date violated § 22a-208b (b); this court's examination of the regulations persuaded it that the regulations do not permit a new transfer station or other type of solid waste facility anywhere in the city, in effect, prohibiting the construction, alteration, or operation of solid waste facilities and, as such, they did not conform to the strictures of § 22a-208b (b).

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

2. The defendant could not prevail on its claim that the plaintiff lacked standing to claim a violation of § 22a-208b (b) on the basis of allegations that the regulations failed to allow solid waste facilities other than the specific subtype of facility it sought to construct on its property: the plaintiff did not seek to have the regulations invalidated, it merely sought to have the court order the defendant to approve the site plan that complied with regulations related to industrial uses in the zone as required by § 22a-208b (b); moreover, the plaintiff was aggrieved by the defendant's denial of the site plan and there was an actual controversy at issue; furthermore, the court did not invalidate the regulations, rather, it held that the ground on which the defendant denied the site plan, that a volume reduction plant and transfer station was not a permitted use in the zone, did not withstand judicial scrutiny pursuant to § 22a-208b (b).

Argued October 13, 2020—officially released February 23, 2021

Procedural History

Appeal from the decision of the defendant denying the plaintiff's site plan application, brought to the Superior Court in the judicial district of Danbury, where the matter was transferred to the judicial district of Hartford, Land Use Litigation Docket; thereafter, the matter was transferred to the judicial district of New Britain; subsequently, the matter was tried to the court, *Hon. Stephen F. Frazzini*, judge trial referee; judgment sustaining the appeal, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Daniel E. Casagrande, for the appellant (defendant).

Kenneth R. Slater, Jr., with whom was *Ann M. Catino*, for the appellee (plaintiff).

Opinion

LAVINE, J. This zoning appeal concerns the conflict that sometimes arises between the state's authority to regulate solid waste management[1] and a municipality's right to regulate the structures and land use within its

[1] See General Statutes § 22a-208 (powers and duties of Commissioner of Energy and Environmental Protection regarding solid waste management).

borders.[2] The plaintiff, MSW Associates, LLC, filed a site plan application (site plan) to construct and operate a solid waste transfer station and volume reduction plant[3] in Danbury (city) that was denied by the defendant, the Planning and Zoning Department of the City of Danbury. The plaintiff appealed to the Superior Court pursuant to General Statutes § 8-8.[4] The Superior Court sustained the plaintiff's appeal. Thereafter, this court granted the defendant's petition for certification to appeal.

On appeal before us, the defendant claims that the trial court erred by (1) construing General Statutes § 22a-208b (b)[5] to require it to approve the site plan

[2] See General Statutes § 8-2 (zoning commission's authority to regulate).

[3] The waste management terms used in this opinion are defined in General Statutes § 22a-207, which provides in relevant part: "(3) 'Solid waste' means unwanted or discarded solid, liquid, semisolid or contained gaseous material, including, but not limited to, demolition debris, material burned or otherwise processed at a resources recovery facility or incinerator, material processed at a recycling facility and sludges or other residue from a water pollution abatement facility, water supply treatment plant or air pollution control facility . . . (4) 'Solid waste facility' means any solid waste disposal area, volume reduction plant, transfer station, wood-burning facility or biomedical waste treatment facility . . . (5) 'Volume reduction plant' means any location or structure, whether located on land or water, where more than two thousand pounds per hour of solid waste generated elsewhere may be reduced in volume, including, but not limited to, resources recovery facilities, waste conversion facilities and other incinerators, recycling facilities, pulverizers, compactors, shredders, balers and composting facilities . . . (11) 'Transfer station' means any location or structure, whether located on land or water, where more than ten cubic yards of solid waste, generated elsewhere, may be stored for transfer or transferred from transportation units and placed in other transportation units for movement to another location, whether or not such waste is stored at the location prior to transfer . . . ."

[4] General Statutes § 8-8 (b) provides in relevant part: "[A]ny person aggrieved by any decision of a board, including a decision to approve or deny a site plan . . . may take an appeal to the superior court for the judicial district in which the municipality is located . . . ." In a decision it issued on May 8, 2018, the court found that the plaintiff was aggrieved by the defendant's decision to deny the site plan.

[5] General Statutes § 22a-208b (b) provides: "Nothing in this chapter or chapter 446e shall be construed to limit the right of a municipality to regulate, through zoning, land usage for an existing or new solid waste facility. No municipal regulation adopted pursuant to section 8-2 shall have the effect of

even though the use is prohibited in the IG-80 zone in which it was proposed and when the city's zoning regulations (regulations) permit other types of solid waste facilities at other locations in the city, (2) ruling that the regulations "have the effect of prohibiting the construction, alteration or operation of solid waste facilities within the limits" of the city and thus violate § 22a-208b (b), (3) refusing to invoke the doctrine of primary jurisdiction to remand the case to the city's zoning commission,[6] and (4) disregarding the language of § 22a-208b (b) that "[n]othing in this chapter shall be construed to limit the right of a municipality to regulate, through zoning, land usage for an existing or new solid waste facility," and by ordering it to approve the site plan in a particular location and zone, thereby usurping the legislative authority of the zoning commission. The defendant also claims that the plaintiff lacks standing to claim a violation of § 22a-208b (b) on the basis of allegations that the regulations fail to allow solid waste facilities other than the specific subtype of facility that it seeks to construct on its property. We agree with the court that the plain language of § 22a-208b (b) bars zoning regulations from having the effect, as the city's do, of prohibiting construction of solid waste facilities of any type within its borders. We, therefore, affirm the judgment of the trial court.

The following facts underlie the present appeal. The plaintiff is the owner of property at 14 Plumtrees Road in the city (property). In February, 2017, pursuant to General Statutes § 22a-208a (a),[7] the Commissioner of

prohibiting the construction, alteration or operation of solid waste facilities within the limits of a municipality."

[6] During oral argument before us, the defendant represented that if we affirm the judgment of the court, we need not reach its primary jurisdiction claim.

[7] General Statutes § 22a-208b (a) provides: "The Commissioner of Energy and Environmental Protection may issue a permit to construct a facility for the land disposal of solid waste pursuant to section 22a-208a, provided the applicant submits to the commissioner a copy of a valid certificate of zoning approval, special permit, special exception or variance, or other documenta-

Energy and Environmental Protection (commissioner) issued a permit to the plaintiff to construct and operate a solid waste transfer station and volume reduction plant on its property.[8] On August 15, 2017, the plaintiff filed with the defendant a site plan to construct a volume reduction plant and waste transfer station on its property. The defendant denied the site plan on October 12, 2017, stating "[i]n accordance with section 6.B of the Zoning Regulations, a volume reduction plant and transfer station is not a permitted use in the IG-80 Zoning District."

Pursuant to § 8-8, the plaintiff timely filed an appeal to the Superior Court that sounded in two counts. In count one, the plaintiff alleged that the defendant acted

tion, establishing that the facility complies with the zoning requirements adopted by the municipality in which such facility is located pursuant to chapter 124 or any special act."

General Statutes § 22a-208a (a) provides in relevant part: "The Commissioner of Energy and Environmental Protection may issue, deny, modify, renew, suspend, revoke or transfer a permit, under such conditions as he may prescribe and upon submission of such information as he may require, for the construction, alteration and operation of solid waste facilities, in accordance with the provisions of this chapter and regulations adopted pursuant to this chapter. . . . In making a decision to grant or deny a permit to construct a solid waste land disposal facility . . . the commissioner shall consider the character of the neighborhood in which such facility is located and may impose requirements for hours and routes of truck traffic, security and fencing and for measures to prevent the blowing of dust and debris and to minimize insects, rodents and odors. In making a decision to grant or deny a permit to construct or operate a new transfer station, the commissioner shall consider whether such transfer station will result in disproportionately high adverse human health or environmental effects. . . ."

[8] The city and its Housing Authority (housing authority) were granted intervenor status in the permit proceedings before the Department of Energy and Environmental Protection. When the commissioner issued the plaintiff a permit, the city and the housing authority filed an administrative appeal under the Uniform Administrative Procedures Act, General Statutes § 4-166 et seq. That appeal also was assigned to the court, *Hon. Stephen F. Frazzini*, judge trial referee, who dismissed the administrative appeal. In adjudicating the present zoning appeal, Judge Frazzini took judicial notice of the companion case, *Danbury* v. *Klee*, Superior Court, judicial district of New Britain, Docket No. CV-17-6036083-S.

arbitrarily, capriciously, unlawfully, and in abuse of the discretion vested in it by, among other things, denying the site plan as a use not permitted by the regulations when that denial is in direct violation of § 22a-208b (b), which provides that no Connecticut zoning regulation shall have the effect of prohibiting the construction and operation of a volume reduction plant and transfer station.[9] The plaintiff also alleged that the site plan complied with all of the requirements applicable to uses permitted in the zone.[10] The plaintiff asked the court to sustain its appeal and to order the defendant to approve its site plan.

The defendant responded, representing that one transfer station and one volume reduction facility existed at 307 White Street (White Street) in the city before a 2007 amendment to the regulations prohibited the construction of transfer stations in the city and before the General Assembly enacted § 22a-208b. The defendant argued that it was entitled to apply the regulations to prohibit the construction of a solid waste facility anywhere else in the city and, therefore, to deny the plaintiff's site plan. In May, 2018, before trial, the court and counsel for the parties visited the property. Trial was held on July 31, 2018, and the court issued a detailed memorandum of decision on February 26, 2019, sustaining the plaintiff's appeal and ordering the defendant to grant the plaintiff's site plan.

In its memorandum of decision, the court stated its findings of fact and legal conclusions as follows. The court began its decision by quoting the defendant's reason for denying the site plan, i.e., "a volume reduction

[9] In count two, the plaintiff sought a declaratory judgment as to whether its proposed solid waste facility is exempt from the regulations or, if not, is subject to the regulations as a permitted use. The plaintiff did not pursue count two at trial, and the court considered the claim abandoned.

[10] The defendant has not claimed that the site plan failed to comply with the requirements for uses permitted in the zone.

plant and transfer station is not a permitted use in the IG-80 zoning district." (Internal quotation marks omitted.) The court then noted that under a permissive zoning scheme such as the one employed by the city,[11] "[a]ny use which is not specifically permitted is automatically excluded." *Gada* v. *Zoning Board of Appeals*, 151 Conn. 46, 48, 193 A.502 (1963).

The court found that the solid waste facility that the plaintiff proposed was to be located in the city's general industrial zone, IG-80. As of the date the defendant denied the site plan, the city's regulations permitted only one type of solid waste facility in IG-80, namely, wood waste processing.[12] The regulations provide that

[11] Section 1.D.2 of the Danbury Zoning Regulations provides: "Except as otherwise provided for in these Regulations for lawfully existing nonconformities, no land, structure or premises, or part thereof, shall be constructed, reconstructed, extended, enlarged, or the use changed, or the dimensional requirements of lots, yards, courts, or open spaces changed except in conformity with the requirements of these Regulations for the applicable district in which it is located. No building or buildings shall occupy in the aggregate a greater percentage of lot area, nor be greater in height than as set forth in the applicable section hereof, except as otherwise specifically provided for in these Regulations."

[12] Section 6 of the Danbury Zoning Regulations is titled Industrial Districts and provides in relevant part:

"6.A. LIGHT INDUSTRIAL DISTRICT: IL-40.

"6.A.1. Purpose and Intent. The purpose of this district is to provide an area for expansion of the industrial base in the City. The uses allowed in this district are of a limited and light industrial nature that if appropriately developed can be compatible with abutting commercial and residential uses.

"6.A.2. Uses. Land and structures may be used only for the following:

"a. Permitted uses. . . .

"b. Special Exception Uses. . . .

"(14) Transfer station if in existence prior to the effective date of this amendment. [Eff. 10/15/2007] . . . .

"6.B. GENERAL INDUSTRIAL DISTRICT: IG-80.

"6.B.1. Purpose and Intent. The purpose of this district is to provide an area for manufacturing, assembly, and product processing of a more general industrial nature than permitted in the IL-40 district. Large lot areas are required to provide an appropriate buffer for the heavy industrial uses that are permitted. This district is also appropriate for planned industrial uses organized in an industrial park setting in suburban locations.

"6.B.2. Uses. Land and structures may be used only for the following.

a transfer station that has been in existence since before October 15, 2007, is a use permitted by special exception in the IL-40 light industrial zone. See footnote 12 of this opinion. Until 2007, transfer stations also were a permitted use by special exception in the IG-80 zone.[13]

In 1985, the commissioner issued a permit for a "solid waste resource recovery and recycling facility" at White Street in the IL-40 zone, and a "solid waste resource recovery and recycling facility" has been in operation at White Street since approximately 1986. (Internal quotation marks omitted.) In 1993, the commissioner issued permits to construct and operate a solid waste transfer station and solid waste volume reduction plant at White Street. As of October 15, 2007, White Street had been used as a transfer station, volume reduction facility, and intermediate processing (recycling) center. White Street has been operated by Winter Bros. Transfer Station of CT, LLC (Winter Bros.), since 2011. In 2012, the city's planning commission approved a revised site plan authorizing Winter Bros. to demolish two buildings and to construct a new 20,720 square foot building at White Street. In 2014, the planning commission approved another revised site plan authorizing Winter Bros. to demolish a third building and to construct a replacement at White Street. The record before the court did

"a. Permitted Uses. . . .

"(24) Wood waste processing. See Section 6.B.4.d.

"b. Special Exception Uses. . . .

"(7) Screening of earth materials, not including washing or crushing. See Sec. 6.B.5.c.

"(8) Sewage works, transformer substation, water storage facility. See Sec. 6.B.5.d. [Eff. 9/29/2011] . . . ."

[13] See *MSW Associates, LLC* v. *Planning Commission*, Superior Court, judicial district of Danbury, Docket No. CV-08-4008817-S (August 8, 2014). The trial court, *Ozalis, J.*, upheld the decision of the city's planning commission to deny the plaintiff's site plan for a special exception permit and site plan approval for a transfer station at 16 Plumtrees Road. Judge Ozalis noted that transfer stations had been a permitted use at the time of that site plan application, but that the city's regulations "subsequently removed transfer stations from permitted special exceptions for the IG-80 zone . . . ." Id., n.1.

not reveal whether the 2012 or the 2014 revised site plans expanded the overall size of White Street.

In addition, the court found that in 2004, Ferris Mulch Products, LLC (Ferris Mulch), filed a site plan application to operate a wood waste and brush recycling facility at 6 Plumtrees Road.[14] The defendant approved Ferris Mulch's site plan in 2005, and the facility has been in operation since that time. As of at least August 18, 2014, the commissioner has permitted Ferris Mulch to operate a solid waste volume reduction plant at 6 Plumtrees Road.

After making the foregoing factual findings, the court turned to the question the plaintiff raised in its appeal, i.e., whether the regulations have the effect prohibited by the second sentence of § 22a-208b (b), that is that "[n]o municipal regulation adopted pursuant to [General Statutes § 8-2] shall have the effect of prohibiting the construction, alteration or operation of solid waste facilities within the limits of a municipality." The court noted that § 22a-208b (b) was enacted in its present form in No. 12-2 of the 2012 Public Acts (P.A. 12-2), in response to *Recycling, Inc.* v. *Milford*, Superior Court, judicial district of Ansonia-Milford, Docket No. CV-10-6002308-S (November 2, 2010) (50 Conn. L. Rptr. 866). In *Recycling, Inc.*, the court, *Hiller, J.*, held that in 2006, the General Assembly repealed the state law permitting local zoning authorities to regulate solid waste facilities other than "facilities for the land disposal of solid waste, i.e., landfills." Id., 870. (Internal quotation marks omitted.) Judge Frazzini found that the General Assembly's enactment of P.A. 12-2 reinstated the law that had existed since 1978, which permitted local zoning bodies to regulate all types of solid waste facilities. See id., 867–68.

[14] The court also found that the commissioner had issued a permit for a " 'Single Item Recycling Facility' " at 6 Plumtrees Road. A cover letter for that site plan application stated that the " 'intended use' " of the facility " 'would be to operate a wood waste and brush recycling facility.' "

Judge Frazzini also found that since at least 1977, courts in this state have recognized that "solid waste management [is] a problem of [statewide] magnitude," and that " '[t]he General Assembly has enacted a rather comprehensive [statewide] solid waste management program, to be administered by the commissioner . . . .' " *Colchester* v. *Reduction Associates, Inc.*, 34 Conn. Supp. 177, 180, 382 A.2d 1333 (1977). "The General Assembly has seen fit to exercise its own power of regulation of solid waste management in this state. To be sure, the General Assembly may allow localities to make additional provisions and otherwise further to control the disposal of solid waste located within their boundaries." Id., 183. The court noted that zoning, a limitation on property rights, is an exercise of the state's police power that derives from and must comply with its statutory authority and purposes. See, e.g., *Builders Service Corp.* v. *Planning & Zoning Commission*, 208 Conn. 267, 275, 545 A.2d 530 (1988); *State* v. *Hillman*, 110 Conn. 92, 100, 147 A. 294 (1929); *Windsor* v. *Whitney*, 95 Conn. 357, 367, 111 A. 354 (1920). The court, therefore, concluded that the zoning authority exercised by the defendant must be construed in the context of the limitations imposed by § 22a-208b (b).

At trial, the plaintiff argued that the city was in violation of § 22a-208b (b) because the regulations do not list solid waste facilities as a permitted use in any zone in the city. The defendant countered that the existence of the Winter Bros. and Ferris Mulch facilities, the zoning regulations that permit wood waste processing in the IG-80 zone, and transfer stations in existence before 1985 in the IL-40 zone demonstrate that solid waste facilities are allowed in some zones in the city, thereby establishing the city's compliance with the strictures of § 22a-208b (b).

The court reviewed the regulations and found that they allow for the construction and operation of one type of solid waste reduction facility in the IG-80 zone,

specifically wood waste processing. As of May 15, 2017, the regulations also permitted rock crushing in the IG-80 zone. Nonetheless, the court concluded that, even if rock crushing is considered volume reduction within the meaning of the Solid Waste Management Act, the 2017 amendment of the regulations did not affect its analysis that under the regulations, no other type of volume reduction facility is permitted to be constructed or operated anywhere in the city. Although White Street contains a volume reduction plant, that function is not included in the regulations as a use by special exception and continues to exist by virtue of § 8-2, which provides in relevant part that zoning "regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations . . . ." The regulations also permit transfer stations that existed in the IL-40 zone before October, 1985, but the regulations do not permit construction of *new* transfer stations anywhere in the city.

The court then turned to the statute, quoting the second sentence of § 22a-208b (b) that forbids municipal regulations that "have the effect of prohibiting the construction, alteration or operation of solid waste *facilities* . . . ." (Emphasis in original.) The court identified the principal question posed by the plaintiff's appeal: "Whether municipal regulations that *permit* construction and operation of only one type of solid waste facility, a volume reduction plant for wood waste processing, *prohibit* construction of any type of transfer station, and prohibit operation of any transfer station not already in existence as of October, 2007, comply with" § 22a-208b (b). (Emphasis added.) In answering the question in the negative, the court was mindful of the canons of statutory construction.[15]

[15] The court cited numerous rules of statutory construction, including among others, that "[w]hen construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other

The court determined that the regulations "prohibit construction of a transfer station anywhere in the city and the construction and operation of most types of volume reduction plants, specifically those unrelated to wood waste processing anywhere in the city. By virtue of § 22a-208b (b), construction of 'solid waste facilities' must be allowed somewhere within the city . . . . The . . . regulations do not allow construction of all subtypes of solid waste facilities. The plain language of § 22a-208b (b) shows, however, that the statute encompasses all subtypes listed in the statutory definition of 'solid waste facility,' which includes '*any* solid waste disposal area' including volume reduction plants and transfer stations. . . . [See General Statutes] § 22a-207 (4). If the legislature had intended to allow a municipality to exclude any of these facilities from the reach of § 22a-208b (b), the language of P.A. 12-2 would have so indicated. By contrast, subsection (a) of § 22a-208b, addressing only facilities 'for the land disposal of solid waste,' shows that when the legislature intends to apply the solid waste laws to only one type of solid waste facility, it does so expressly and not by implication. Instead, subsection (b) of [§ 22a-208b, which is] at issue in [the present] case, forbids prohibiting construction of any type of operation or enterprise fitting within the ambit of the term 'solid waste facility.' Subsection (b) allows a municipality to use zoning laws 'to regulate . . . land usage for an existing or new solid waste facility' so long as the laws do not have 'the effect of prohib-

statutes. If, after examining such text considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 380, 194 A.3d 759 (2018). The court is "required to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provisions at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Teresa T.* v. *Ragaglia*, 272 Conn. 734, 748, 865 A.2d 428 (2005).

iting construction, alteration or operation of solid waste facilities within the limits of a municipality." (Emphasis in original; footnote omitted.) See *Neighborhood Assn., Inc.* v. *Limberger*, 321 Conn. 29, 39, 136 A.3d 581 (2016) (statutes must be construed such that no clause, sentence, or word is superfluous, void, or insignificant). The court stated that interpreting the language of the statute otherwise would not be reasonable or rational. See *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010) (those who promulgate statutes do not intend absurd results).

The defendant, however, argued that the fact that the regulations allow transfer stations that existed as of October, 2007, within the IL-40 zone means that the regulations do not run afoul of § 22a-208b (b). The court rejected the argument, stating that under the regulations, no owner of other property in the IL-40 zone may construct or operate a transfer station. Although such a provision may not violate the uniformity requirement of § 8-2 (a); see *Roncari Industries, Inc.* v. *Planning & Zoning Commission*, 281 Conn. 66, 82–83, 912 A.2d 1008 (2007) (*Roncari*); the regulations allowing within the IL-40 zone only transfer stations in existence as of October, 2007, prohibit by implication the construction of any transfer stations after that date, as well as the operation of such newly constructed facilities, all in contravention of the plain language of § 22a-208b (b). Under § 22a-208b (b), zoning regulations may not have the effect, as do the regulations in the present case, of prohibiting the construction of solid waste facilities or the operation of such facilities.

The court continued, stating: "Moreover, 'it is axiomatic that those who promulgate statutes . . . do not intend to promulgate statutes . . . that lead to absurd consequences or bizarre results.' " . . . *State* v. *Courchesne*, [supra, 296 Conn. 710]. "The law prefers rational and prudent statutory construction, and we seek to avoid interpretations of statutes that produce

odd or illogical outcomes." *State* v. *George J.*, 280 Conn. 551, 574–75, 910 A.2d 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007). The court reasoned that "[i]t would make little sense and would yield a bizarre result if the [regulations] could not prohibit operation of a solid waste facility, because such a prohibition would have the effect barred by § 22a-208b (b), but could nonetheless prohibit" construction of such a facility. Although the court found that the language of § 22a-208b (b) is clear and unambiguous and encompasses all types of solid waste facilities, the court nonetheless reviewed the legislative history, which it found instructive.[16]

On the basis of its review of the legislative history of P.A. 12-2, the court concluded that "the legislative history supports a broad construction of the second

[16] Pursuant to its review of the legislative history, the court found that "[t]he crux of § 22a-208b (b) was to restore the authority of municipalities to regulate solid waste facilities and to decide where within a municipality these facilities should be located, but [not] to prevent municipalities from banning any type of solid waste facility within [its] borders." The court quoted remarks of State Senator J. Edward Meyer during a discussion of P.A. 12-2: "I think that the balance is here because within zoning, for example, a solid waste facility might not be appropriate in a residential zone, but would be appropriate in a commercial zone. And the town, if it did an outright prohibition, and just said that there is no zone in which a solid waste facility could be constructed in that town. You've got a very direct provision in this bill that we're debating today that says you can't prohibit solid waste facilities. So within a zoning plan or a zoning scheme of any town there will be, as a matter of law, a place in which one of these facilities could be constructed." 55 S. Proc., Pt. 1, 2012 Sess., pp. 164–65.

In its brief, the defendant notes the comments made by Representative Richard Roy, who moved for passage of P.A. 12-2, stating in relevant part: "This bill clarifies that municipalities do retain those powers to enact and implement local zoning laws that regulate safety issues such as fire and traffic concerns at solid waste facilities in their communities. . . . The Department of . . . Energy and Environmental Protection will possess sole regulatory authority over those facilities and its power to impose conditions related to such local concerns are limited. The bill makes clear that towns can continue to regulate those traditional local issues. *A town would not be permitted to pass an ordinance banning such facilities*." (Emphasis added.) 55 H.R. Proc., Pt. 1, 2012 Sess., pp. 324–25.

sentence of § 22a-208b (b) as barring zoning laws from prohibiting construction or alteration or operation of any type of a solid waste facility. The statute gives towns the right to regulate solid waste facilities—where they may be located, etc., but not to bar any type of them. Allowing construction of only a leaf mulching facility, for example, would not relieve a [municipality] from the prohibition of that statute . . . . The statutes describe and define many types of solid waste facilities, and permitting only one of those types has the effect prohibited by § 22a-208b (b) of excluding other types. . . . [A]llowing construction of only one subset of one type of solid waste facilities in the IG-80 zone and not allowing construction of a transfer station anywhere in the city [does] not comport with the language of § 22a-208b (b) or the legislative intent behind that statute."[17] (Footnotes omitted.)

In its conclusion, the court stated that "[t]he defendant denied the plaintiff's site plan . . . on the grounds that 'a volume reduction plant and transfer station is not a permitted use in the IG-80 zoning district.' The reason thus stated is, in effect, an admission that permitting one subset (wood waste processing) of one type

[17] The court also addressed the defendant's claim that the court should apply the doctrine of primary jurisdiction if it determined that the regulations have the effect prohibited by § 22a-208b (b) and either remand the case or stay the judicial proceeding to enable the zoning commission to adopt new regulations that comply with § 22a-208b (b). "Primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." (Internal quotation marks omitted.) *Waterbury* v. *Washington*, 260 Conn. 506, 574, 800 A.2d 1102 (2002). The court stated that the present case did not require "the resolution of threshold issues" within "the specialized knowledge of the agency involved." (Internal quotation marks omitted.) The issue presented is one of law, i.e., do the regulations comply with the restrictions of § 22a-208b (b). The court did not need agency help in interpreting overly technical regulations. Trial courts regularly decide zoning appeals.

(a volume reduction plant) of solid waste facility does not mean that the zoning regulations permit volume reduction plants in that zone. More importantly, the [regulations] applied by the [defendant] when it denied the . . . site plan . . . 'have the effect of prohibiting the construction . . . of solid waste facilities' throughout [the city] contrary to the mandate of § 22a-208b (b). The plain language of that statute prohibits [municipalities] from using their zoning regulations to prevent construction of transfer stations and all types of volume reduction plants, as the [regulations] do. Although [the regulations] may be permissive in nature, they also cannot have the effect of prohibiting construction of *any* type of solid waste facility throughout the entire [city], or of then prohibiting operation of such facilities. In the face of [§ 22a-208b (b)], the defendant's reason for denying the . . . site plan . . . cannot withstand judicial scrutiny." (Emphasis added; footnotes omitted.) The court, therefore, sustained the plaintiff's appeal and remanded the case with direction to grant the site plan.

Thereafter, on March 15, 2019, the defendant filed a petition for certification to appeal to this court. The defendant's principal claim was that the court improperly construed § 22a-208b (b) to require it to grant the site plan "even though the use is prohibited in the IG-80 . . . zone . . . in which it was proposed, and when [the regulations] permit other types of solid waste facilities at other locations in the city." This court granted the petition on May 22, 2019.

I

The defendant has briefed several interrelated claims; we will address them together.[18] The defendant claims that the court erred by holding that (1) the regulations' limitation of transfer station facilities only to those in

[18] There is some discrepancy between the defendant's statement of the issues and the issues as they are briefed. We will address the claims as the defendant briefed them.

the IL-40 zone and in existence as of October 15, 2007, violates § 22a-208b (b), (2) the rights that White Street enjoys as a prior nonconforming use do not limit its status as a permitted special exception use, and (3) the regulations have the effect of prohibiting throughout the city the construction, alteration or operation of the type of transfer station/volume reduction facility that the plaintiff desires to build. We disagree.

We begin with a brief review of the history of zoning and solid waste management law in this state to provide context for this appeal. Our review demonstrates that these two areas of law have not always worked together seamlessly. Of principal importance is the fact that "a municipality, as a creature of the state can exercise only such powers as are expressly granted it or such powers as are necessary to enable it to discharge the duties and carry into effect the objects and purposes of its creation." (Internal quotation marks omitted.) *Bencivenga* v. *Milford*, 183 Conn. 168, 173, 438 A.2d 1174 (1981). Connecticut municipalities have no inherent powers of their own. *Capalbo* v. *Planning & Zoning Board of Appeals*, 208 Conn. 480, 490, 547 A.2d 528 (1988). "There is attached to every ordinance, charter or resolution adopted by or affecting a municipality the implied condition that these must yield to the predominant power of the state when that power has been exercised." *Bencivenga* v. *Milford*, supra, 173. "[A] local ordinance is preempted by a state statute whenever the legislature has demonstrated an intent to occupy the entire field of regulation on the matter . . . or . . . whenever the local ordinance irreconcilably conflicts with the statute." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, 234 Conn. 221, 232, 662 A.2d 1179 (1995). "[W]hether the legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute, and of the facts and

circumstances upon which it intended to operate." (Internal quotation marks omitted.) *Bencivenga* v. *Milford*, supra, 176.

The General Assembly can delegate the authority of the state to municipalities, particularly for local matters and including land use. See *Bottone* v. *Westport*, 209 Conn. 652, 658, 553 A.2d 576 (1989). "[Z]oning authorities can only exercise such power as has been validly conferred upon them by the General Assembly." (Internal quotation marks omitted.) *Capalbo* v. *Planning & Zoning Board of Appeals*, supra, 208 Conn. 490. The General Assembly enacted the first land use laws in 1917, which permitted "municipalities to form planning commissions, with limited powers." 9 R. Fuller, Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 1:1, p. 2. "In 1925, the legislature passed a zoning enabling act, which applied to all Connecticut municipalities . . . ." Id. Zoning, planning, and other land use ordinances are based on valid delegations of authority from the state, but regulation must be exercised in accordance with the grant of authority given by the statute. In deciding whether a power exists, the question is whether there is statutory authority for the enactment, not whether there is a statutory prohibition against it. *Capalbo* v. *Planning & Zoning Board of Appeals*, supra, 490; see also 9 R. Fuller, supra, § 1:1, pp. 3–4.

Since approximately 1977, the courts of this state have recognized that "solid waste management [is] a problem of [statewide] magnitude," and that "[t]he General Assembly has enacted a rather comprehensive [statewide] solid waste management program, to be administered by the commissioner . . . ." *Colchester* v. *Reduction Associates, Inc.*, supra, 34 Conn. Supp. 180. The statutory scheme is codified in title 22a of the General Statutes, titled Environmental Protection. Section 22a-208b (b) is in chapter 446d of title 22a, and is titled "Zoning approval of disposal areas. Municipal

authority re land usage for solid waste facilities. *Limitations*." (Emphasis added.) The language of the first solid waste management statutes and the circumstances surrounding their enactment "indicate that the legislature did not intend to occupy the entire field of regulation with regard to solid waste facilities. That section expressly provides in part that nothing in this chapter . . . shall be construed to limit the right of any local governing body to regulate, through zoning, land usage for solid waste disposal." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 233. Consequently, local zoning laws are preempted only to the extent that they conflict with permits issued by the commissioner. See *Beacon Falls* v. *Posick*, 212 Conn. 570, 579, 563 A.2d 285 (1989). When, however, local zoning regulations irreconcilably conflict with a state statute, the local regulation is preempted. See *Dwyer* v. *Farrell*, 193 Conn. 7, 14, 475 A.2d 257 (1984). "Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives." (Internal quotation marks omitted.) *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 232.

With this background, we now turn to the defendant's claim, which requires us to construe § 22a-208b (b), the regulations, and the court's memorandum of decision. We "construe a statute in a manner that will not thwart its intended purpose or lead to absurd results. . . . We must avoid a construction that fails to attain a rational and sensible result that bears directly on the result that the legislature sought to achieve." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc.* v. *Seventh BRT Development Corp.*, 245 Conn. 1, 31 n.26, 717 A.2d 77 (1998). "In seeking to determine [the] meaning [of a statute we] . . . first . . . consider

the text of the statute . . . itself and its relationship to other statutes . . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594, 181 A.3d 550 (2018). "We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise." (Internal quotation marks omitted.) Id.

"Administrative rules and regulations are given the force and effect of law. . . . We therefore construe agency regulations in accordance with accepted rules of statutory construction." (Internal quotation marks omitted.) *Colonial Investors, LLC* v. *Furbush*, 175 Conn. App. 154, 169, 167 A.3d 987, cert. denied, 327 Conn. 968, 173 A.3d 953 (2017). The interpretation of statutes and regulations is a question of law over which our review is plenary. *Meadowbrook Center, Inc.* v. *Buchman*, supra, 328 Conn. 594. "The construction of a judgment is a question of law with the determinative factor being the intent of the court as gathered from all parts of the judgment." (Internal quotation marks omitted.) *Moasser* v. *Becker*, 107 Conn. App. 130, 135, 946 A.2d 230 (2008).

Section 22a-208b (b) provides in relevant part: "Nothing in this chapter . . . shall be construed to limit the right of a municipality to *regulate*, through zoning, land usage for an existing or new solid waste facility. No municipal regulation adopted pursuant to section 8-2 shall have the effect of prohibiting the construction, alteration or operation of solid waste facilities within the limits of a municipality." (Emphasis added.) By its plain terms, the first sentence of § 22a-208b (b) enables municipalities to *regulate* through zoning land usage for existing or new solid waste facilities. The plain terms of the second sentence of the statute, however, provide

that no zoning regulation shall have the effect of *prohibiting* the construction, alteration or operation of solid waste facilities within the municipality.

As a creation of the state, a municipality can exercise only those powers expressly granted to it. *Bencivenga* v. *Milford*, supra, 183 Conn. 173. We, therefore, look to § 8-2 (a), the statute that grants municipalities their zoning authority, to determine what municipalities may regulate. In doing so, we are mindful that General Statutes § 1-2z provides that we are to consider the text of the statute itself and its relationship to other statutes. "[T]he legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . ." (Internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003).

Section 8-2 (a) provides in relevant part that "[t]he zoning commission of each city . . . is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses . . . . Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district . . . . Such regulations shall not prohibit the continuance of any

nonconforming use, building or structure existing at the time of the adoption of such regulations or require a special permit or special exception for any such continuance. . . .''

Our plenary review of § 8-2 (a) discloses that it grants a municipality authority to regulate, among other things, the height, size, setbacks, and location of structures; it does not, however, grant a municipality the authority to prohibit the construction, alteration or operation of a solid waste facility within its borders. ''We are constrained to read a statute as written . . . and we may not read into clearly expressed legislation provisions which do not find expression in its words . . . .'' (Internal quotation marks omitted.) *Bank of New York* v. *National Funding*, 97 Conn. App. 133, 140–41, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), cert. denied sub nom. *Reyad* v. *Bank of New York*, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007).

''The word regulate has been defined as to prescribe the rule by which commerce is to be governed. . . . The power to regulate, however, entails a certain degree of prohibition. . . . The word regulate implies, when used in legislation, the bringing under the control of constituted authorities the subject to be regulated. . . . It infers limitations.'' (Citations omitted; internal quotation marks omitted.) *Blue Sky Bar, Inc.* v. *Stratford*, 203 Conn. 14, 20, 523 A.2d 467 (1987). ''[T]he power to regulate, however, does not necessarily imply the power to prohibit absolutely any business or trade, as the very essence of regulation, which infers limitations, is the continued existence of that which is regulated. Prohibition of an incident to or particular method of carrying on a business is not prohibition, but rather it is merely regulation.'' (Internal quotation marks omitted.) Id., 20–21.

Sections 8-2 (a) and 22a-208b (b) are part of a coordinated statutory whole. When properly employed, zoning regulations work in tandem with the state's preemption

of solid waste management in the state, as demonstrated in *Bauer* v. *Waste Management of Connecticut, Inc.*, supra, 234 Conn. 221. In *Bauer*, the owner of a landfill in New Milford appealed the town zoning commission's adoption of height limitations on landfills in New Milford. Id., 226–27. The landowner originally received a permit from the commissioner to operate a landfill to a maximum height of ninety feet. Id. The owner of the landfill later applied for a permit from the commissioner allowing it to operate a landfill to a maximum of 190 feet. Id. The New Milford zoning commission amended its regulations limiting the height of landfills to a maximum of ninety feet. Id., 227. The owner of the landfill claimed in its appeal that the reservation of powers to local zoning authorities in what is now § 22a-208b was not applicable to another subsection. Id., 234. Our Supreme Court disagreed with the landowner and read the statute to mean that "the zoning authority of a town may be brought to bear on solid waste facilities located within its borders." Id. It did not "suggest that regulation beyond permissible zoning authority would not be preempted by the solid waste management chapter of the [G]eneral [S]tatues . . . ." Id., 234–35. Nor did it "suggest that land use regulation through zoning that is in conflict with state statutes and regulations is permissible. A height restriction, however, does not go beyond New Milford's zoning authority." Id., 235. The Supreme Court was not convinced that the New Milford height restriction was preempted because it irreconcilably conflicted with the statute or the permit itself. "Compliance with the [zoning commission's] maximum height of ninety feet a fortiori implies compliance with [the commissioner's] authorized maximum height of 190 feet. [The owner of the landfill would have our Supreme Court] read the [commissioner's] permit to authorize the landfill to reach the 190 foot limit; rather [the Supreme Court understood] the permit to allow the landfill to go no higher than 190 feet, but to allow any level

below that. In this sense, [the commissioner's] permit is prohibitory and the height limitation imposed by the [zoning commission], therefore, merely goes further in its prohibition than the [commissioner's] permit." (Emphasis omitted.) Id., 235–36.

In the present case, our examination of the regulations persuades us that they do not permit a new transfer station anywhere in the city, in effect, prohibiting the construction, alteration or operation of solid waste facilities. We agree with the trial court's determination that the regulations permit the construction and operation of one type of solid waste reduction facility, wood waste processing, in the IG-80 zone. The regulations, however, permit no other type of volume reduction facility to be constructed or operated anywhere in the city. Although White Street contains a volume reduction facility, that function is not included in the zoning regulations as a use by special exception. It exists by virtue of § 8-2, which provides in relevant part that zoning regulations "shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations . . . ." The regulations also permit transfer stations existing before October, 1985, in the IL-40 zone, but the regulations do not permit construction of a new transfer station anywhere in the city. We conclude, therefore, that because the regulations do not permit the construction or operation of a *new* transfer station or other type of solid waste facility in the city, the regulations do not conform to the strictures of § 22a-208b (b).

The defendant relies on *Roncari*, supra, 281 Conn. 66, to support its position that a zoning commission has the power to limit uses allowed in a zone to those existing on a specific date.[19] Although that proposition

[19] The defendant represented that the trial court favorably cited *Roncari*, supra, 281 Conn. 66. Our review of the trial court's memorandum of decision discloses that the court cited *Roncari* only for the proposition that zoning imposed on transfer stations within the IL-40 zone in existence as of October,

is an accurate statement with respect to zoning law generally, it has no application in the present case. First, *Roncari* concerns the legislative authority of a municipal planning and zoning commission, unlike the defendant's function to review site plans to determine whether they conform to the regulations. "In ruling upon a site plan application, the planning commission acts in its ministerial capacity, rather than its quasi-judicial or legislative capacity. It is given no independent discretion beyond determining whether the plan complies with the applicable regulations." (Internal quotation marks omitted.) *Berlin Batting Cages, Inc.* v. *Planning & Zoning Commission*, 76 Conn. App. 199, 221, 821 A.2d 269 (2003). More obviously, *Roncari* did not concern a solid waste management facility, but rather a site plan for valet parking along a highway in Windsor Locks. *Roncari*, supra, 68. The regulations at issue in *Roncari* did not come within the ambit of § 22a-208b (b). *Roncari* is purely a zoning case and the zoning principles articulated therein are not applicable in the present case in which § 22a-208b (b) controls the extent to which the city may exercise its zoning authority over solid waste facilities.

We do not disagree with the defendant's claim that White Street, as a prior nonconforming use, does not limit its status as a permitted special exception use. But we do agree with the plaintiff's position that White Street's status as a preexisting transfer station is not relevant to the trial court's determination that the regulations under which the defendant denied the plaintiff's site plan do not permit the construction and operation of a *new* waste management facility, unless it is related

2007, does not violate the uniformity requirement of § 8-2 (a). The court, however, concluded that the regulations allowing within the IL-40 zone only transfer stations in existence as of October, 2007, prohibit by implication the construction of any transfer station after that date, as well as the operation of any such newly constructed facilities, all in contravention of the plain language of § 22-208b (b).

to the production of mulch, anywhere in the city. The defendant's claim is without merit

The defendant also claims, referring to one sentence in the court's memorandum of decision, that the court erred by ruling that the regulations have the effect of prohibiting the volume reduction component of White Street. The defendant has misconstrued the court's analysis. The referenced sentence states: "Although the Winter Bros. facility contains a volume reduction plant, that function is not included in the zoning regulations as a use by special exception and continues to exist by virtue of . . . § 8-2, which provides in relevant part that '[zoning] regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. . . .' That sentence merely means that the regulations do not permit the construction, alteration or operation of any *new* solid waste facility in the city. Preexisting solid waste facilities are protected by § 8-2. The defendant denied the site plan because "a volume reduction plant and transfer station is not a permitted use in the IG-80 Zoning District." The regulations do not permit the construction, alteration or operation of any *new* solid waste reduction facility in the city and, therefore, solid waste facilities that exist in the city pursuant to § 8-2 are not relevant to the issue before us.

II

The defendant asserts that the plaintiff lacks standing to claim a violation of § 22a-208b (b) on the basis of allegations that the regulations fail to allow solid waste facilities other than the specific subtype of facility it seeks to construct on the property.[20] We do not construe the plaintiff's allegations as making such a claim.

[20] The defendant argues that the plaintiff lacks standing because it has no legal right to set judicial machinery in motion because it has no real interest in the cause of action. See *AvalonBay Communities, Inc.* v. *Zoning Commission*, 87 Conn. App. 537, 542, 867 A.2d 37 (2005), aff'd, 280 Conn. 405, 908 A.2d 1033 (2006). We disagree. The plaintiff sought the approval

"[A] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the right to set judicial machinery in motion." (Citation omitted; internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002). "It is axiomatic that aggrievement is a basic requirement of standing . . . ." (Internal quotation marks omitted.) *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 485, 122 A.3d 242 (2015). Standing implicates the court's subject matter jurisdiction; the plenary standard of review pertains to questions of standing. *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 398–99, 234 A.3d 111 (2020).

In its zoning appeal, the plaintiff alleged, in relevant part, that it was the owner of the property and desired to construct and operate a volume reduction plant and transfer station on the property. It also alleged that a volume reduction plant and transfer station is a solid waste facility and that § 22a-208b (b) provides that "[n]o municipal regulation adopted pursuant to § 8-2 shall have the effect of prohibiting the construction, alteration or operation of solid waste facilities within the limits of a municipality." The plaintiff further alleged that construction and operation of a volume reduction plant and transfer station is not a permitted use in the city's IG-80 zone. The appeal also alleged that the site plan complied with all of the requirements applicable to uses permitted in the IG-80 zone and that the defendant denied the site plan on the ground that "a volume reduction plant and transfer station is not a permitted use in the zone." In addition, the plaintiff alleged that the defendant "acted arbitrarily, capriciously, unlawfully, and in abuse of the discretion vested in it . . . [b]y denying the site plan . . . as a use not permitted by the regulations when that denial is in direct violation

of a site plan that the defendant denied and therefore was aggrieved by the defendant's action.

of . . . § 22a-208b . . . .'' The plaintiff prayed that the court sustain its appeal and order the defendant to approve the site plan.

On March 26, 2018, the defendant filed a motion to dismiss the appeal on the ground that the plaintiff was not aggrieved by its decision to deny the site plan as it was not the owner of the property. Following an evidentiary hearing, the trial court denied the motion to dismiss on May 8, 2018, finding that the plaintiff was an equitable owner of the property.[21]

The defendant argues that the plaintiff sought approval to construct a transfer station and volume reduction facility on its property. The defendant claims that it has demonstrated that the regulations do not have the effect of prohibiting the construction, alteration or operation of White Street, which is the same type of facility the plaintiff wishes to construct and operate. It also claims that the plaintiff asserted, and that the trial court agreed, that the regulations violate § 22a-208b (b) because they do not permit all subtypes of solid waste facilities in the city, and that the plaintiff lacks standing to raise the alleged violation of § 22a-208b (b) as to any type of solid waste facility other than the one it seeks to construct and operate.

The plaintiff responded that it did not seek to have the regulations invalidated. In its appeal, it merely sought to have the court order the defendant to approve the site plan that complied with the regulations related to industrial uses in the IG-80 zone as required by § 22a-208b (b). We agree with the plaintiff. We also conclude that the plaintiff is aggrieved by the defendant's denial of the site plan and that there is an actual controversy

[21] The court found that the plaintiff had a contract to purchase the property. See *Salce* v. *Wolczek*, 314 Conn. 675, 688–89, 104 A.3d 694 (2014) (doctrine of equitable conversion vests equitable title in purchaser of land under contract).

at issue. See *AvalonBay Communities, Inc.* v. *Zoning Commission*, 87 Conn. App. 537, 542, 867 A.2d 37 (2005), aff'd, 280 Conn. 405, 908 A.2d 1033 (2006). Moreover, the trial court did not invalidate the regulations. Rather it held that the ground on which the defendant denied the site plan, i.e., a volume reduction plant and transfer station is not a permitted use in the zone, did not withstand judicial scrutiny pursuant to § 22a-208b (b).

As we concluded in part I of this opinion, White Street's existence is not relevant to the question of whether the defendant properly denied the site plan pursuant to § 22a-208b (b). The plaintiff's zoning appeal sought to have the site plan approved, not to invalidate the regulations. The defendant's claim lacks merit and therefore fails.[22]

For the foregoing reasons, we agree with the trial court that the regulations are incompatible with the second sentence of § 22-208b (b), which provides that "[n]o municipal regulation adopted pursuant to section 8-2 shall have the effect of prohibiting the construction, alteration or operation of solid waste facilities within the limits of a municipality."

The judgment is affirmed.

In this opinion the other judges concurred.

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[22] Because we affirm the judgment of the court, we decline to address the defendant's primary jurisdiction claim. See footnote 6 of this opinion.

STATE OF CONNECTICUT *v.* DWAYNE SAYLES (AC 43500)

Elgo, Alexander and Suarez, Js.

Syllabus

The defendant, who had been convicted of felony murder and several other crimes, appealed, claiming that the trial court improperly denied his motions to suppress his cell phone that was seized by the police and the information it contained. The defendant and two other men, V and S, had driven to and parked their car near a convenience store. V remained in the car while the defendant and S went into the store, robbed it of cash and cigars, and fatally shot the victim, an employee, before fleeing in the car with V. The police later took a statement from V, who identified the defendant and S as the perpetrators of the robbery and murder, and stated that they had contacted him by cell phone or that he had contacted them by cell phone on the day of the victim's death. The next day, the defendant spoke with two detectives at the police station. After the defendant invoked his right to counsel pursuant to *Miranda* v. *Arizona* (384 U.S. 436), one of the detectives, P, asked the defendant where his cell phone was located. The defendant responded that the phone was with his mother, who was waiting outside of the interview room. P then asked the defendant's mother for the cell phone, which she gave him. The next day, P prepared an affidavit in support of an application for a search and seizure warrant to obtain the contents of the phone. The defendant claimed in his first motion to suppress that the police lacked probable cause to seize his phone at the police station and that the detectives improperly continued questioning him after he invoked his right to counsel pursuant to *Miranda*. He further claimed that the subsequent search of the phone's contents constituted fruit of the poisonous tree as a result of P's having prepared an inaccurate affidavit as part of the warrant application. In his second motion to suppress, the defendant sought to suppress the contents of and cellular data from the phone due to alleged violations of the federal and state constitutions. He claimed that he was entitled to a hearing pursuant to *Franks* v. *Delaware* (438 U.S. 154) because he had made a preliminary showing that P's affidavit contained assertions that were known to be false or were made with reckless disregard for the truth. On appeal, the defendant claimed, inter alia, that this court should adopt a prophylactic rule under the state constitution that would render inadmissible incriminating evidence obtained after a criminal suspect invokes the right to counsel or to have counsel present and the police continue to use deceptive tactics to undermine those rights. *Held*:

1. The trial court properly denied the defendant's motion to suppress the evidence that was obtained from his cell phone, which was based on

his assertion that the evidence was discovered as a result of a *Miranda* violation by the police: the defendant did not seek to suppress his response to P, which occurred after the defendant's request for counsel, and, even if a *Miranda* violation occurred when P questioned him as to the phone's location after the invocation of his rights to remain silent and to counsel, the phone and its contents were not subject to suppression under the fruit of the poisonous tree doctrine, as *Miranda* does not apply to the fruits of unwarned statements; furthermore, this court declined to adopt the prophylactic rule the defendant proposed, as the record and the trial court's findings did not support his claim that the police intended to undermine his invocation of his *Miranda* rights and to trick him into telling them where his phone was, and the trial court found, to the contrary, that there was evidence of the phone's use prior to and after the victim's death, and that P wanted to seize the phone to ensure that its data was not erased or damaged; moreover, the defendant's brief lacked a comprehensive analysis of the state constitution that would persuade this court of the propriety of adopting his proposed rule or that the protections afforded by the state constitution are greater than those afforded by the federal constitution.

2. The defendant could not prevail on his claim that the trial court erred in concluding that the police had probable cause to seize his cell phone pursuant to the exigent circumstances exception to the fourth amendment's warrant requirement: the court correctly found that P, while at the police station, had sufficient information to establish probable cause, which included information that the defendant and S had been involved in the robbery and shooting and that one of them had communicated with V by cell phone, and the court credited P's testimony that criminal actors often use cell phones to communicate with one another and that cell phones may contain evidence that may connect a person to a crime; moreover, there was no merit to the defendant's assertion that the police should not have relied on V's statements to establish probable cause, as it is proper for the police to assess the credibility of informants, and V's statements that were against his penal interest carried their own indicia of credibility.

3. The defendant's claim that the warrant application to search his cell phone contained materially false information pursuant to *Franks* was inadequate for review, as the trial court did not make a finding as to whether the omission in P's affidavit that questioning of the defendant occurred after he requested counsel was done knowingly or falsely or with reckless disregard for the truth, and the defendant's brief failed to address whether that omission was material to the determination of probable cause.

Argued September 17, 2020—officially released February 23, 2021

Procedural History

Substitute information charging the defendant with the crimes of felony murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *B. Fischer*, *J.*, denied the defendant's motions to suppress certain evidence; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Seth R. Garbarsky*, senior assistant state's attorney, and *Lisa M. D'Angelo*, assistant state's attorney, for the appellee (state).

Opinion

ALEXANDER, J. The defendant, Dwayne Sayles, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2), criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court improperly denied his motions to suppress certain evidence. Specifically, he contends that (1) police detectives violated his *Miranda* rights[1]

[1] See *Miranda* v. *United States*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

and his rights pursuant to article first, § 8, of the Connecticut constitution when they continued to interrogate him after he invoked his right to counsel, (2) the police detectives seized his cell phone in violation of the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution, and (3) the affidavit that the police submitted in support of their application for a warrant to search the contents of his cell phone contained materially false information.[2] We disagree and, accordingly, affirm the judgment of conviction.

The jury reasonably could have found the following facts. On April 6, 2015, Leighton Vanderberg drove around in his wife's Ford Focus with the defendant and Jamal Sumler.[3] The three men proceeded to the Fair Haven section of New Haven and then toward Forbes Avenue. Sumler requested that they stop at a store. Vanderberg complied, drove to a convenience store and parked on the street. Vanderberg asked Sumler to purchase a couple of cigars and provided him with cash to complete the transaction. The defendant and Sumler went into the convenience store while Vanderberg remained in the vehicle.

Sumler, wearing a grey hooded sweatshirt, entered the convenience store first. As he approached the counter, he pointed a pistol at the victim, Sanjay Patel, an employee at the convenience store. As Sumler moved behind a counter, the defendant entered the convenience store. The defendant pulled out a pistol from his pocket and, after a few moments, shot the victim. The defendant was handed a box of cigars and some cash. He then moved toward the entrance of the convenience store. As Sumler and the victim, who brandished

[2] See generally *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

[3] See *State* v. *Sumler*, 199 Conn. App. 187, 190–93, 235 A.3d 576 (2020).

a stool, engaged in a physical altercation, the defendant fled. After the defendant departed, Sumler shot the victim.

At the time of the robbery and shooting, Jonathan Gavilanes was at a friend's house on Forbes Avenue. He heard the sound of gunshots coming from the convenience store. Gavilanes observed two men leaving the store. Gavilanes called 911 and reported the shooting. The victim was transported to Yale New Haven Hospital, where he died from his injuries.[4] During their investigation, the police recovered evidence from the shooting scene as well as a surveillance video of the incident.

After the shooting, Vanderberg noticed that the defendant was carrying cigars that were falling out of his hands as he returned to the vehicle.[5] As the defendant entered the vehicle, he demanded that Vanderberg drive away. Vanderberg responded that they had to wait for Sumler. After Sumler returned and got into the car, the three men drove away, and the defendant directed Vanderberg to go to the Church Street South housing complex. After parking there, Vanderberg noticed that the defendant had taken an entire box of cigars from the convenience store and watched as the defendant placed that box, and the sweatshirt he had been wearing, into a nearby dumpster. Vanderberg, who had lent the sweatshirt to the defendant, asked why he had thrown it away. The defendant responded, "that shit [is] hot." The three men then walked along a path to the defendant's apartment, where Vanderberg, after speaking with the defendant later, realized that the defendant and Sumler likely had robbed the convenience

[4] Frank Evangelista, an associate state medical examiner, testified that he had performed an autopsy on the victim and determined the cause of death to be gunshot wounds of the torso and extremities.

[5] Shortly after the shooting, Elsa Berrios, a New Haven police officer, parked her police cruiser near the crime scene and searched for suspects or evidence. She observed a trail of cigars on the ground that were similar to those taken by the defendant from the convenience store.

store. After receiving approximately $20 for gas from the defendant and thirty to forty cigars from Sumler, Vanderberg left the apartment.

The next night, Vanderberg learned from a friend that the victim had been shot and killed at the convenience store. Thereafter, he informed his probation officer about what had transpired at the convenience store. Following his arrest, Vanderberg met with police detectives on April 14, 2015, and identified the defendant and Sumler in photographs that were taken from surveillance video at the convenience store. On April 15, 2015, after the police had procured a warrant and conducted a search of the defendant's residence, the defendant came to the police station, accompanied by his mother, and was interviewed by two detectives. After further investigation, the police arrested the defendant. In May, 2015, while in pretrial custody, he admitted to a fellow inmate that he and Sumler had shot the victim during the robbery of the convenience store.

The state charged the defendant with felony murder, conspiracy to commit robbery in the first degree, criminal possession of a pistol or revolver and carrying a pistol without a permit. The court denied two pretrial motions to suppress that the defendant had filed, and, following a trial, the jury found him guilty of all counts. The court rendered judgment in accordance with the verdict and imposed a total effective sentence of eighty years of incarceration. This appeal followed.[6]

The following additional facts and procedural history are necessary to address the defendant's specific claims. In the defendant's first motion to suppress, filed on January 16, 2018, he sought to suppress the contents of his cell phone, which, he alleged, had been seized

[6] The defendant filed a motion for articulation, which the trial court denied on February 4, 2020. The defendant then filed a motion for review with this court. We granted the motion but denied the relief requested.

in violation of the United States and Connecticut constitutions. The defendant claimed that, after his unambiguous request for counsel during his interview at the police station on April 15, 2015, Detective Christopher Perrone of the New Haven Police Department asked him where his cell phone was located. The defendant responded that his mother, who was waiting outside the interview room, possessed the phone.[7] Perrone then obtained the phone from the defendant's mother. The next day, Perrone prepared an affidavit as part of an application for a search and seizure warrant to obtain the data contained in the defendant's cell phone. Thereafter, the court issued the warrant for the contents of the defendant's cell phone.[8]

In his first motion to suppress, the defendant argued that the police detectives lacked probable cause to seize his cell phone on April 15, 2015. At that time, they did not have a warrant. He additionally claimed that, during

[7] In *Riley* v. *California*, 573 U.S. 373, 385, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), the United States Supreme Court considered "how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." It also noted that "[t]he term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, [R]olodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps or newspapers." Id., 393. Ultimately, the court held that "officers must generally secure a warrant before conducting . . . a search [of the information on a cell phone]." Id., 386.

[8] The detectives sent the defendant's cell phone to the Federal Bureau of Investigation (FBI) for the purpose of retrieving the data contained within the phone. Initially, the FBI was unable to defeat the phone's passcode protection. Thereafter, the phone remained in the custody of the New Haven Police Department. On October 12, 2017, the police filed a second application for a search and seizure warrant to retrieve the data from the phone. The court issued the warrant, and the FBI, at this time, successfully accessed the data.

On May 29, 2015, the court issued a warrant, and the police successfully obtained the account information for the defendant's cell phone, including the account history and global positioning system information.

the interview at the police station, the detectives continued questioning him after he had requested the presence of counsel and that the subsequent search of the contents of the cell phone constituted "fruit of the poisonous tree"[9] as a result of inaccuracies in Perrone's affidavit, which was part of the April 16, 2015 application for a search and seizure warrant.

The defendant filed his second motion to suppress on January 18, 2018. He moved to suppress the contents of his cell phone and any cellular data because of violations of both the federal and state constitutions. The defendant again claimed that the contents of the phone constituted fruit of the poisonous tree. He argued that he had made a preliminary showing that the affidavit in support of the April 16, 2015 search warrant contained assertions that were known to be false or were made with reckless disregard for the truth, and, therefore, he was entitled to a hearing pursuant to *Franks* v. *Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The court held a hearing on the defendant's motions to suppress on January 24, 2018. Perrone and the defendant's mother testified at the hearing. After argument from counsel, the court orally denied both of the defendant's motions and indicated that a supplemental memorandum of decision would be issued at a later date. The state utilized the data obtained from the defendant's cell phone as part of its case against the defendant, including global positioning system (GPS) information, the defendant's Internet search history, and the commu-

[9] "Under the exclusionary rule, evidence must be suppressed if it is found to be the fruit of prior police illegality. *Wong Sun* v. *United States*, [371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)]. All evidence is not, however, a fruit of the poisonous tree simply because it would not have been discovered but for the illegal action of law enforcement officials." (Internal quotation marks omitted.) *State* v. *Colvin*, 241 Conn. 650, 656, 697 A.2d 1122 (1997); see also *State* v. *Romero*, 199 Conn. App. 39, 50, 235 A.3d 644, cert. denied, 335 Conn. 955, 238 A.3d 731 (2020).

nications between the defendant and Sumler and Vanderberg on the night of the murder.

The court issued the supplemental memorandum of decision on April 23, 2018. It set forth the following findings of fact. On April 14, 2015, Vanderberg provided a statement to the New Haven police indicating that he had driven the defendant and Sumler to the convenience store on April 6, 2015, where they committed a robbery and murder. On that day, the defendant used his cell phone before and after the shooting. In connection with this statement, and after further investigation, the police obtained a search and seizure warrant for the defendant's residence on April 15, 2015.[10] This warrant, however, did not include the defendant's cell phone. The police executed this warrant in the early morning hours of April 15, 2015, seizing a ski mask and gloves. The defendant was not home during the search of his residence but contacted the police later that day. He agreed to go to the New Haven police station to speak with Perrone and another detective, David Zaweski.

The defendant, accompanied by his mother, went to the police station. Before entering an interview room with the two detectives, the defendant handed his cell phone to his mother, who sat on a nearby bench outside of the interview room. The defendant was not placed under arrest and was free to leave the police station at any time. After a few minutes of the interview, which was video-recorded, the defendant requested to speak with an attorney.[11] At this point, the detectives terminated the interview.

[10] In the application for the search warrant, the police sought to seize the following items from the defendant's residence: a black face mask, dark colored gloves, a black baseball hat with an insignia on the front and white colored sneakers. Any items seized would be submitted to the state forensics laboratory for testing.

[11] At the outset of the interview, the two detectives introduced themselves to the defendant. The defendant then complied with Perrone's request that he read out loud the *Miranda* rights. The defendant acknowledged that he understood his *Miranda* rights and the fact that he was not under arrest.

Perrone, concerned about the loss of evidence through damage or intentional erasure, intended to seize the defendant's cell phone. Perrone had observed the defendant with a cell phone when he arrived at the police station, but the defendant did not have it with him in the interview room. Thus, after the defendant invoked his right to counsel, Perrone walked over to the defendant's mother and asked if she had the defendant's cell phone. She responded in the affirmative and handed it to Perrone. The defendant's mother also provided the defendant's cell phone number to Perrone.

With respect to the January 16, 2018 motion to suppress, the court concluded that the detectives were justified in seizing the phone under the facts of the case, and the exigent circumstances and inevitable discovery exceptions to the fourth amendment's warrant requirement. As part of its analysis, the court concluded that Perrone had probable cause to seize the defendant's cell phone to prevent the destruction of evidence. With respect to the January 18, 2018 motion to suppress, the court found that Perrone had not made a false statement knowingly and intentionally or with reckless disregard for the truth in his affidavit, which was part of the April 16, 2015 application for a search warrant.

Prior to addressing the defendant's specific claims, we set forth the relevant legal principles regarding the denial of a motion to suppress. "As a general matter, the standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record. . . . [W]hen a question of

Perrone then asked the defendant to initial the *Miranda* waiver form. At this point, the defendant stated: "I really would like a lawyer. Cause I don't, I can't just speak. I don't know. It's crazy. I don't. They never raided my mother'[s] house before or something . . . . I don't know what's going on. I need a lawyer." The defendant then reaffirmed to Perrone the request for a lawyer.

fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights,[however] and the credibility of witnesses is not the primary issue, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence. . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision." (Internal quotation marks omitted.) *State* v. *Ingala*, 199 Conn. App. 240, 247, 235 A.3d 619, cert. denied, 335 Conn. 954, 238 A.3d 731 (2020); see also *State* v. *Castillo*, 329 Conn. 311, 321–22, 186 A.3d 672 (2018); *State* v. *Marsan*, 192 Conn. App. 49, 65, 216 A.3d 818, cert. denied, 333 Conn. 939, 218 A.3d 1049 (2019).

I

The defendant first claims that the evidence found in his cell phone had been obtained after the detectives violated his *Miranda* rights[12] and his rights pursuant to

[12] In *Miranda* v. *Arizona*, supra, 384 U.S. 436, "the United States Supreme Court held that the fifth and fourteenth amendments' prohibition against compelled self-incrimination requires that a suspect in police custody be informed specifically of his or her right to remain silent and to have an attorney present before being questioned. . . . The court further held that [i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease . . . and [i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (Citations omitted; internal quotation marks omitted.) *State* v. *Hafford*, 252 Conn. 274, 289–90, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000); see also *State* v. *McMillion*, 128 Conn. App. 836, 839–40, 17 A.3d 1165 (*Miranda* recognized that right to have counsel present at interrogation is indispensable to protection of fifth amendment privilege), cert. denied, 302 Conn. 903, 23 A.3d 1243 (2011).

Our Supreme Court has noted that "*Miranda* warnings are required when a suspect is in police custody and subject to interrogation. . . . [T]he term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those

article first, § 8, of the state constitution, and, therefore, should have been suppressed. He argues that (1) his interview with the detectives on April 15, 2015, was custodial in nature and, therefore, the *Miranda* protections applied, (2) he invoked his rights to remain silent and to have an attorney present, (3) despite his invocation of his *Miranda* rights, the detectives continued questioning him regarding the location of his cell phone, and (4) the continued questioning, conducted with the aim of obtaining incriminating evidence, constituted a violation of his rights to remain silent and to have counsel present. The defendant also contends that the interrogation after his invocation of his rights to remain silent and to have counsel present violated article first, § 8, of the Connecticut constitution[13] and our Supreme Court's recent decision in *State* v. *Purcell*, 331 Conn. 318, 203 A.3d 542 (2019), which broadened the scope of the *Miranda* protections.[14] Furthermore, the defendant requests that we establish a new prophylactic rule, under the Connecticut constitution, that would render any incriminating evidence inadmissible if it is obtained after a suspect invokes his right to remain silent or to have counsel present, and the police continue to utilize

normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (Citations omitted; internal quotation marks omitted.) *State* v. *Canales*, 281 Conn. 572, 585, 916 A.2d 767 (2007).

[13] Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel . . . . No person shall be compelled to give evidence against himself . . . ."

[14] In *State* v. *Purcell*, supra, 331 Conn. 318, our Supreme Court held that "our state constitution requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel. . . . Interrogators confronted with such a situation alternatively may inform the defendant that they understand his statement(s) to mean that he does not wish to speak with them without counsel present and that they will terminate the interrogation." (Citation omitted; internal quotation marks omitted.) Id., 362.

deceptive questioning and tactics to undermine those rights.

The state counters that, even if a *Miranda* violation occurred, the fruit of the poisonous tree doctrine does not apply to physical evidence under these circumstances. We agree with the state.

As a general matter, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against [self-incrimination]." (Internal quotation marks omitted.) *State* v. *Donald*, 325 Conn. 346, 355, 157 A.3d 1134 (2017); see also *State* v. *Turner*, 267 Conn. 414, 420, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004). The United States Supreme Court, however, has held that a violation of *Miranda* does not require suppression of physical evidence resulting from that violation. *United States* v. *Patane*, 542 U.S. 630, 634, 124 S. Ct. 2620, 159 L. Ed. 2d 667 (2004).

The respondent in *Patane* was arrested for violating a restraining order. Id., 635. The law enforcement officers who arrested the respondent, a convicted felon, knew that he illegally possessed a firearm. Id., 634–35. The officers attempted to advise the respondent of his *Miranda* rights, but he interrupted them, asserting that he knew his rights. Id., 635. The officers never completed providing the *Miranda* warnings to the respondent. Id. One of the officers inquired where the firearm was located, and the respondent eventually admitted that it was in his bedroom in his home. The officer, with the respondent's permission, then seized the firearm. Id.

A grand jury indicted the respondent for possession of a firearm by a convicted felon. Id. The United States District Court granted the respondent's motion to suppress the firearm on the ground that the officers lacked probable cause to arrest him for violating the restraining

order. Id. The United States Court of Appeals for the Tenth Circuit reversed the ruling of the District Court but affirmed the suppression of the firearm on the basis of the respondent's alternative argument that the firearm was the fruit of a statement made without a proper advisement of his *Miranda* rights. Id., 635–36.

The United States Supreme Court noted that the core protection of the self-incrimination clause in the fifth amendment "is a prohibition on compelling a criminal defendant to testify against himself at trial. . . . *The* [*c*]*lause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements*." (Citations omitted; emphasis added.) Id., 637. The court further declined to apply the fruit of the poisonous tree doctrine under these circumstances. Id., 642–43; id., 643 ("[i]ntroduction of the nontestimonial fruit of a voluntary statement, such as [the] respondent's [firearm], does not implicate the [s]elf-[i]ncrimination [c]lause"). See also *United States* v. *Parker*, 549 F.3d 5, 10 (1st Cir. 2008) (physical fruits of otherwise voluntary statement are admissible against defendant even if *Miranda* warnings wrongly were omitted), cert. denied, 556 U.S. 1160, 129 S. Ct. 1688, 173 L. Ed. 2d 1050 (2009); *United States* v. *Capers*, 627 F.3d 470, 493–94 (2d Cir. 2010) (Trager, J., dissenting) (citing holding of *Patane* that physical evidence obtained as result of unwarned statements is not excluded under *Miranda*).

The appellate courts of Connecticut have followed the rule established in *Patane*. In *State* v. *Mangual*, 311 Conn. 182, 186, 85 A.3d 627 (2014), the police obtained a search and seizure warrant for an apartment as part of an investigation of the sale of heroin. After obtaining entry to the apartment, the police detained the defendant and her daughters in the living room. Id. Without providing any *Miranda* warnings, an officer asked the defendant if there were any drugs or weapons in the

apartment. Id., 187. The defendant responded that there were " 'drugs in the bedroom.' " An officer followed the defendant into the bedroom, where she pointed to a can of hairspray on a dresser and indicated that it contained drugs. Id. The officer removed the false bottom of the hairspray can and discovered 235 packets of heroin. Id. He then placed the defendant under arrest. Id.

The defendant filed a motion to suppress her statement on the ground that she had been in custody and questioned before being provided with the *Miranda* warnings. Id., 188. The trial court concluded that the defendant had not been in custody and denied her motion to suppress. Id., 188–89. The defendant filed an appeal, challenging the court's ruling. Id., 190–91.

Our Supreme Court noted that the defendant had asserted, in passing, that the police likely would not have discovered the hidden heroin but for her statements. Id., 188 n.5. In response, the court stated: "The defendant, however, has raised no claim that the heroin itself should be suppressed as a fruit of the *Miranda* violation. *Indeed, a statement that is obtained in violation of Miranda does not require suppression of the physical fruits of the suspect's unwarned but otherwise voluntary statements*." (Emphasis added.) Id.

In *State* v. *Bardales*, 164 Conn. App. 582, 585, 137 A.3d 900 (2016), the police obtained a warrant to search the defendant's residence and person after a confidential informant indicated that the defendant stored illegal firearms for sale. In executing the warrant, the police stopped the defendant in his motor vehicle. Id., 586. After the defendant exited his vehicle, a police sergeant asked the defendant if there was anything in the car that "he needed to be concerned about." Id. The defendant admitted that there was cocaine in the pocket of the driver's side door. Id., 589. As a result, the defendant was arrested and charged with possession of narcotics. Id. At trial, the defendant moved to suppress his statement regarding the presence of cocaine in his vehicle.

Id., 587–88. The trial court denied the defendant's motion to suppress on the basis of the public safety exception to the requirement of a prior *Miranda* warning before a suspect's answers may be admitted into evidence.[15] Id., 588 and n.1.

On appeal, the defendant claimed that the court improperly denied his motion to suppress as a result of its misapplication of the public safety exception. Id., 587–88. In rejecting this claim, we noted that, even if we were to assume that the sergeant's question did not fall within the public safety exception, the defendant would not necessarily be entitled to suppression of the cocaine, the physical evidence discovered as a result of the alleged *Miranda* violation. Id., 599 n.6. In support, we cited to *United States* v. *Patane*, supra, 542 U.S. 633–34, and *State* v. *Mangual*, supra, 311 Conn. 188 n.5. *State* v. *Bardales*, supra, 164 Conn. App. 599 n.6.

In the present appeal, the defendant contends that the court erred in failing to suppress the evidence obtained from his cell phone, which he argues was discovered as a result of the alleged *Miranda* violation when Perrone asked the defendant where his cell phone was after the defendant had asked for a lawyer. The defendant does not seek the suppression of his response to Perrone after he requested counsel. On the basis of the precedent previously discussed, even if a *Miranda* violation occurred when Perrone questioned the defendant as to the location of his cell phone after he had invoked his rights to remain silent and to counsel, the cell phone and its contents were not subject to suppression under the fruit of the poisonous tree doctrine. See *State* v. *Mangual*, supra, 311 Conn. 188 n.5; *State* v. *Bardales*, supra, 164 Conn. App. 599 n.6. The remedy for such a violation would be limited to suppression of the defendant's response to the post-*Miranda* questioning, and

[15] See generally *New York* v. *Quarles*, 467 U.S. 649, 653, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984); *State* v. *Betances*, 265 Conn. 493, 503–505, 828 A.2d 1248 (2003).

not the actual cell phone and its contents. See, e.g., *United States* v. *Oloyede*, 933 F.3d 302, 308–10 (4th Cir. 2019) (even if *Miranda* violation had occurred when defendant provided passcode for her iPhone, contents obtained from that device were not subject to suppression), cert. denied sub nom. *Popoola* v. *United States*, U.S. , 140 S. Ct. 2554, 206 L. Ed. 2d 488 (2020), and cert. denied sub nom. *Ogundele* v. *United States*, U.S. , 140 S. Ct. 1213, 206 L. Ed. 2d 213 (2020), and cert. denied sub nom. *Popoola* v. *United States*, U.S. , 140 S. Ct. 1212, 206 L. Ed. 2d 213 (2020); *United States* v. *Heusner*, United States District Court, Docket No. 3:18-cr-02658-BTM (S.D. Cal. October 24, 2019) (*Miranda* violation alone does not require suppression of fruits of unwarned statements, including contents of cell phone).[16] We conclude, therefore, that the court properly denied the defendant's motion to suppress under the United States constitution.[17]

[16] Pursuant to Practice Book § 67-10, the defendant notified this court on September 14, 2020, of his intention to rely on a decision of the District of Columbia Court of Appeals, *Green* v. *United States*, 231 A.3d 398 (D.C. 2020). The defendant's reliance on *Green* is not persuasive, as the suppression motion in that case was directed at a fourth amendment violation and not a fifth amendment violation, as in the present appeal.

[17] It is axiomatic that we may affirm the proper result of the trial court on a different basis. See, e.g., *State* v. *Marro*, 68 Conn. App. 849, 859, 795 A.2d 555 (2002); see also *Diaz* v. *Commissioner of Correction*, 125 Conn. App. 57, 63 n.6, 6 A.3d 213 (2010), cert. denied, 299 Conn. 926, 11 A.3d 150 (2011); *Coleman* v. *Commissioner of Correction*, 111 Conn. App. 138, 140 n.1, 958 A.2d 790 (2008), cert. denied, 290 Conn. 905, 962 A.2d 793 (2009).

Furthermore, as a result of our conclusion regarding the appropriate remedy for a *Miranda* violation as it relates to physical evidence, we reject the defendant's reliance on our Supreme Court's decision in *State* v. *Purcell*, supra, 331 Conn. 318. In that case, the court held that our state constitution provides greater safeguards for the *Miranda* right to counsel than the federal constitution. Id., 362. Specifically, "our state constitution requires that, if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." (Internal quotation marks omitted.) Id. The court in *Purcell* did not, however, address whether the remedy for such a violation includes suppression of physical evidence. Stated differently, whether the violation occurred under

In his appellate brief, the defendant, for the first time, argues that this court should adopt a new prophylactic rule, as a matter of due process pursuant to our state constitution, to protect against police tactics aimed at undermining the constitutional rights of a suspect. Specifically, he proposes the following: "In a custodial interrogation, if incriminating evidence is obtained from a suspect after he has invoked his right to counsel and it can be shown that the evidence was obtained through impermissible questioning designed to undermine the suspect's *Miranda* rights, the evidence can only be admissible if it is shown that 'curative measures' were taken to ensure that a reasonable person in the suspect's situation would understand the effect of his answering questions after he has invoked his right to counsel and that his doing so was voluntary."

We decline to adopt the rule proposed by the defendant for a variety of reasons. First, in support of his proposal, the defendant asserts that the conduct of the police in the present case revealed "an intent to undermine [his] invocation of rights and to trick him into telling them where they could find his [cell] phone . . . ." The record and the findings of the trial court do not support this assertion. The court made no such findings of fact regarding police deception, trickery, or the intent to deprive the defendant of his constitutional rights. To the contrary, the court found that Perrone had intended to seize the defendant's cell phone because there was evidence that it had been used prior to and after the death of the victim, and because he wanted to ensure that the data contained therein was not erased or damaged.

Second, the defendant's brief has not persuaded us that such a rule is required by our state constitution.

the federal or the state constitution, or both, the defendant does not gain the remedy sought in this appeal, namely, suppression of the cell phone and its contents.

In certain instances, our state constitution affords the citizens of Connecticut protections beyond those provided by the federal constitution. *State* v. *Marsala*, 216 Conn. 150, 160, 579 A.2d 58 (1990); *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 57, 469 A.2d 1201 (1984); see also *State* v. *Joyce*, 229 Conn. 15–16, 639 A.2d 1007 (1993) ("[i]t is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection of such rights"); cf. *State* v. *Dukes*, 209 Conn. 98, 114, 547 A.2d 10 (1988) (law of land may not also be law of this state in context of our state constitution).

"In construing the Connecticut constitution to determine whether it provides our citizens with greater protections than [does] the federal constitution, we employ a multifactor approach that we first adopted in [*State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992)]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]." (Internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 50, 225 A.3d 668 (2020); *State* v. *Taupier*, 330 Conn. 149, 175, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

In his appellate brief, the defendant mentions the *Geisler* test, summarily recites the first *Geisler* factor, and briefly addresses the issue of police deception and trickery. Absent from the defendant's brief is a comprehensive *Geisler* analysis that would persuade this court that the protections afforded by our state constitution are greater than those afforded by the federal constitution or of the propriety of adopting his proposed rule

under our state constitution. Cf. *State* v. *Estrella*, 277 Conn. 458, 488, 893 A.2d 348 (2006) (defendant raised due process claim under state constitution, complete with requisite *Geisler* analysis). "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." (Internal quotation marks omitted.) *State* v. *Fetscher*, 162 Conn. App. 145, 155–56, 130 A.3d 892 (2015), cert. denied, 321 Conn. 904, 138 A.3d 280 (2016); *State* v. *Diaz*, 94 Conn. App. 582, 593, 893 A.2d 495, cert. denied, 280 Conn. 901, 907 A.2d 91 (2006). For these reasons, we decline the defendant's invitation to adopt a new prophylactic rule pursuant to our state constitution.

II

The defendant next claims that the police seized his cell phone in violation of the fourth amendment to the United States constitution and article first, § 7, of the Connecticut constitution,[18] and, therefore, the court should have suppressed the evidence obtained from the phone as fruit of the poisonous tree. Specifically, he argues that the court erred in concluding that the police had probable cause to seize his cell phone at the police station pursuant to the exigent circumstances doctrine. The state counters that the court properly determined that probable cause existed at the time of the seizure. We agree with the state.[19]

[18] In a single sentence in his brief, the defendant asserts that our state constitution affords greater protection to citizens in the determination of probable cause than does the federal constitution. In the absence of a *Geisler* analysis or any additional argument in his brief, we conclude that the defendant has abandoned any claim to greater protection under our state constitution with respect to this claim. See, e.g., *State* v. *Rivera*, 335 Conn. 720, 725 n.2, 240 A.3d 1039 (2020); *State* v. *Marcus H.*, 190 Conn. App. 332, 335 n.2, 210 A.3d 607, cert. denied, 332 Conn. 910, 211 A.3d 71, cert. denied, U.S. , 140 S. Ct. 540, 205 L. Ed. 2d 343 (2019). Thus, we evaluate the claim only under the federal constitution.

[19] As a result of our conclusion, we need not address the other ground on which the state relies in support of the denial of the defendant's motion to suppress, namely, the inevitable discovery doctrine.

In his January 16, 2018 motion to suppress, the defendant argued that the police had seized his cell phone on April 15, 2015, without probable cause. He claimed that there was no "nexus" linking the cell phone to any criminal behavior. He further argued that, even if probable cause had existed to seize the cell phone, the exigent circumstances doctrine did not justify its immediate seizure at the police station.

In denying the January 16, 2018 motion to suppress, the court concluded that "the police were justified in seizing [the defendant's cell] phone under the facts of this case and the law of exigent circumstances and inevitable discovery." The court first explained that the police detectives had probable cause to seize the phone. The court relied on Perrone's testimony that, on the basis of his training and experience, coconspirators often use cell phones, before and after the criminal activity, to communicate by talking, texting or using social media. Perrone indicated that he had received information that either the defendant or a coconspirator had communicated with a third coconspirator via cell phones at about the time of the crime. Perrone also stated that cell phones frequently contained "GPS coordinates on where the phone was at the time of the crime." On the basis of this evidence, the court found that probable cause had existed to seize the defendant's phone at the police station on April 15, 2015.

The court then turned to the exigent circumstances doctrine. It noted that this doctrine constitutes a well recognized exception to the warrant requirement of the fourth amendment. It concluded that Perrone had seized the defendant's cell phone to prevent him from leaving the police station with it, after which the phone could have been destroyed or discarded or the evidence contained therein could have been erased.

On appeal, the defendant contends that the exigent circumstances doctrine applies only if there is probable cause to believe that the seized evidence contains evi-

dence of a crime. He further asserts that the court erred in crediting Perrone's testimony regarding the probable cause to seize[20] the defendant's cell phone at the police station on April 15, 2015. As a result of this alleged constitutional violation, he maintains that his cell phone, and the contents therein, should have been excluded from evidence.[21] We are not persuaded.

We now turn to the legal principles relevant to our analysis of the defendant's claim. "The fourth amendment to the United States constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures . . . . U.S. Const., amend. IV; see also Conn. Const., art. I, § 7. Ordinarily, police may not conduct a search unless they first obtain a search warrant from a neutral magistrate after establishing probable cause. . . . Under both the federal and state constitutions, a warrantless search and seizure is per se unreasonable, subject to a few well defined exceptions. . . . These exceptions have been jealously and carefully drawn . . . and the burden is on the state to establish the exception." (Internal quotation marks omitted.) *State* v. *Ortiz*, 182 Conn. App. 580, 587, 190 A.3d 974, cert. denied, 330 Conn. 920, 194 A.3d 290 (2018); see also *State* v. *Owen*, 126 Conn. App. 358, 364, 10 A.3d 1100, cert. denied, 300 Conn. 921, 14 A.3d 1008 (2011).[22]

[20] "A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 64, 128 A.3d 431 (2015); *State* v. *Jackson*, 304 Conn. 383, 394, 40 A.3d 290 (2012).

[21] "To discourage unreasonable searches and seizures, the evidence obtained as a direct result of that illegal search or seizure, as well as the fruits, or evidence derived therefrom, are excluded from evidence unless the connection between the fruits and the illegal search has been sufficiently attenuated to be purged of its primary taint." (Internal quotation marks omitted.) *State* v. *Ryder*, 301 Conn. 810, 821, 23 A.3d 694 (2011).

[22] "The fourth amendment to the United States constitution, made applicable to the states through the [due process clause of the] fourteenth amendment, prohibits unreasonable searches and seizures by government agents." (Internal quotation marks omitted.) *State* v. *Jones*, 320 Conn. 22, 64, 128

Our Supreme Court has explained: "The fourth amendment's requirement that a warrant issue from a neutral and detached judicial officer rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. . . . [As we have already observed, however], the fourth amendment proscribes only unreasonable searches and seizures, and *there will be occasions when, given probable cause to search, resort to the judicial process will not be required of law enforcement officers*. Thus, where exigent circumstances exist that make the procurement of a search warrant unreasonable in light of the dangers involved . . . [or the likelihood of evidence being destroyed or removed from the grasp of law enforcement officers] . . . a warrant will not be required." (Emphasis added; internal quotation marks omitted.) *State* v. *Spencer*, 268 Conn. 575, 585–86, 848 A.2d 1183, cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004); see *State* v. *Jackson*, 304 Conn. 383, 394–95, 40 A.3d 290 (2012); *State* v. *Curet*, 200 Conn. App. 13, 25, A.3d , cert. granted on other grounds, 335 Conn. 969, 240 A.3d 287 (2020); see generally *State* v. *Mann*, 271 Conn. 300, 319–20, 857 A.2d 329 (2004) (it is long-standing rule that police must, whenever practicable, obtain in advance judicial approval of searches and seizures via warrant procedure), cert. denied, 544 U.S. 949, 125 S. Ct. 1711, 161 L. Ed. 2d 527 (2005).

"*The exigent circumstances doctrine is one of three exceptions to the warrant requirement that are triggered by the need for swift action by the police.* All three exceptions, the exigent circumstances doctrine, the protective sweep doctrine and the emergency doctrine, must be supported by a reasonable belief that immediate action was necessary. . . . Of the three, the

A.3d 431 (2015); see *State* v. *Thomas*, 98 Conn. App. 542, 551, 909 A.2d 969 (2006) (same), cert. denied, 281 Conn. 910, 916 A.2d 53 (2007).

exigent circumstances doctrine arguably encompasses the widest variety of factual scenarios. [Our Supreme Court] previously [has] recognized the [catchall] quality of the doctrine, explaining that [*t*]*he term, exigent circumstances, does not lend itself to a precise definition but generally refers to those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization. . . . There are three categories of circumstances that are exigent: those that present a risk of danger to human life; the destruction of evidence; or flight of a suspect. . . . The exigent circumstances doctrine, however, is limited to instances in which the police initially have probable cause either to arrest or to search. . . .*

"Our Supreme Court has adopted a totality of circumstances test to evaluate whether an exigency exists, which inquires whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would have been able to destroy evidence, flee or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others. This is an objective test; its preeminent criterion is what a reasonable, [well trained] police officer would believe, not what the . . . officer actually did believe. . . . Put simply, given probable cause to arrest or search, exigent circumstances exist when, under the totality of the circumstances, the officer reasonably believed that immediate action was necessary to protect the safety of those present, or to prevent the flight of the suspect, or the destruction of evidence. . . . The test requires a reasonable belief, not a level of certainty approaching probable cause. . . . That said, [w]hen there are reasonable alternatives to a warrantless search, the state has not satisfied its burden of proving exigent circumstances.

. . . Moreover, [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Ingala*, supra, 199 Conn. App. 248–49; see also *State* v. *Kendrick*, 314 Conn. 212, 225–28, 100 A.3d 821 (2014). Thus, the existence of probable cause serves as a necessary prerequisite to the applicability of the exigent circumstances doctrine. See *State* v. *Spencer*, supra, 268 Conn. 585–86; *State* v. *Ingala*, supra, 248; *State* v. *Owen*, supra, 126 Conn. App. 366. "Whether the trial court properly found that the facts submitted were enough to support a finding of probable cause is a question of law. . . . The trial court's determination on [that] issue, therefore, is subject to plenary review on appeal. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . Reasonable minds may disagree as to whether a particular affidavit establishes probable cause. . . .

"We consistently have held that [t]he quantum of evidence necessary to establish probable cause exceeds mere suspicion, but is substantially less than that required for conviction. . . . The probable cause determination is, simply, an analysis of probabilities. . . . The determination is not a technical one, but is informed by the factual and practical considerations of everyday life on which reasonable and prudent [persons], not legal technicians, act. . . . Probable cause is not readily, or even usefully, reduced to a neat set of legal rules." (Citations omitted; internal quotation marks omitted.) *State* v. *Correa*, 185 Conn. App. 308, 334–35, 197 A.3d 393 (2018), cert. granted on other grounds, 330 Conn. 959, 199 A.3d 19 (2019); see also *State* v. *Eady*, 249 Conn. 431, 440, 733 A.2d 112 (mere suspicion

and probable cause often separated by fine line), cert. denied, 528 U.S. 1030, 120 S. Ct. 551, 145 L. Ed. 2d 428 (1999).

In determining whether probable cause existed, the "United States Supreme Court has endorsed an objective standard, noting that evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 182 Conn. App. 592; accord *State* v. *Eady*, supra, 249 Conn. 441; see generally *Ornelas* v. *United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996); *Beck* v. *Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Additionally, the determination of probable cause requires a consideration of the totality of the circumstances. *State* v. *Duffus*, 125 Conn. App. 17, 25–26, 6 A.3d 167 (2010), cert. denied, 300 Conn. 903, 12 A.3d 572 (2011); see also *State* v. *Sawyer*, supra, 335 Conn. 45–46; *State* v. *Trine*, 236 Conn. 216, 236–37, 673 A.2d 1098 (1996).

On appeal, the defendant claims that the court relied on evidence that was not available to the police at the time they seized his cell phone at the police station. See, e.g., *State* v. *DeMarco*, 311 Conn. 510, 536, 88 A.3d 491 (2014) (reasonableness of police officer's determination that emergency exists so as to justify application of emergency exception to warrant requirement is evaluated on facts known at time of entry into defendant's home); *State* v. *Federici*, 179 Conn. 46, 58, 425 A.2d 916 (1979) (probable cause for seizure under plain view doctrine cannot be established by knowledge obtained after intrusion occurs). He also contends that the police should not have relied on Vanderberg's statements as a basis for determining whether probable cause existed. We are not persuaded by these arguments.

At the January 24, 2018 hearing on the defendant's motion to suppress, Perrone testified that he had taken

a statement from Vanderberg approximately one week after the shooting. Perrone learned that Vanderberg drove the defendant and Sumler on April 6, 2015. Vanderberg stated that either they had contacted him or he had contacted one of them by the use of a cell phone. Vanderberg further indicated the he had contact with either the defendant or Sumler via cellular voice call or a FaceTime video call. During the interview, Vanderberg provided Perrone with cell phone numbers for both the defendant and Sumler.

Perrone then testified regarding the interview that he had conducted with the defendant on April 15, 2015. He recalled observing the defendant holding a cell phone while talking with his mother prior to going into the interview room. After a brief time, the defendant asked for an attorney, and Perrone concluded what the prosecutor termed the "substantive portion of the interview . . . ." Perrone explained that, at some point, he had intended to seize the cell phone that he had observed the defendant holding. Perrone also testified, on the basis of his training and experience, that a person suspected of committing a homicide would have an incentive to conceal or to destroy a cell phone or erase the data contained therein. Thus, Perrone thought that, if he had attempted to obtain a warrant, this evidence could have been destroyed or lost. The next day, Perrone obtained a warrant to search the contents of the defendant's cell phone.[23] During his cross-examination at the January 24, 2018 suppression hearing, Perrone acknowledged that Vanderberg never specifically stated that the defendant's cell phone had been used, but, rather, that Vanderberg had called either the defendant or Sumler.[24]

[23] See *State* v. *Boyd*, 295 Conn. 707, 717, 992 A.2d 1071 (2010) (defendant had reasonable expectation of privacy in contents of cell phone), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011).

[24] Specifically, the following colloquy occurred between defense counsel and Perrone:

"Q. . . . So, what probable cause did you have to think that [the defendant's] phone is the one that he was communicating with?

In its memorandum of decision on the motions to suppress, the court found that Vanderberg had given a statement to the police on April 14, 2015, and that he identified the defendant and Sumler as the perpetrators of the April 6, 2015 robbery and murder. The court also credited Perrone's testimony that cell phones often are used by criminal coconspirators before or after criminal activity and that these devices therefore may contain evidence of such conduct and may include GPS information, text messages, voice communications and social media postings. The court stated: "Perrone further testified that he had information that the defendant had a Facebook account, that the defendant used that Facebook account to communicate with one of the [perpetrators], and that either the defendant or another [perpetrator] communicated with the third [perpetrator] via their cell phone on the night of the shooting."

The defendant first argues that the court's determination that Perrone had probable cause to seize the cell phone on April 15, 2015, at the police station was flawed because it was based on information that Perrone obtained after that seizure. Specifically, he contends that, "[a]t the time of the seizure of the cell phone, the police did not have information that the defendant may have used a Facebook account to communicate with [Sumler or Vanderberg] at the time of the crime."

This argument is unavailing because, even if it is accurate, the court's determination regarding probable

"A. I didn't. It could have been either of the two guys.
"Q. It could have been either.
"A. Um-hm.
"Q. So, you had no probable cause that that search—that phone that you seized from [the defendant] was the one that Mr. Vanderberg was talking about; right?
"A. I don't know.
"Q. Pardon me.
"A. I don't know.
"Q. You don't know?
"A. It could have been either of the two he was contacted with on the phones.
"Q. Right. But you don't know, right?
"A. I don't know which one he contacted."

cause did not rely exclusively on the use of Facebook by the defendant, Sumler and Vanderberg. At the time of the seizure of the defendant's cell phone, Perrone had information that the defendant and Sumler had been involved in the April 6, 2015 robbery and shooting, and that one of those individuals had communicated with Vanderberg via cell phone. Additionally, on the basis of his training and experience, Perrone knew that criminal actors often communicate with one another via cell phone, and that these devices may contain evidence that can connect a person to a crime, such as call logs, text messages and GPS data. In the present case, the court correctly found that Perrone had sufficient information to establish probable cause, beyond mere suspicion, at the time of the seizure, that the defendant's cell phone contained evidence that could link him to the April 6, 2015 robbery and shooting at the convenience store.

The defendant also argues that the police should not have relied on Vanderberg's self-serving statements to establish probable cause to seize the cell phone. He contends that Vanderberg was not an established informant, he was operating under a cooperation agreement with the state and had provided contradictory information regarding his involvement in another criminal incident. As a result of these factors, the defendant asserts, the police should not have considered Vanderberg to be a trustworthy source, nor should they have relied on his statements to establish probable cause to seize the defendant's cell phone. We disagree.

Vanderberg provided a recorded statement to the New Haven police on April 14, 2015. Our Supreme Court has recognized that facts the police obtain from an informer can be significant in a credibility determination. "In such circumstances, the police can observe the informant's demeanor to determine his . . . credibility, and the informant runs the greater risk that he may be held accountable if his information proves false.

. . . Indeed, as this court has repeatedly recognized, [t]he fact that an informant's identity is known . . . is significant because the informant could expect adverse consequences if the information that he provided was erroneous." (Citations omitted; internal quotation marks omitted.) *State* v. *Flores*, 319 Conn. 218, 227–28, 125 A.3d 157 (2015), cert. denied, U.S. , 136 S. Ct. 1529, 194 L. Ed. 2d 615 (2016); see also *State* v. *Mann*, supra, 271 Conn. 326–27.

Vanderberg also made statements against his penal interest, which, as our Supreme Court has noted, "carry their own indicia of credibility—*sufficient at least to support a finding of probable cause* . . . ." (Emphasis in original; internal quotation marks omitted.) *State* v. *Flores*, supra, 319 Conn. 229. We conclude, therefore, that the defendant's argument concerning the credibility of Vanderberg is without merit, and, thus, the trial court properly denied the defendant's motion to suppress the seizure of his cell phone and the evidence obtained as a result of that seizure.

III

Finally, the defendant claims that Perrone's affidavit in support of the warrant application to search the contents of the cell phone contained materially false information. Specifically, he argues that Perrone's affidavit concealed the *Miranda* violation that had occurred at the police station on April 15, 2015. The defendant contends that, had the court been aware of this violation, it would not have authorized the search warrant for the contents of his phone. We disagree. The trial court, in conducting the *Franks* hearing, found that the defendant did not establish the requisite proof in his preliminary showing to require further inquiry.

As previously noted, the police seized the defendant's cell phone after his interview on April 15, 2015. The next day, they applied for a search warrant for the contents of the phone. The following was part of the affidavit attached to that application: "On April 15, 2015,

[the defendant] came to [p]olice [h]eadquarters with his mother. Prior to any questioning, [the defendant] was given his *Miranda* [r]ights from a New Haven Police Department *Miranda* [w]aiver form. [*The defendant*] *requested an attorney and no questioning took place.* Prior to [the defendant] leaving, his mother handed to detectives a cellular telephone she said belonged to [the defendant] and provided . . . the phone number. The phone was seized and placed in an electronic protective bag to prevent remote erasure of data." (Emphasis added.) The application was signed by a judge of the Superior Court on April 16, 2015.

In his January 18, 2018 motion to suppress, the defendant claimed that the affidavit supporting the April 16, 2015 search warrant application contained factual assertions that were known to be false or were made with reckless disregard for the truth, and, therefore, he was entitled to a hearing pursuant to *Franks* v. *Delaware*, supra, 438 U.S. 154. At the January 24, 2018 hearing on the defendant's motions to suppress, the court stated: "To be entitled to a hearing, the defendant must have a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant affidavit and that the alleged false statement is necessary to a finding of probable cause. The defendant has not met his burden here, and I will again supplement that with more findings and more case law to support the court's finding[s] and denial of the motion down the road."

In the court's April 23, 2018 supplemental memorandum of decision, the court noted that a presumption of validity exists with respect to an affidavit that is submitted in support of an application for a search warrant.[25] The court then focused its analysis on the interac-

[25] See, e.g., *State* v. *Bergin*, 214 Conn. 657, 666, 574 A.2d 164 (1990); *State* v. *Dolphin*, 195 Conn. 444, 457, 488 A.2d 812, cert. denied, 474 U.S. 833, 106 S. Ct. 103, 88 L. Ed. 2d 84 (1985).

tion between Perrone and the defendant's mother, and concluded that she had provided him with the defendant's cell phone in a consensual interaction. The court ultimately found that Perrone had not made "a false statement knowingly and intentionally or with reckless disregard for the truth when he indicated to the magistrate that [the defendant's mother] handed him the cell phone."

"In *Franks*, the United States Supreme Court held that where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the [f]ourth [a]mendment requires that a hearing be held at the defendant's request. . . . As our Supreme Court has explained, before a defendant is entitled to a *Franks* hearing, the defendant must (1) make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit; and (2) show that the allegedly false statement is necessary to a finding of probable cause." (Citation omitted; internal quotation marks omitted.) *State* v. *Crespo*, 190 Conn. App. 639, 651, 211 A.3d 1027 (2019); see also *State* v. *Ferguson*, 260 Conn. 339, 363–64, 796 A.2d 118 (2002). Stated differently, "before a defendant is entitled to a *Franks* hearing for an alleged omission, he must make a substantial preliminary showing that the information was (1) omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge, and (2) material to the determination of probable cause." *State* v. *Bergin*, 214 Conn. 657, 666–67, 574 A.2d 164 (1990).

The court did not specifically address the question of whether the omission in the affidavit that questioning had taken place after the defendant requested an attor-

ney met the first prong of the *Franks* test. The issue of whether a statement in an affidavit supporting an application for a search warrant was knowingly and falsely made, or whether it was made with a reckless disregard for the truth, is a question of fact subject to the clearly erroneous standard of review. See, e.g., *State* v. *Stepney*, 191 Conn. 233, 239, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984); see also *State* v. *Mordowanec*, 259 Conn. 94, 107, 788 A.2d 48, cert. denied, 536 U.S. 910, 122 S. Ct. 2369, 153 L. Ed. 2d 189 (2002); *State* v. *Gjini*, 162 Conn. App. 117, 132, 130 A.3d 286 (2015), cert. denied, 320 Conn. 931, 134 A.3d 621 (2016). In the absence of such a finding, the record is inadequate for our review.

"The duty to provide this court with a record adequate for review rests with the appellant. . . . Without the necessary factual and legal conclusions furnished by the trial court, any decision made by us respecting the defendant's claims would be entirely speculative." (Citation omitted; internal quotation marks omitted.) *State* v. *Cotto*, 111 Conn. App. 818, 821, 960 A.2d 1113 (2008); see *State* v. *Pecor*, 179 Conn. App. 864, 876, 181 A.3d 584 (2018) (it is not function of Appellate Court to speculate or presume error from silent record).

Additionally, the defendant's brief failed to address the question of whether the purported false or misleading statement was material to the determination of probable cause. We have recognized that, "there can be no *Franks* violation when the omissions, if included in the . . . warrant affidavit, would not defeat probable cause." (Internal quotation marks omitted.) *State* v. *St. Louis*, 128 Conn. App. 703, 711, 18 A.3d 648, cert. denied, 302 Conn. 945, 30 A.3d 1 (2011); see also *State* v. *Altayeb*, 126 Conn. App. 383, 398, 11 A.3d 1122, cert. denied, 300 Conn. 927, 15 A.3d 628 (2011).

In his brief, the defendant simply asserts that the court would not have issued the search warrant if the police had included in their affidavit the fact that he

had requested an attorney before he provided them with information as to the phone's location. For the reasons set forth in part I of this opinion, this is not correct. Furthermore, "[w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016); see also *State* v. *Errol J.*, 199 Conn. App. 800, 807, 237 A.3d 747, cert. denied, 335 Conn. 962, 239 A.3d 1213 (2020). For these reasons, we decline to review the defendant's final claim.

The judgment is affirmed.

In this opinion the other judges concurred.

LISA FRONSAGLIA *v.* BENIGNO FRONSAGLIA
(AC 42685)

Lavine, Moll and Bishop, Js.*

Syllabus

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and issuing certain financial orders. *Held*:

1. Contrary to the defendant's claim, the trial court did not abuse its discretion in issuing its financial orders by making a grossly disproportionate property distribution in the plaintiff's favor and assigning the majority of the marital debt to the defendant; that court's property distribution was not grossly disproportionate, as the defendant had dissipated $550,000 of marital assets in violation of the automatic orders, and the court merely reattributed those assets to the defendant.
2. There was ample evidence before the trial court to support its finding that the defendant had actual earnings of $160,000; evidence in the record of the defendant's past earnings and spending habits, as evinced

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

by his bank statements and credit card accounts, supported the court's finding, and the defendant's reliance on *Keusch* v. *Keusch* (184 Conn. App. 822) was misplaced, as the reasoning in that case on which he relied had no bearing on the merits of this case.

3. The defendant could not prevail on his claim that the trial court erred by basing its alimony award to the plaintiff solely on his gross income rather than on his net income; the record revealed that that court did not rely solely on the defendant's gross income in determining its alimony award and that it did not state that it relied on the defendant's gross income, but merely referenced it; moreover, although the court did not expressly state that it considered the defendant's net income, this court inferred that it considered the relevant statutory factors (§ 46b-82) and all of the evidence submitted by the parties.

4. The defendant's claim that the trial court abused its discretion by awarding alimony to the plaintiff to punish him for his purported misdeeds was unavailing; that court was permitted to take into consideration all the causes for the dissolution of the marriage in fashioning its alimony award, including the defendant's extramarital affair and poor business decisions.

Argued October 15, 2020—officially released February 23, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Grossman*, *J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court; thereafter, the court, *Grossman*, *J.*, issued an articulation of its decision. *Affirmed*.

William W. Taylor, for the appellant (defendant).

Campbell D. Barrett, with whom were *Johanna S. Katz* and, on the brief, *Jon T. Kukucka*, for the appellee (plaintiff).

Opinion

BISHOP, J. The defendant, Benigno Fronsaglia, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Lisa Fronsaglia. On appeal, the defendant claims that the court (1) abused its discretion in fashioning its financial orders by making a grossly disproportionate property distribution in the

plaintiff's favor and by assigning the majority of the marital debt to him, (2) erred by basing its orders on the defendant's assumed earning capacity of $160,000, where no evidence existed to support the earning capacity determined by the court, (3) erred in basing its alimony award on gross income rather than net income, when there was no evidence to support a net income based on the defendant's assumed gross income, and (4) abused its discretion by awarding alimony to the plaintiff to punish the defendant for his purported misdeeds. We affirm the judgment of the trial court.

The following facts, as found by the trial court or as undisputed in the record, and procedural history are relevant to our resolution of this appeal. The parties were married on June 20, 1992, in Trumbull. They have two children, one of whom was a minor at the time of the dissolution. The plaintiff commenced the dissolution action on November 28, 2016, seeking a dissolution of her marriage to the defendant on the ground that the marriage had broken down irretrievably without the chance of reconciliation. The plaintiff also sought, inter alia, joint legal and primary physical custody of the minor child, equitable distribution of all marital debts and assets, and orders for payment of alimony, child support, postsecondary education, and attorney's fees. At the time of the dissolution proceeding, the plaintiff was fifty-two years old and working as a registered nurse. The defendant was fifty-four years old with a bachelor's degree in business and working as a self-employed businessman importing and selling furniture through his limited liability company, Meeting International.

During the pendency of the action, the court incorporated into an order the parties' pendente lite stipulation in which the defendant agreed, inter alia, to continue to pay the mortgage for the family home, cell phone bills, automobile insurance, homeowners insurance, and other household bills.

On November 7, 2018, after a five day trial, the court issued an oral ruling, which was later signed as its memorandum of decision, dissolving the marriage and issuing financial orders. In its decision, the court found the plaintiff's gross income to be $115,000 per year, and the defendant's gross income for 2018 to be $160,000.

During the pendente lite period, the defendant terminated his association with emuamericas, LLC, a furniture wholesale company based in Italy with which he had been doing business for many years. In doing so, the defendant sold his 12.5 percent interest in emuamericas, LLC, for $550,000 without the court's permission and without informing the plaintiff. The defendant disclosed that he depleted the entire $550,000 sum pendente lite. The defendant had also invested tens of thousands of dollars in a restaurant, Thigh High Chicken Co., LLC, pendente lite in violation of the automatic orders.[1]

The defendant did not file his tax returns for the two years prior to the dissolution action. The court found that he intentionally had delayed filing his taxes so that he could file them when the dissolution proceedings were over. Further, the court found that, because the defendant had commingled his business and personal finances and had no current employee who could attest to his income, the only way to determine his income was by looking at his historical annual earnings, his profit and loss statements that he had submitted into evidence, his bank account and credit card records, e-mail exchanges between the defendant and the companies Pedrali and emuamericas, LLC,[2] the testimony

[1] The plaintiff provided the defendant with notice of the automatic orders pursuant to Practice Book § 25-5, which provides in relevant part that "[n]either party shall incur unreasonable debts hereafter, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards." Practice Book § 25-5 (b) (5).

[2] After leaving emuamericas, LLC, the defendant entered into negotiations with another company, Pedrali, for a potential employment opportunity. After many months of negotiating, Pedrali eventually withdrew its offer of employment.

of his former employee, and by taking judicial notice of prior court orders and arrangements, such as the parties' agreement that the defendant would continue paying the family's household bills. The defendant also filed two financial affidavits with the court, in which he listed his total net weekly income, total weekly expenses and liabilities, total cash value of assets, and total liabilities after breaking down his expenses in detail.

On the basis of that evidence, the court found that the defendant's "actual income range [was] between $150,000 and $175,000 annually." Moreover, the court determined that the defendant's actual personal gross earnings for 2018, the calendar year in question, were $160,000.

Thereafter, the court ordered the defendant to pay alimony to the plaintiff based on the length of the parties' marriage, the reason for the breakdown of the marriage,[3] the disparity in the parties' earnings, the parties' earning capacities,[4] "as well as the myriad of factors in [General Statutes §] 46b-82 . . . ." In doing so, among other orders, the court awarded the plaintiff alimony for twenty years, a nonmodifiable term, during which the plaintiff was to receive $1500 per month from the defendant, which was nonmodifiable for the first five years. The court assigned any debts arising from the defendant's business ventures to the defendant, as well as any tax liabilities in the defendant's name and those tax obligations arising from his businesses. The defendant retained his interest in his companies and any interest he had in his mother's home. The plaintiff was ordered to pay all of the debts that she incurred.

[3] The court found that the defendant was largely to blame for the breakdown of the marriage due to his extramarital affair with his twenty-two year old employee.

[4] As delineated in part II of this opinion, although the court referenced the earning capacities of the parties in its decision, its orders were based on the parties' actual earnings as determined by the court.

The court awarded the family home to the plaintiff. The court found that the home had an approximate value of $477,000 with $127,000 remaining on the mortgage, and liens on the home in the amount of $203,000 due to the defendant's decision to use the home as collateral for his business loans. Consequently, there was only $147,000 of equity in the home. The court also ordered that, because the defendant was responsible for the business debts secured by the home, in the event that the plaintiff was to sell the home in the future, the defendant would be obligated to pay the plaintiff an amount sufficient to satisfy any remaining liens so that the net proceeds due to the plaintiff upon the sale would not be reduced by the amount of those liens, other than the mortgage, remaining on the property. The court further ordered that, in the event that the defendant is unable to pay the plaintiff or secure the release of the liens prior to the sale of the home, he must pay the plaintiff $18,000 per year until the full amount of the lien balances has been reduced to zero. The court ordered the defendant to make the $18,000 payments in order to reimburse the plaintiff for any amount of the sale proceeds that would have been used to pay the liens before the sale of the home, thereby reducing the amount of the encumbrances on the property. The court also ordered that, should the defendant procure releases or reductions for some of the liens prior to any sale, "it [would] reduce the total amount due to the [plaintiff] from him." The court also ordered that the defendant continue to seek releases of the business debts after the marital dissolution in order to clear the title to the home of the liens that were associated with his business debts.

The defendant filed a postjudgment motion for articulation on November 26, 2018. He sought to have the court articulate the factual basis for its findings as to his purported gross income, net income, and the basis for the court's distribution of the parties' assets and debts.

The court granted the motion in part and issued an articulation. In its articulation, the court stated that, in fashioning its distribution of assets award, it took into consideration the defendant's dissipation of the $550,000 that he had obtained from the sale of his interest in emuamericas, LLC. Specifically, in fashioning its property allocation award, the court stated that it had included the $550,000 in the defendant's portion of the marital assets because it had found that he "received, concealed and spent approximately $550,000 in marital assets during the pendente lite period." The court stated that, by doing so, the parties were awarded an approximate equal share of the marital assets. The court also clarified its reasoning regarding the distribution of the parties' debts. The court based its division of the marital debts on its finding that the defendant had incurred debt and spent money frivolously during the pendente lite period in violation of the automatic orders. Particularly, the court had found that the defendant continued to accumulate credit card debt while failing to pay the household bills and mortgage as required by the pendente lite orders, and that the defendant also had incurred debts associated with Thigh High Chicken Co., LLC. Noting that the defendant's representations of his financial status were given little weight due to his numerous misrepresentations to the court, the court explained that the defendant was assigned the debts related to the many failed business ventures that he had undertaken, most of which were undertaken without the plaintiff's knowledge and over which she exercised no control. The defendant himself stated that the plaintiff was not responsible for his business debts. This appeal followed.

Before addressing the defendant's claims, we set forth the well settled standard of review applicable to a court's decision regarding financial orders. "We review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that

the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *Evans* v. *Taylor*, 67 Conn. App. 108, 111, 786 A.2d 525 (2001).

"In determining whether the trial court's broad legal discretion is abused, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness." (Internal quotation marks omitted.) *Febbroriello* v. *Febbroriello*, 21 Conn. App. 200, 202, 572 A.2d 1032 (1990). "We apply that standard of review because it reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties." (Internal quotation marks omitted.) *Hughes* v. *Hughes*, 95 Conn. App. 200, 203, 895 A.2d 274, cert. denied, 280 Conn. 902, 907 A.2d 90 (2006).

I

The defendant first claims that the court abused its discretion in issuing its financial orders by making a grossly disproportionate property distribution in the plaintiff's favor and assigning the majority of the marital debt to the defendant. We are not persuaded.

"Generally, we will not overturn a trial court's division of marital property unless it misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Internal quotation marks omitted.) *Greco* v. *Greco*, 275 Conn. 348, 355, 880 A.2d 872 (2005). The defendant claims that the court made a grossly disproportionate property distribution in the plaintiff's favor by purportedly awarding the plaintiff $331,897 in assets while awarding him $53,964. The defendant expounds on his argument by positing that the court's financial award essentially will

force him into "financial poverty" because the plaintiff purportedly was awarded approximately 87 percent of the total marital assets compared to the defendant's 13 percent, where the defendant claims the total value of marital assets was $385,861.

"[General Statutes §] 46b-81 governs the distribution of the assets in a dissolution case. . . . That statute authorizes the court to assign to either spouse all, or any part of, the estate of the other spouse. . . . In fixing the nature and value of the property, if any, to be assigned, the court, after considering all the evidence presented by each party, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." (Citations omitted; internal quotation marks omitted.) *Kent* v. *DiPaola*, 178 Conn. App. 424, 430–31, 175 A.3d 601 (2017). Moreover, "[w]e have iterated that there is no set formula the court is obligated to apply when dividing the parties' assets and . . . the court is vested with broad discretion in fashioning financial orders." (Internal quotation marks omitted.) Id., 441–42. As a panel of this court once expressed, the court has "vast discretion" in fashioning its orders. *Damon* v. *Damon*, 23 Conn. App. 111, 114, 579 A.2d 124 (1990).

At the outset, we note that the defendant's claim of disproportionality is factually untenable. The court found that the defendant received approximately $550,000 in lump sum payments over the course of a few months after selling his 12.5 percent interest in emuamericas, LLC, during the pendente lite period. The court determined that the payments for the defendant's

interest in emuamericas, LLC, were marital assets subject to division by the court because they were earned entirely during the marriage. Notably, the court found that the defendant had misappropriated the $550,000, only later revealing that he had spent the entire sum. The court also found that the defendant spent all of this money on his own needs and wants and did not use any of this sum to pay down any of the family's debts or outstanding obligations. Specifically, the court found that the defendant failed to "pay down and secure releases for any of the over $200,000 worth of liens on the family home." In essence, the defendant dissipated a marital asset. "[D]issipation in the marital dissolution context requires financial misconduct involving marital assets, such as intentional waste or a selfish financial impropriety, coupled with a purpose unrelated to the marriage." (Internal quotation marks omitted.) *Gong* v. *Huang*, 129 Conn. App. 141, 153, 21 A.3d 474, cert. denied, 302 Conn. 907, 23 A.3d 1247 (2011). As correctly noted by the court, the payments should have been "held secure or subject to the automatic orders," which the defendant failed to do; instead, he spent the entire sum in violation of the automatic orders.[5]

The defendant asserts that the court abused its discretion when it included the $550,000 payment in dividing the marital assets because the funds were no longer part of the marital estate. "[W]e reiterate that [t]he power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power,

[5] "[W]hile the dissolution proceedings are pending, no party shall sell, transfer, [or] exchange any property without permission from the other party or the court. . . . The automatic orders are intended to keep the financial situation of the parties at a status quo during the pendency of the dissolution action." (Citation omitted; internal quotation marks omitted.) *O'Brien* v. *O'Brien*, 326 Conn. 81, 101, 161 A.3d 1236 (2017); see Practice Book § 25-5 (b) (1).

the courts in some cases might be unable fairly to resolve the parties' dispute . . . ." (Internal quotation marks omitted.) *Greco* v. *Greco*, supra, 275 Conn. 362.

Moreover, it has been established by our Supreme Court that a trial court can take the dissipation of assets into consideration when fashioning alimony orders in a dissolution action. See *O'Brien* v. *O'Brien*, 326 Conn. 81, 102–104, 161 A.3d 1236 (2017) (court is authorized to consider party's dissipation of marital assets and to reduce party's share of marital assets accordingly where party is found to have dissipated assets in violation of automatic orders).

As noted previously herein, the court found that the defendant was not a credible witness and, thus, gave no credence to his claims that he believed that the $550,000 belonged to him and that he could spend it without restrictions. We will not disturb credibility determinations made by the court. See *Greco* v. *Greco*, supra, 275 Conn. 359 (on appeal, "[w]e cannot retry the facts or pass on the credibility of the witnesses" (internal quotation marks omitted)). We cannot say that the court inaccurately determined that the defendant dissipated the $550,000 and expended this amount on himself where the record shows that he made expensive purchases and supported his paramours financially while the mortgage on the family home went unpaid and one of the children's cars was repossessed. See *Gershman* v. *Gershman*, 286 Conn. 341, 346, 943 A.2d 1091 (2008). Moreover, the defendant often was found to be in contempt during the pendency of this action for not making payments on the household bills and mortgage, as required under the pendente lite orders.

In *Greco*, our Supreme Court concluded that the trial court abused its discretion in awarding the plaintiff more than 98 percent of the marital property, alimony, and attorney's fees because the financial award far exceeded the defendant's income. *Greco* v. *Greco*,

supra, 275 Conn. 349–50. Unlike the defendant in *Greco*, the defendant in the present case misappropriated and dissipated a marital asset of $550,000 for his own benefit in violation of the automatic orders, as none of the money was found to have paid off any of the family's obligations, including the liens levied on the family home for debts owed as a result of the defendant's poor business decisions. The defendant fails to account for the fact that the debts apportioned to him included business obligations that he solely and unilaterally accumulated throughout the marriage, largely without the plaintiff's knowledge and over which the plaintiff had no control.

Consequently, we conclude that the court did not abuse its discretion as the distribution was not grossly disproportionate where the court found that the defendant misappropriated and dissipated $550,000 of marital assets in violation of the automatic orders, and the court merely reattributed those assets to the defendant, as the law permits. See *O'Brien* v. *O'Brien*, supra, 326 Conn. 102–104; *Shaulson* v. *Shaulson*, 125 Conn. App. 734, 736, 739–42, 9 A.3d 782 (2010), cert. denied, 300 Conn. 912, 13 A.3d 1102 (2011).

II

The defendant's second claim is that the court erred when it found that he had actual earned income or an earning capacity of $160,000 per year because there was no evidence to support such a finding. For the reasons that follow, we are not persuaded.

The defendant argues that the court erred in finding that he had an earning capacity of $160,000 in gross income per year. In making this claim, the defendant appears to have conflated earning capacity with actual earnings, as the transcript clearly shows that the court determined his actual earnings, not his earning capac-

ity.[6] Because the court's orders were based on the defendant's actual earnings and not his earning capacity, we need to determine only whether the court had evidence before it from which it could have determined the defendant's actual earnings.

In finding that the defendant had actual earnings of $160,000, the court considered the defendant's past earnings and his spending history. Specifically, due to the defendant's lack of candor toward the court regarding his financial status, as noted previously in this opinion, in order to determine the defendant's actual earnings, the court took into consideration the defendant's past earnings from documents, such as those he submitted to the court detailing his historical earnings and liabilities, his bank accounts and credit card statements, and e-mail correspondence between the defendant and his employer and potential employer.

The defendant's reliance on *Keusch* v. *Keusch*, 184 Conn. App. 822, 195 A.3d 1136 (2018), to argue that the court's finding was based on insufficient evidence is misplaced. In *Keusch*, this court held that the trial court abused its discretion when it calculated the defendant's child support obligation on the basis of the defendant's earning capacity rather than his actual earnings without "first stating the presumptive support amount at which it arrived by applying the guidelines and using the parent's actual income *and* second finding application of the guidelines to be inequitable or inappropriate." (Emphasis in original; internal quotation marks omitted.) Id., 829. The reasoning in *Keusch* on which the defendant relies has no bearing on the merits of the present case because the holding in *Keusch* was constrained by the requirements delineated under the child support guidelines and regulatory framework. See id.

[6] Of course, in the proper case, a court may base its orders on a party's earning capacity; see *Tanzman* v. *Meurer*, 309 Conn. 105, 113–14, 70 A.3d 13 (2013); but because that was not the court's undertaking in this case, we do not discuss the propriety of finding earning capacity.

Moreover, in the present case, the court indeed determined the defendant's actual earnings on the basis of ample evidence in the record. The evidence of his past earnings and his spending habits, as evidenced by his bank statements and credit card accounts, supported the court's finding that the defendant had actual earnings of $160,000. Thus, the defendant's second claim fails.

III

The defendant next claims that the court erred by basing its alimony award solely on the defendant's gross income as opposed to his net income. Specifically, he asserts that the court made no effort to determine his net income in fashioning the alimony award and there was no evidence presented from which the court could have calculated his net income. We disagree.[7]

"It is well settled that a court must base child support and alimony orders on the available net income of the parties, not gross income." (Internal quotation marks omitted.) *Tuckman* v. *Tuckman*, 308 Conn. 194, 209, 61 A.3d 449 (2013); see also *Tobey* v. *Tobey*, 165 Conn. 742, 747, 345 A.2d 21 (1974) (establishing that gross earnings is not criterion for alimony awards, but net income available to defendant should be considered). "Although our case law consistently affirms the basic tenet that support and alimony orders must be based on net income, the proper application of this principle is context specific. . . . [W]e differentiate between an order that is a function of gross income and one that is based on gross income. . . . [T]he term based as used in this context connotes an order that only takes into consideration the parties' gross income and not the

[7] We note that the plaintiff asserts in her appellate brief that the record is inadequate for us to review this claim because the defendant failed to adequately preserve it by failing to file a motion for review, presumably of the court's articulation. This argument is of no avail because the record is adequate for review as the basis of the court's orders is plain in the record.

parties' net income. Consequently, an order that takes cognizance of the parties' disposable incomes may be proper even if it is expressed as a function of the parties' gross earnings." (Internal quotation marks omitted.) *Leonova* v. *Leonov*, 201 Conn. App. 285, 300, A.3d (2020).

"[We have] previously . . . overlooked the failure of the trial court to make a finding as to a party's net income. . . . We have concluded that such an omission does not compel the conclusion that the court's order was improperly based on gross income if the record indicates that the court considered evidence from which it could determine a party's net income, and it did not state that it had relied on the party's gross earnings to form the basis of its order. . . .

"In *Kelman* v. *Kelman*, 86 Conn. App. 120, 123, 860 A.2d 292 (2004), cert. denied, 273 Conn. 911, 870 A.2d 1079 (2005), this court rejected a similar claim on the ground that, although the trial court, in its decision, made reference to the parties' gross incomes, it did not expressly state that it was relying solely on gross earnings in framing its order." (Citation omitted.) *Leonova* v. *Leonov*, supra, 201 Conn. App. 300–301. Generally, when a court fails to state explicitly that an award for alimony is based on net income, it has been established that this failure does not automatically negate the validity of the award on appeal when there is ample evidence from which the court could have determined the parties' net income. See *Febbroriello* v. *Febbroriello*, supra, 21 Conn. App. 202–203 (trial court's award is not solely based on defendant's gross income where court had ample evidence "from which it could have determined the defendant's net income"); *Valentine* v. *Valentine*, 164 Conn. App. 354, 368–69, 141 A.3d 884 (trial court did not improperly base its decision on defendant's gross income because financial affidavits submitted as evidence reflected parties' net income after mandatory deductions and court stated it considered amount and

sources of income in fashioning financial order), cert. denied, 321 Conn. 917, 136 A.3d 1275 (2016); *Hartney* v. *Hartney*, 83 Conn. App. 553, 558–59, 850 A.2d 1098 (trial court did not improperly base its alimony award on defendant's gross income where court did not make repeated references or comparisons to defendant's gross income, it heard testimony about parties' net and gross income, and its memorandum of decision stated that it took § 46b-82 into consideration when it fashioned award), cert. denied, 271 Conn. 920, 859 A.2d 578 (2004).

In the present case, the court found that the defendant was not credible because he made various misrepresentations to the court about his earnings and was less than candid toward the court in an effort to "deprive [the plaintiff] of financial support . . . ." The record reveals that the court assigned to the defendant a gross income of $160,000 for 2018 on the basis of the evidence before it.

As noted, the defendant failed to provide any tax information from which the court could ascertain his net income, leaving the court to derive the defendant's net income from the evidence it had. The court's decision reflects that it considered evidence such as the defendant's historical annual earnings, his profit and loss statements, his bank accounts and credit card records, various e-mail exchanges between the defendant and employers or potential employers, and the testimony of his former employee. The court also took judicial notice of prior court orders and arrangements (such as the parties' agreement for the defendant to continue paying household bills). The defendant also had filed financial affidavits with the court pendente lite in which he had listed his total net weekly income while notating mandatory deductions (such as mandatory state and federal income tax deductions), total weekly expenses and liabilities, total cash value of assets, and his total liabilities after breaking down his

expenses in detail. Although the court deemed the defendant's financial documents and business records to be untrustworthy standing alone, it took them and the defendant's spending habits into consideration in fashioning the alimony award.

Although the defendant argues that the court used "fictitious numbers" and had *no* evidence before it to support a finding of his net income, that argument is without merit for two principal reasons. First, as noted, the court found the defendant totally lacking in candor during the trial. Indeed, the court found that the defendant endeavored to misrepresent facts before the court. We have often said that a party who fails to provide information to the court will not later be heard to complain that the court made orders without sufficient information. See *Rosenfeld* v. *Rosenfeld*, 115 Conn. App. 570, 581, 974 A.2d 40 (2009) ("[w]here a party's own wrongful conduct limits the financial evidence available to the court, that party cannot complain about the resulting calculation of a monetary award" (internal quotation marks omitted)). Second, the court had before it evidence of the defendant's historic spending and previous findings regarding his routine deductions from gross income. In sum, the court considered the defendant's spending habits when it looked to the defendant's bank accounts and credit cards statements, as well as the other bills the defendant was required to and agreed to pay during the pendency of the proceedings. Moreover, it is not improper for a court to look at a party's financial affidavits and to consider the ample evidence before it to "determine the [party's] net income and the respective financial needs and abilities of each party." *Hughes* v. *Hughes*, supra, 95 Conn. App. 206–207.

On the basis of our careful review of the record, we cannot conclude that the court solely relied on the defendant's gross income to form the basis of its alimony award. We note, as well, that the court did not

state that it relied on the defendant's gross income but, instead, merely referenced it, which is not improper. See id., 207. "Consequently, an order that takes cognizance of the parties' disposable incomes may be proper even if it is expressed as a function of the parties' gross earnings." Id.

Additionally, even though the court did not expressly state that it was basing the alimony award on the defendant's net income, "[o]ur Supreme Court has repeatedly held . . . that the trial court is not required to make specific reference to the criteria that it considered in making its decision. . . . [W]e are . . . of the opinion that a trial court need not expressly state that it has considered the appropriate factors in reaching its decision. According the court every reasonable presumption in favor of the correctness of its decision, we assume that the court considered the appropriate statutory and evidentiary underpinnings in fashioning its financial orders." (Citation omitted.) Id., 207–208. Therefore, although the court did not expressly state that it considered the defendant's net income in determining the alimony award, we infer that the court considered the relevant statutory factors and all of the evidence submitted by the parties.

Accordingly, this claim fails.

IV

The defendant's final claim is that the court abused its discretion by awarding alimony to the plaintiff to punish him for his "alleged bad behavior." We disagree.

The purpose of alimony is not to punish but "to meet one's continuing duty to support . . . ." (Citation omitted.) *Weiman* v. *Weiman*, 188 Conn. 232, 234, 449 A.2d 151 (1982); see also *Greco* v. *Greco*, supra, 275 Conn. 361. In determining whether to award alimony, the court "shall consider the length of the marriage, the causes

for the . . . dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and [any property] award . . . pursuant to section 46b-81 . . . .'' General Statutes § 46b-82 (a).[8] Moreover, ''[t]he court is not obligated to make express findings on each of these statutory criteria.'' *Weiman* v. *Weiman*, supra, 234.

In essence, the defendant argues that the court erred by taking his misdeeds into consideration when fashioning the alimony award and that doing so resulted in an alimony award designed to punish him. In pursuing this argument, the defendant ignores the breadth of § 46b-82 (a), which, inter alia, permits the court to take into consideration the causes for the breakdown of the marriage in fashioning its alimony award. Although the statute provides many factors that a court must consider upon determining whether to award alimony, there is no requirement that the court must weigh the factors equally. See *Horey* v. *Horey*, 172 Conn. App. 735, 741, 161 A.3d 579 (2017) (''The court is to consider these factors [under § 46b-82 (a)] in making an award of alimony, but it need not give each factor equal weight. . . . We note also that [t]he trial court may place varying degrees of importance on each criterion according

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

to the factual circumstances of each case. . . . There is no additional requirement that the court specifically state how it weighed the statutory criteria or explain in detail the importance assigned to each statutory factor." (Internal quotation marks omitted.)).

The court's findings that the defendant's extramarital affair with his twenty-two year old employee and his unilateral, poor business decisions led to the breakdown of the marriage is amply supported by the record. The court found that there was evidence that the defendant paid all of his paramour's bills, including those for her car insurance, car payment, gym membership, student loans, and credit card bills. The court also determined that the evidence supported the finding that the defendant and his paramour went on vacations or took trips together where they shared a hotel room, and that the defendant bought her expensive gifts and paid for all of her expenses in violation of the court's pendente lite orders.

Accordingly, we conclude that the court did not abuse its discretion by considering the defendant's extramarital affair and poor business decisions in fashioning the alimony award. The court is permitted to take into consideration all causes for the dissolution of the marriage in determining whether to award alimony. See *Dubicki* v. *Dubicki*, 186 Conn. 709, 715–16, 443 A.2d 1268 (1982).

The judgment is affirmed.

In this opinion the other judges concurred.

ROGEAU R. COLLINS *v.* COMMISSIONER OF CORRECTION (AC 42785)

Lavine, Suarez and Devlin, Js.*

Syllabus

The petitioner, who had been convicted of felony murder and robbery in the first degree, sought a writ of habeas corpus, claiming that his right to conflict free counsel was violated and that his trial counsel provided ineffective assistance. Specifically, the petitioner claimed that his trial counsel had a financial incentive not to retain three expert witnesses and that he failed to investigate a potential eyewitness and present her testimony. The habeas court rendered judgment denying the habeas petition, and the petitioner, on the granting of certification, appealed to this court. *Held:*

1. The petitioner could not prevail on his claim that the habeas court erred in concluding that his trial counsel did not have a conflict of interest:
   a. This court concluded, contrary to the determination of the habeas court, that the petitioner's conflict of interest claim was not procedurally defaulted, as it was a type of ineffective assistance of counsel claim that typically must be raised by way of habeas corpus, rather than by direct appeal, due to the need for a full evidentiary record of the claim; neither trial counsel nor the court raised the potential for a conflict of interest at trial and, consequently, the record on direct appeal was not adequate to review the claim; accordingly, the claim was not subject to the procedural default doctrine.
   b. The habeas court properly determined that no actual conflict of interest existed because trial counsel did not have an obligation to finance the petitioner's litigation costs or to make his private resources available to the petitioner: the fee agreement clearly placed responsibility for the payment of experts on the petitioner and his family, and counsel's decision not to advance funds to engage experts after the family failed to do so did not violate his duty of loyalty or otherwise create a conflict of interest.
2. The habeas court did not err in determining that the petitioner was not denied his constitutional right to the effective assistance of trial counsel, reasoning that trial counsel's failure to investigate the potential eyewitness did not result in any prejudice to the petitioner's defense: the habeas court's conclusion that the witness would not have been willing to assist the defense at trial, even if she had been contacted by counsel, was based on a credibility determination that was not clearly erroneous even though the witness stated at the habeas trial that she would have

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

testified at the trial if she had been approached by counsel because she also testified that she witnessed the shooting, knew that the petitioner had been arrested, and yet made no efforts to contact the police; accordingly, the petitioner did not establish that there was a reasonable probability that the trial outcome would have been different if trial counsel had investigated the eyewitness.

Argued October 13, 2020—officially released February 23, 2021

Procedural History

Second 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 the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Jennifer B. Smith, for the appellant (petitioner).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, former state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

DEVLIN, J. The petitioner, Rogeau R. Collins, appeals from the judgment of the habeas court, *Kwak*, *J.*, denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly (1) determined that his conflict of interest claim was procedurally defaulted and that, in any event, his trial counsel did not have a conflict of interest and (2) denied his ineffective assistance of counsel claim. We affirm the judgment of the habeas court.

The following recitation of facts was set forth by this court in the petitioner's direct appeal from his conviction. "In March, 2009, Robert Dixon, the victim, resided in Hartford with his girlfriend. Dixon always carried two cell phones. He used one cell phone to sell drugs and the other for personal matters. In addition, he always wore an expensive pair of Cartier glasses. He did not store the drugs he sold at his home, but kept them at

a remote location secured in a safe. The key to the safe was on the same key ring as Dixon's car keys.

"On March 9, 2009, Dixon exchanged several phone calls with an individual named Adrian Dean, a friend of the [petitioner]. At approximately 9:25 p.m. that night, Dixon left his residence in his vehicle carrying both of his cell phones and wearing his Cartier glasses. Sometime thereafter, Dean joined Dixon in the vehicle. Dean then contacted the [petitioner], who was driving around the Hartford area in his girlfriend's vehicle. Dean arranged to meet the [petitioner] at a location in Bloomfield and gave the [petitioner] directions to that location. The [petitioner] followed Dean's directions and arrived at the location at approximately the same time as Dean and Dixon. Dixon and the [petitioner] then drove their vehicles toward a cul-de-sac at the end of the road. Dixon turned his vehicle in the cul-de-sac and came to a stop. The [petitioner] pulled up and stopped his vehicle to the left of Dixon's vehicle. The [petitioner] then exited his vehicle. Both the [petitioner] and Dean, who had exited Dixon's vehicle, approached the driver's side door of Dixon's vehicle. Dixon was still sitting in the driver's seat of his vehicle. Dean, with a firearm in one of his hands, opened the driver's side door of Dixon's vehicle and shot Dixon in the head. Dean then asked the [petitioner] to search Dixon's pockets. The [petitioner] began patting Dixon's pockets when Dixon flinched and attempted to escape the vehicle through the passenger side door. Dixon was shot seven times as he attempted to escape and died as a result of the multiple gunshot wounds. The [petitioner] and Dean then left the scene in the [petitioner's] vehicle. The following morning, on March 10, 2009, Dixon was found dead by two fishermen. Dixon's two cell phones, Cartier glasses, and keys were not found at the scene. The [petitioner] was arrested on March 24, 2009.

"The state, in a long form information filed on January 11, 2011, charged the [petitioner] with murder in viola-

tion of General Statutes § 53a-54a (a), felony murder in violation of [General Statutes] § 53a-54c, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), robbery in the first degree in violation of [General Statutes] § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (2). The jury found the [petitioner] guilty of felony murder and robbery in the first degree, but not guilty [of] each of the remaining charges. The court sentenced the [petitioner] to a total effective term of forty-five years of imprisonment." *State* v. *Collins*, 147 Conn. App. 584, 586–88, 82 A.3d 1208, cert. denied, 311 Conn. 921, 86 A.3d 1057 (2014). This court affirmed the trial court's judgment on appeal. Id., 598.

On March 23, 2015, the self-represented petitioner filed a petition for a writ of habeas corpus. The petitioner filed an amended petition with the assistance of counsel on February 14, 2018, which was again amended on April 10, 2018. The second amended petition contained four counts, only two of which are relevant to this appeal.[1] In the first count, the petitioner alleged that his trial counsel, Aaron Romano, had a conflict of interest and, thus, rendered ineffective assistance. In the second count, the petitioner alleged that Romano was ineffective for failing to investigate and present a potentially exculpatory witness to the robbery, Teara Rosario, and that such failure materially prejudiced the petitioner's case.[2]

A trial on the habeas petition was held on June 8 and 12, 2018. On December 28, 2018, the habeas court issued

[1] The second amended habeas petition included claims of conflict of interest, ineffective assistance of trial counsel, a violation of due process, and actual innocence. The habeas court denied all four counts. On appeal, the petitioner challenges only the counts pertaining to conflict of interest and ineffective assistance of counsel.

[2] The petitioner alleged seventeen potential failures of trial counsel in the second amended petition, but he advances only the failure to investigate Rosario on appeal. The habeas court denied all seventeen allegations of ineffective assistance.

a memorandum of decision in which it denied each of the petitioner's claims. Specifically, as to the first count, the court concluded that the petitioner's conflict of interest claim was procedurally defaulted and that, even if it were not, the petitioner had failed to demonstrate that Romano had a conflict of interest. As to the second count, the court agreed with the petitioner that Romano was ineffective in not investigating the potentially exculpatory witness but also found that "it would be too speculative to assess whether the absence of [the witness'] testimony at the criminal trial inured to the petitioner's prejudice." Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. The habeas court granted the petition for certification to appeal. Additional facts will be set forth as necessary.

Before we turn to the petitioner's claims, we briefly set forth our standard of review for habeas corpus appeals. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

The petitioner first claims that the habeas court erred in concluding that his conflict of interest claim was procedurally defaulted and that, even if it were not, Romano did not have an actual conflict of interest that

rendered his representation ineffective. Although we agree that the petitioner's claim was not procedurally defaulted, we also agree with the habeas court's conclusion that Romano did not have a conflict of interest.

The following additional facts are relevant to our resolution of this claim. After he was arrested, the petitioner was found to be indigent and initially a special public defender was appointed for him. The petitioner's family retained Romano on February 27, 2010, to represent the petitioner in lieu of a special public defender. The petitioner's father signed a representation agreement, agreeing to pay Romano a retainer of $25,000, which included the trial fee, should the case proceed to trial. The father also agreed that, "[i]f in the opinion of [counsel], the services of experts or private investigators or the acquisition of medical, police, or other investigatory reports are necessary in defending [the petitioner] in the abovementioned matter, I agree to pay the additional costs and fees that may arise as a result of securing these services."

On March 10, 2010, Romano filed a motion for expenses pursuant to *Ake* v. *Oklahoma*, 470 U.S. 68, 87, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985),[3] arguing that the petitioner was indigent and that state funding of expert witnesses was necessary in order to provide effective assistance of counsel. Specifically, Romano claimed that he needed a ballistics expert to challenge the state's firearms expert, a cell phone expert to challenge the state's cell phone expert, a psychologist or psychiatrist to opine on the voluntariness of the petitioner's statements, and an independent medical examiner to determine the trajectory of the bullets. The court, *Mullarkey*, *J.*, conducted an evidentiary hearing over the course

[3] In *Ake* v. *Oklahoma*, supra, 470 U.S. 86–87, the United States Supreme Court held that, when an indigent defendant's mental state at the time of the offense is likely to be a significant factor at trial, due process requires that a state provide access to a psychiatric expert to assist in preparing a defense.

of three days. Ultimately, the court denied the request for expenses, concluding that Romano had failed to make a sufficiently particularized showing of need for the experts and that the petitioner's indigency was voluntary.[4] The court explained that, because the petitioner's family had decided to retain and pay Romano, the petitioner was voluntarily indigent. The court recommended that Romano pay for experts to review the case using funds he already had received and consult with the state's experts, such as the state medical examiner, before deciding if independent experts were necessary. Additionally, before adjourning, the court specifically instructed the petitioner that "the state will pay for all experts that the Chief Public Defender's office determines are necessary if you're represented by the public defender."

Prior to trial, on January 19, 2011, Romano filed an amended motion for expenses, arguing again that the petitioner was indigent and that experts were absolutely necessary to his defense. After a hearing on the motion held on February 8, 2011, the court, *Espinosa*, *J.*, denied the motion, finding that "[t]he [petitioner] had access to a special public defender, with all of the advantages and resources that the Office of the Public Defender could provide. The [petitioner] knowingly and wilfully rejected those services by having a private counsel file an appearance in this case." The court also recommended that Romano consider spending a portion of the fee that he received on experts and then subsequently seek reimbursement from the petitioner's family, pursuant to the provision in the retainer agreement.

On February 8, 2011, the petitioner moved to suppress his statements made to the police, arguing that the statements were tainted, as they were obtained as the result of an arrest made without probable cause, and

[4] The petitioner has not challenged the indigency finding or the denial of the motion for expenses.

were involuntary. Romano presented no expert testimony to support the argument, nor did he argue specifically that the petitioner's cognitive deficiencies affected the voluntariness of the statements. The court denied the motion, finding that the statements were made knowingly and voluntarily. The introduction of evidence at trial began on March 15, 2011. Romano did not present any expert witnesses at trial.

A

The petitioner argues that the habeas court's determination that his conflict of interest claim was procedurally defaulted because he did not raise the claim at trial or on direct appeal was improper. We agree with the petitioner.

A habeas court's conclusion that a petitioner's claim was in procedural default involves a question of law, over which our review is plenary. *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

We begin with a review of the procedural default rule. "Under the procedural default doctrine, a [petitioner] may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding, unless he can prove that his default by failure to do so should be excused." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 199, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018). Ordinarily, if the state "alleges that a [petitioner] should be procedurally defaulted from now making the claim, the [petitioner] bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016). This cause and

prejudice test derives from *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), and was held by our Supreme Court to be "the appropriate standard for reviewability in a habeas corpus proceeding of constitutional claims not adequately preserved at trial because of a procedural default . . . ." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991); see also *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 (1993) (holding that "the *Wainwright* cause and prejudice standard should be employed to determine the reviewability of habeas claims that were not properly pursued on direct appeal"). The procedural default doctrine, however, is limited to claims that *could* have been raised at the trial level. See *Hinds* v. *Commissioner of Correction*, supra, 853.

Conflict of interest claims are a species of ineffective assistance of counsel claims. See *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 582, 867 A.2d 70, cert. denied, 273 Conn. 930, 873 A.2d 997 (2005) ("[w]here a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest"). Our Supreme Court has explained that ineffective assistance of counsel claims are generally more appropriately resolved on collateral review: "Almost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . Moreover, we have stated as our preference that *all* of the claims of ineffective assistance, those arguably supported by the record as well as others requiring an evidentiary hearing, be evaluated by the same trier in the same proceeding. . . . On the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal, we have limited our review to allegations that the defendant's sixth

amendment rights had been jeopardized by the actions of the *trial court*,[5] rather than by those of his counsel. . . . We have addressed such claims, moreover, only where the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." (Citations omitted; emphasis in original; footnote added; internal quotation marks omitted.) *State* v. *Crespo*, 246 Conn. 665, 687–88, 718 A.2d 925 (1998) (declining to review conflict of interest claim on direct appeal), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999).

In *State* v. *Navarro*, 172 Conn. App. 472, 474, 160 A.3d 1116, cert. denied, 326 Conn. 910, 164 A.3d 681 (2017), this court examined a conflict of interest claim predicated on dual representation. In declining to review the claim on direct appeal, this court stated that the defendant's "ineffective assistance [claim] should be resolved . . . after an evidentiary hearing in the trial court where the attorney whose conduct is in question may have an opportunity to testify." (Internal quotation marks omitted.) Id., 491. The same need for testimony applies to the present case. Romano never raised the potential for a conflict of interest with the court, nor did the court raise the issue on its own. As such, it was not until the habeas trial itself that Romano explained on the record specifically *why* he declined to pay for experts using the retainer. Thus, we see no reason to depart from our Supreme Court's guidance that ineffective assistance of counsel claims are more appropriately resolved on collateral review. We conclude that the petitioner's conflict of interest claim is not subject to

[5] Because the petitioner argues on appeal that the conflict of interest arises from the conduct of Romano in not paying for experts himself, rather than from the trial court's findings of indigency and denial of the various motions for funding for expert witnesses, we conclude that this exception does not apply to the petitioner's appeal.

the procedural default doctrine and decline to apply the *Wainwright* cause and prejudice test, as the record on direct appeal was not adequate to review the claim.[6]

B

Having concluded that the petitioner's claim is not subject to procedural default, we proceed to consider the merits of his conflict of interest claim. The petitioner argues that Romano had an actual conflict of interest "because he had a personal financial incentive to not retain and present the testimony of three experts once the trial court denied his motion for state funding for the cost of those experts."[7] We are not persuaded.

We begin by setting forth the general legal principles concerning conflicts of interest in the representation of criminal defendants. "It is well established that the sixth amendment to the United States constitution guarantees the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d

[6] In support of its assertion that the petitioner's conflict of interest claim is procedurally defaulted, the respondent, the Commissioner of Correction, has also framed this claim as a failure to appeal from the denial of the motions for ancillary expenses and the findings of indigency. Specifically, the respondent argues that "[b]ecause the petitioner has presented no evidence and argument to explain why he did not previously challenge the trial court's ruling on Romano's request for ancillary funds, and has only argued why he did not claim a conflict of interest at trial and on direct appeal, he necessarily has failed to establish the requisite cause and prejudice to excuse his procedural default." The petitioner's claim, however, is directed not at the denial of the motions for ancillary expenses but rather at Romano's conduct in the aftermath of such denials. We conclude that the petitioner's failure to raise the trial courts' indigency findings and denial of payment for ancillary expenses in his direct appeal does not preclude the petitioner from making a conflict of interest claim in a habeas corpus proceeding.

[7] We note that the petitioner does not argue on appeal that his counsel's failure to call the experts constituted ineffective assistance.

1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).[8]

"In a case of a claimed conflict of interest . . . in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an *actual conflict of interest* adversely affected his lawyer's performance. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . Accordingly, an ineffectiveness claim predicated on an actual conflict of interest is unlike other ineffectiveness claims in that the petitioner need not establish actual prejudice." (Emphasis in original; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 813, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

"*An actual conflict of interest is more than a theoretical conflict.* The United States Supreme Court has cautioned that the possibility of conflict is insufficient to impugn a criminal conviction. . . . A conflict is merely a potential conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future. . . . To demonstrate an actual conflict of interest, the petitioner must be able

[8] The petitioner's statement of issues and introductory portion of his conflict of interest argument also aver that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated. However, beyond these cursory mentions, the petitioner's brief does not contain any substantive analysis of potential Connecticut constitutional violations. Accordingly, we decline to review these claims. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, 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.)).

to point to specific instances in the record which suggest impairment or compromise of his interests for the benefit of another party." (Emphasis altered; internal quotation marks omitted.) *Tilus* v. *Commissioner of Correction*, 175 Conn. App. 336, 349–50, 167 A.3d 1136, cert. denied, 327 Conn. 962, 172 A.3d 800 (2017); see *Cuyler* v. *Sullivan*, 446 U.S. 335, 345–50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). "Whether the circumstances of . . . counsel's representation, as found by the habeas court, amount to an actual conflict of interest is a question of law [over] which our review is plenary." *Shefelbine* v. *Commissioner of Correction*, 150 Conn. App. 182, 193, 90 A.3d 987 (2014).

The petitioner claims that Romano breached his duty of loyalty to him when Romano declined to use his retainer to pay expert witness fees. Specifically, in his brief, the petitioner states: "Here, counsel's representation of the petitioner was materially limited because he had a financial interest in not presenting the testimony of these experts because he would have had to use his retainer fee to pay for them. His financial interests were inconsistent with the petitioner's interests, who had an interest in challenging the state's evidence and mounting a defense to these serious charges by way of presentation of expert testimony on three important issues."

We can identify no Connecticut or federal authority holding that counsel's failure to apply funds from a retainer agreement to the hiring of expert witnesses creates a conflict of interest. This court previously has found no conflict of interest where a fee agreement provided for a fixed fee of $7500 for all work leading up to trial and payment of $250 an hour with a $5000 retainer once the case was placed on the trial list. See *Grover* v. *Commissioner of Correction*, supra, 183 Conn. App. 808, 814. The petitioner in *Grover* was unable to pay the full trial retainer and, subsequently, accepted a plea agreement. Id., 809. In his habeas petition the

petitioner claimed "that [counsel] had a financial incentive to convince the petitioner to accept a plea rather than proceed to trial due to the fact that the petitioner was unable to pay [counsel's] trial retainer in full." Id. This court declined to find a conflict of interest, explaining that "[w]e do not agree that the petitioner's inability to pay the outstanding balance of the trial retainer created such a conflict. According to the testimony of [counsel], which the habeas court credited in its entirety, although he was disappointed that the trial retainer had not been paid in full, [counsel] valued his professional reputation above any single fee. He testified that his advice throughout the pendency of the criminal case was based on his overall assessment of the facts and not the financial situation of the petitioner." Id., 814–15. Moreover, this court has also concluded that a $300,000 retainer for the entire representation, without regard to whether the case was resolved by plea agreement or trial, does not represent an actual conflict of interest. See *Shefelbine* v. *Commissioner of Correction*, supra, 150 Conn. App. 193.

Federal courts have rejected conflict of interest claims arising from fee agreements similar to the one in the present case. In *Williams* v. *Vasquez*, 817 F. Supp. 1443, 1472 (E.D. Cal. 1993), aff'd sub nom. *Williams* v. *Calderon*, 52 F.3d 1465 (9th Cir. 1995), cert. denied, 517 U.S. 1183, 116 S. Ct. 1588, 134 L. Ed. 2d 686 (1996), the petitioner claimed that his trial counsel had a conflict of interest because "he was placed in the position whereby he had to personally pay for ancillary defense services, or [forgo] the use of such services." (Internal quotation marks omitted.) Id. In rejecting this claim, the District Court for the Eastern District of California stated: "Although the [s]ixth [a]mendment guarantee of effective assistance of counsel includes the collateral right to counsel's undivided loyalty . . . counsel's duty of loyalty does not impose an ancillary obligation to

personally finance his client's defense investigation and/or expert costs. In other words, no conflict of interest existed. Counsel's failure to financially support [the] [p]etitioner's defense does not constitute a violation of his duty of loyalty or of [the] [p]etitioner's [s]ixth [a]mendment right to effective assistance of counsel." (Citations omitted.) Id., 1473. In affirming the judgment of the District Court, the Court of Appeals for the Ninth Circuit observed: "The quality of such representation might well improve if counsel were to volunteer to place her private financial resources at [the] defendant's disposal. As the [D]istrict [C]ourt correctly noted, counsel is under no obligation to do so." *Williams* v. *Calderon*, 52 F.3d 1465, 1473 (9th Cir. 1995), cert. denied, 517 U.S. 1183, 116 S. Ct. 1588, 134 L. Ed. 2d 686 (1996).

In *Bonin* v. *Calderon*, 59 F.3d 815, 827 (9th Cir. 1995), the United States Court of Appeals for the Ninth Circuit again considered a habeas petitioner's claim that his trial counsel had a conflict of interest because trial counsel's substitution as retained counsel deprived the defendant of state funded investigators and expert witnesses, thereby requiring counsel to pay for any investigators or experts out of his own pocket. In rejecting this claim, the court noted that "[t]his allegation of conflict is . . . inadequate under *Cuyler* [v. *Sullivan*, supra, 446 U.S. 335]. . . . [A]n assertion of conflict based on the fact that payment for any investigation or psychiatric services could have come from counsel's pocket [forcing] counsel to choose between [the client's] interests and his own . . . is the same theoretical conflict that exists . . . in any pro bono or underfunded appointment case. . . . While such arrangements create a theoretical conflict of interest, they do not typically create actual conflicts under *Cuyler*." (Citations omitted; internal quotation marks omitted.) Id.

In *United States* v. *Stitt*, 552 F.3d 345, 350 (4th Cir. 2008), cert. denied, 558 U.S. 831, 130 S. Ct. 65, 175 L.

Ed. 2d 48 (2009), the petitioner argued that "under the financial agreement between him and [counsel], [counsel] was required to pay for all case-related expenses out of his own pocket and that [counsel], not wishing to incur the costs of an out-of-state investigator, thus declined to pursue any investigation [out of state]." However, the United States Court of Appeals for the Fourth Circuit noted that the District Court had made the express factual finding, to the contrary, that counsel "were paid flat fees for their services, with costs and expenses to be paid as they arose . . . . Petitioner's family agreed to raise the money for any additional costs and expenses." (Internal quotation marks omitted.) Id., 351. After determining that this finding was not clearly erroneous, the court concluded that a fee agreement where counsel is paid a flat fee and must seek additional costs and expenses from the petitioner's family did not represent an actual conflict. Id.

The petitioner in the present case asserts that *Williams*, *Bonin*, and *Stitt* are distinguishable because the written fee agreement in the present case allowed Romano to advance the funds for experts and then pursue legal action against the petitioner's family for reimbursement. The petitioner's effort to distinguish *Williams*, *Bonin*, and *Stitt* on the ground that Romano could bring an action for reimbursement is unpersuasive. The fact that there might be a theoretical path to reimbursement does not create a conflict of interest where otherwise one does not exist. Those cases stand for the proposition that trial counsel has no obligation to finance a defendant's litigation costs and, further, is under no obligation to put counsel's private resources at the defendant's disposal. Advancing funds for experts amounts to exactly that.

The petitioner relies heavily on *State* v. *Cheatham*, 296 Kan. 417, 292 P.3d 318 (2013), for the proposition that "[a] fee agreement creates a conflict of interest

between a client and his attorney where the fee agreement pits the attorney's interest in getting paid against those of the client." In *Cheatham*, the Kansas Supreme Court addressed the propriety of a flat fee arrangement in a death penalty case and concluded that the agreement in that case did constitute a conflict of interest. Id., 453. However, the court stressed several key facts that differentiate *Cheatham* from the present case. First, counsel in *Cheatham* was not paid any fees before the trial and thus operated under the presumption that there was "little likelihood of any payment because [the defendant] was indigent, which [counsel] knew." Id. Indeed, by the time of collateral proceedings, counsel testified that he still was owed the $50,000 retainer. Id., 451. Second, "[counsel], a solo practitioner with a 'high volume' law practice requiring near daily court appearances, [had] little financial incentive to invest the significant time commitment a capital case requires." Id., 453–54. Additionally, we note that when counsel in *Cheatham* took the case he was aware that the defendant would not be able to pay for expenses or expert witnesses. Id., 422. Ultimately, the court in *Cheatham* characterized the representation as "[bearing] a greater resemblance to a personal hobby engaged in for diversion rather than an occupation that carried with it a responsibility for zealous advocacy." Id., 454. An unpaid flat fee agreement in a death penalty case that incentivizes an attorney to do no more than the minimum necessary to secure a fee rather than seek acquittal is far from the situation in the present case, in which a written fee agreement placed the responsibility to pay for experts and investigators squarely on the petitioner's family. We find *Cheatham* inapposite to the claimed conflict of interest in the present case.

Given that this court has declined to find a conflict of interest between a defendant and counsel in flat fee cases, consistent with our holdings in *Grover* and

Shefelbine and the holdings in the federal case law cited herein, we conclude that Romano did not have an actual conflict of interest. The fee structure in the present case is essentially the same fee structure that was present in *Stitt*, for which the Court of Appeals for the Fourth Circuit concluded there was no actual conflict of interest. See *United States* v. *Stitt*, supra, 552 F.3d 351. Further, an actual conflict of interest is more than a theoretical conflict. The United States Supreme Court has cautioned that "the possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler* v. *Sullivan*, supra, 446 U.S. 350. A conflict is merely "a *potential* conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future." (Emphasis in original; internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, supra, 87 Conn. App. 589. In the present case, there was a written fee agreement that clearly delineated the financial arrangement involved in Romano's representation of the petitioner. The responsibility to pay for experts and investigators was placed squarely on the petitioner and his family. When they defaulted on this obligation, counsel's decision not to advance funds for experts did not violate his duty of loyalty or otherwise create a conflict of interest.[9] We therefore cannot conclude that Romano had an actual conflict of interest.

Because we conclude that there was no actual conflict of interest between the petitioner and Romano, we do not reach the second prong of the conflict of interest analysis concerning whether the conflict of interest adversely affected counsel's performance.

[9] As the respondent, the Commissioner of Correction, correctly points out, if Romano unreasonably failed to investigate the petitioner's case or to present any expert witness at trial, the petitioner's recourse would be to claim, under *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), that Romano rendered ineffective assistance of counsel. In the present case, the petitioner made that claim only with respect to Romano's failure to locate and to call Rosario, the potential eyewitness.

II

The petitioner next claims that the habeas court improperly concluded that he received effective assistance of counsel. Specifically, the petitioner claims that the habeas court correctly concluded that Romano's performance was deficient for failing to investigate a potential witness, but that the court erred in concluding that Romano's failure to investigate the witness and to present her testimony did not prejudice the petitioner's case. We do not agree.

The following additional facts are relevant to our resolution of this claim. The petitioner testified at the habeas trial that he did not have a gun with him on the night of the shooting and that Dean ordered him at gunpoint to participate in the robbery. He claimed that he was ordered to pat down the victim, but that he did not fire any shots. This testimony was contradicted by the ballistics evidence presented at the criminal trial, which suggested that there were bullets fired from two different guns based on distinctive ballistic markings. The petitioner contends that trial testimony from the potential witness could have corroborated his version of the events, namely, that he was acting under duress when he participated in the robbery.

The petitioner testified at the habeas trial that there was a woman, Rosario, in his car with him on the night of the murder who witnessed the shooting. At the time, he only knew the woman as "T." He explained that he saw the woman on the street that night and that, because he had not seen her in four years, she got into his car and joined him as they drove around Hartford. After his arrest, the petitioner explained to the police that he had picked up the woman earlier that night. He told the police that she rode in the backseat of the car to the location of the murder and was dropped off afterward on Mather Street in Hartford. He described

the witness to the police as "half black and half Spanish with a funny nose and a big forehead" with "shoulder length" hair and mentioned that she hangs out at a smoke shop on Mather Street, but he was not able to provide her name. It was not until the petitioner was incarcerated that he learned from another inmate that the witness' name is Teara Rosario.

The petitioner also testified at the habeas trial that he had told Romano to find "T" and that she lived on Marvin Street. Romano testified that he was aware of the description of the woman in the police report and that he and the petitioner had discussed the potential witness. He considered the woman to be a potential witness, but, due to the petitioner's vague description of her and lack of a name, he thought that it was doubtful that an investigator would be able to locate the woman. Romano testified at the habeas trial that he believed that hiring a private investigator to find Rosario was necessary and that he requested expenses to do so. After his motion for expenses was denied, Romano made no effort to locate the woman either personally or through a private investigator. After learning of the witness' name while he was incarcerated, the petitioner was able to hire a private investigator to locate Rosario for the habeas trial. Rosario testified at the habeas trial that she ran into the petitioner in Hartford on the evening of the shooting and got into his car. While she was driving around with the petitioner, he received a "chirp" from Dean on his push-to-talk mobile phone. Rosario heard Dean ask the petitioner to pick him up and give him a ride. Rosario testified that there was no mention of a robbery or plans to confront Dixon on this call. The petitioner first drove to a house where Dean had indicated that he was located. Upon determining that Dean was not there, they drove for approximately ten minutes and parked near a hotel, where Rosario saw Dean standing near another car in which Dixon, the victim, was

seated in the driver's seat. Dean started walking toward the petitioner's vehicle. Rosario testified that Dean had a gun but that the petitioner did not. Dean opened the petitioner's car door and ordered him out of the car. Rosario then saw Dean and the petitioner approach Dixon's car, where Dean pointed his gun at Dixon and said something to the petitioner. The petitioner leaned into the car to pat down Dixon, then stepped away from the car, at which point Dean started shooting at Dixon. Although Rosario testified that only Dean had a gun, at one point she also stated "[a]nd then they just start shooting."[10] Rosario stayed in the petitioner's car during the confrontation and could not hear what was said between the three men. After the petitioner and Dean ran back to the petitioner's car, Rosario asked to be dropped off.

Rosario was asked at the habeas trial "had the defense attorney come and found you, would you have testified at [the petitioner's] trial and told this story?" She responded that she would have done so. However, she also testified that she was aware that a crime had been committed and had made no efforts to speak to the police even after hearing that the petitioner had been arrested, despite characterizing their relationship as that of "good friends." She then explained on redirect that she did not go to the police because she did not want to be involved, as she was afraid that she would end up in jail or that the victim's family or Dean's family could hurt her or her family.

The habeas court agreed that the petitioner provided Romano with "very little useful information" that could be used to locate the woman but ultimately ruled that counsel's representation was deficient because counsel took no steps to locate her: "Hiring one or more . . .

[10] Insofar as this statement suggests that there were two shooters, we note that the petitioner describes this statement as a mistake, which is amply supported by evidence in the record, as Rosario repeatedly testified that Dean was the only person with a gun.

expert witnesses can readily be distinguished from utilizing an investigator to find and interview a potential fact or eyewitness who is identified in the police report. The police report placed an unknown woman (i.e., 'T') inside the vehicle during the robbery and shooting. Reasonably competent defense counsel would hire and utilize an investigator to conduct an investigation that is limited in scope: finding 'T' and discerning if she had information that would assist the defense. The court finds that . . . Romano was deficient for not utilizing an investigator to locate . . . Rosario."

However, the court concluded that Romano's failure to investigate Rosario did not result in prejudice to the petitioner. The court found that "she was not willing to come forward and assist the defense at the time of the trial for fear of the codefendant, Dean. Efforts by counsel to locate . . . Rosario would not, therefore, have likely resulted in her cooperating with the investigation in a manner that assisted the defense." Ultimately, the habeas court determined that, "[a]lthough this court has concluded that . . . Romano was deficient for not utilizing an investigator to locate . . . Rosario, it would be too speculative to assess whether the absence of her testimony at the criminal trial inured to the petitioner's prejudice."

As a preliminary matter, we set forth the general principles surrounding ineffective assistance of counsel claims and our standard of review. "In *Strickland* v. *Washington*, [466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted

from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011).

As to the first prong, the habeas court found that Romano's representation was deficient because Romano did not hire an investigator to locate and to interview Rosario. The respondent, the Commissioner of Correction, has not challenged this finding on appeal.

"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." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 776, 138 A.3d 908 (2016).

"In a habeas appeal, although this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, 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.) *Griffin* v. *Commissioner of Correction*, 119 Conn. App. 239, 241, 987 A.2d 1037, cert. denied, 295 Conn. 912, 989 A.2d 1074 (2010). With the foregoing principles in mind, we now address the merits of the petitioner's claim.

The petitioner claims that the court erred in concluding that Romano's failure to investigate Rosario and to present her testimony did not prejudice the petitioner's case. We are not persuaded. Because the court's conclusion was premised on a factual finding, we first apply the clearly erroneous standard of review to that finding.[11] "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, [t]his court does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . Thus, the court's factual findings are entitled to great weight. . . . Furthermore, [a] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–42, 937 A.2d 656 (2007).

The habeas court's conclusion of no prejudice was predicated on its finding that Rosario would not have

[11] The petitioner, citing *State* v. *Clark*, 297 Conn. 1, 997 A.2d 461 (2010), claims that "when a constitutional issue turns upon a factual finding, a reviewing court must conduct a scrupulous examination of the record to determine whether a lower court's finding is supported by substantial evidence." Although *Clark* includes language supporting that statement, *Clark* and the line of cases cited therein make it clear that the substantial evidence standard applies to "review of a trial court's findings and conclusions in connection with a motion to suppress." Id., 7; see *State* v. *DeMarco*, 311 Conn. 510, 519, 88 A.3d 491 (2014); *State* v. *Burroughs*, 288 Conn. 836, 843, 955 A.2d 43 (2008). Accordingly, we apply the well established definition of clearly erroneous when evaluating the court's factual findings.

been willing to assist the defense at the time of the trial. Although the petitioner stresses that Rosario responded in the affirmative when asked if she would have testified if approached by defense counsel, there is sufficient support in the record to discredit her statement. Even after characterizing her relationship with the petitioner as that of "good friends" and unequivocally stating that she witnessed Dean shoot the victim and that she knew the petitioner had been arrested, Rosario testified that she made no efforts to contact the police to tell them what she had witnessed. The following colloquy occurred on redirect examination of Rosario:

"Q. Miss Rosario, why didn't you go to the police?

"A. Because I didn't want to be involved.

"Q. Why not?

"A. I have a life and children and I was pregnant. And I didn't know what possibly—what could happen. . . .

"Q. Did you believe that someone could hurt you or your family if you came forward in this case?

"A. Yes. . . .

"Q. Who were you afraid might hurt you or your family?

"A. The victim's family or [Dean's] family."

In arguing that the court's factual finding is clearly erroneous, the petitioner contends that "[t]he habeas court ignored the distinction between Rosario not coming forward independently, and Rosario coming forward if she was approached by trial counsel and asked to testify." However, we agree with the respondent that "[t]he habeas court's conclusion that the petitioner failed to establish that Rosario would have presented helpful testimony amounted to a discrediting of her testimony that, if she had been located and called to testify at the criminal trial, she would have testified in

the same manner as she testified at the habeas trial." The habeas court's finding that Rosario was not willing to assist the defense at the time of the trial is an implicit credibility finding. The habeas court was free to reject her testimony that she would have testified at the petitioner's criminal trial as she did at the habeas trial. We must assume that the habeas court carefully weighed Rosario's testimony that she would have cooperated if approached by counsel against her testimony that she was afraid to be involved, and found the former to be not credible. "[A] pure credibility determination . . . is unassailable." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017); see also *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014) ("[W]e must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.)). Accordingly, we cannot conclude that the habeas court's factual finding is clearly erroneous.

Having accepted the habeas court's finding that Rosario would not have assisted the defense at the time of trial, we agree with the habeas court's ultimate conclusion that Romano's failure to investigate the potential witness resulted in no prejudice to the petitioner's defense. We agree with the habeas court's conclusion that "it would be too speculative to assess whether the absence of her testimony at the criminal trial inured to the petitioner's prejudice." The petitioner cannot establish that there is a reasonable probability that the outcome of his trial would have been different even if Romano had investigated Rosario.[12]

[12] We note that the petitioner claims that "the habeas court failed to state and apply the correct prejudice standard—the 'reasonable probability' standard. . . . Nowhere in the habeas court's decision . . . does it state

Because we have concluded that the habeas court's ruling was proper pursuant to its credibility determination of Rosario, we decline to address the petitioner's claim that the habeas court erroneously found that Rosario did not substantially corroborate the petitioner's version of events.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSIONER OF PUBLIC HEALTH *v.* ANTHONY COLANDREA (AC 42475)

Elgo, Cradle and Alexander, Js.

Syllabus

The defendant, a dentist licensed by the Department of Public Health, appealed to this court from the judgment of the trial court denying in part his motion to vacate a prior contempt judgment stemming from his noncompliance with a subpoena duces tecum seeking the production of certain patient records, issued by the plaintiff, the Commissioner of Public Health, pursuant to statute (§ 19a-14 (a) (10)). The court previously had granted a petition for the enforcement of the subpoena and ordered the defendant to release the records to the department, and this court affirmed that order. The trial court subsequently granted the plaintiff's motion to find the defendant in contempt for failure to comply with the subpoena and ordered the defendant to pay a coercive fine each day until he produced the records to the department. Thereafter, the court affirmed its finding of contempt but vacated the fine, and it issued supplemental orders that the defendant permit the department to search his dental office for the patient records and awarded attorney's

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or apply the 'reasonable probability' standard." We agree with the respondent that the habeas court expressly stated that it was applying the prejudice test from *Strickland*, which is the reasonable probability standard. The habeas court appropriately and extensively discussed the relevant principles from *Strickland*, as well as our Supreme Court's ineffective assistance of counsel jurisprudence as set forth in *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 664. The mere fact that the habeas court did not use the precise phrase "reasonable probability" in its conclusion regarding Rosario's testimony is insufficient to give us the impression that the court failed to apply the appropriate standard, particularly where we have agreed with the habeas court's prejudice determination.

fees and costs to the plaintiff pursuant to the statute (§ 52-256b (a)) that permits the award of attorney's fees in contempt proceedings in the discretion of the court. *Held*:

1. The defendant's claim that the trial court erred in finding that his noncompliance with the subpoena was wilful was unavailing; the court found the defendant's testimony as to how the subpoenaed records came to be discarded or destroyed was not credible and concluded that the defendant had failed to prove that he was unable to comply with the subpoena's request for all applicable records, and, as the defendant bore the burden of proving that his noncompliance was not wilful, the plaintiff was not required to present evidence in opposition to the defendant's claim.
2. The trial court did not abuse its discretion in awarding the plaintiff attorney's fees pursuant to § 52-256b (a), as the court found the defendant's noncompliance was wilful and this court affirmed that finding.
3. This court declined to review the defendant's challenge to the constitutionality of the trial court's order permitting the plaintiff to search his office; the defendant claimed the search violated his fourth amendment rights pursuant to our rules of practice (§ 13-9), however, the plaintiff commenced the action seeking enforcement of the subpoena pursuant to § 19a-14 (a) (10), and the defendant did not challenge the constitutionality of that statute or the court's ability to issue the order under that statute.

Argued October 19, 2020—officially released February 23, 2021

Procedural History

Petition for an order to enforce a subpoena duces tecum, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Robaina*, *J.*; judgment granting the petition, from which the defendant appealed to this court, *DiPentima*, *C. J.*, and *Alvord and Lavery*, *Js.*, which affirmed the judgment of the trial court; thereafter, the court, *Sheridan*, *J.*, granted the plaintiff's motion for contempt; subsequently, the court, *Sheridan*, *J.*, granted in part the defendant's motion to vacate, and the defendant appealed to this court. *Affirmed.*

Paul Spinella, for the appellant (defendant).

Susan Castonguay, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (plaintiff).

Opinion

CRADLE, J. The defendant, Anthony Colandrea, a dentist, appeals from the judgment of the trial court denying in part his motion to vacate a prior contempt judgment stemming from his noncompliance with a subpoenaduces tecum issued by the plaintiff, the Commissioner of Public Health,[1] for certain records of his dental practice. On appeal, the defendant claims that the trial court (1) erred in finding that his noncompliance was wilful, (2) improperly awarded attorney's fees on the basis of wilful noncompliance, and (3) violated his constitutional right to be free from unreasonable searches when it issued an order permitting the plaintiff to search the office of his dental practice without a finding of probable cause or a valid search warrant. We affirm the judgment of the trial court.

The trial court set forth the following relevant factual and procedural history. "[The defendant] was licensed as a dentist and has been a self-employed dentist in Connecticut since 1980. In 2014, [the defendant] was the subject of an investigation commenced by the [plaintiff]. United Healthcare, a health insur[ance] provider, contracted with an auditing firm, Verisk Analytics, to conduct audits of various healthcare providers to investigate potential fraudulent billing activities.

"After reviewing patient billings submitted by the [defendant] to United Healthcare billing, Verisk Analytics attempted to obtain certain patient records from [the defendant]. [The defendant] refused to provide the requested records, leading Verisk Analytics to refer the matter to the Office of the Attorney General, which subsequently referred the matter to the [plaintiff].

"On August 27, 2014, the [Department of Public Health's] practitioner licensing and investigations sec-

[1] The Commissioner of Public Health acts on behalf of the Department of Public Health, and references in this opinion to the department include the commissioner.

tion initiated an investigation of allegations of fraudulent billing activities by [the defendant]. On November 16, 2015, [the plaintiff] issued a subpoena duces tecum to [the defendant] for complete copies of all records for thirty-one patients identified by Verisk Analytics. When [the defendant] refused to comply with the subpoena, the present action seeking a contempt order was initiated."

"On December 10, 2015, the plaintiff . . . filed a petition for enforcement of [the] November 16, 2015 subpoena duces tecum served [on] [the defendant] seeking production of certain patient records in connection with an investigation of possible fraudulent billing practices. Th[e] [trial] court, *Robaina*, *J.*, conducted a hearing regarding the petition. On January 25, 2016, the court granted [the plaintiff's] petition and overruled the defendant's objection thereto, ordering the defendant to release thirty-one subpoenaed patient records to [the department]. The defendant appealed that decision and, on August 1, 2017, in a per curiam decision, [this court] affirmed the [trial court's] granting of the petition for enforcement of [the] subpoena. *Commissioner of Public Health* v. *Colandrea*, 175 Conn. App. 254, 167 A.3d 471 (2017). The defendant petitioned the Supreme Court for certification. On November 8, 2017, [our] Supreme Court denied the defendant's petition. *Commissioner of Public Health* v. *Colandrea*, 327 Conn. 957, 172 A.3d 204 (2017).

"On November 20, 2017, [the plaintiff] moved the court to find the defendant in contempt for failing to comply with the subpoenaed patient records. The motion was calendared for a hearing on December 4, 2017. On November 28, 2017, the [defendant] moved for a continuance of the hearing, supposedly because [he] was 'in Florida, and unable to attend or testify on December [4].' . . . The continuance was denied. On December 4, 2017, the motion appeared on the short calendar and the parties

appeared and were heard. [The defendant] was represented by counsel. At the hearing, neither [the defendant] or his counsel informed the court—or even suggested—that the records had been 'accidentally destroyed.' Quite to the contrary, counsel represented that 'there is an explanation for the noncompliance with the court order' but requested tha[t] any questioning of [the defendant] regarding that explanation be deferred until subsequent counsel could be present, because 'there is a fifth amendment problem.' [The defendant] did briefly take the stand but, on the advice of counsel, refused to answer any questions regarding the subpoenaed documents, invoking his fifth amendment privilege against self-incrimination.

"After the hearing, counsel for [the defendant] filed a motion for [a] protective order, based [on] a claim that [the] production of [the] documents in response to the subpoena would violate the fifth amendment prohibition against self-incrimination. The court denied the motion for [a] protective order and, on December 10, 2017, declared [the defendant] in contempt of court and ordered the defendant to pay a coercive fine of [$1000] per day to the Office of the Attorney General from the date of the order until the documents which are the subject of the plaintiff's petition for [the] enforcement of [the] subpoena were delivered to the [department]. . . .

"On December 15, 2017, new counsel for the defendant . . . appeared in the case and filed the present motion to vacate [the] order [of contempt]. In the motion, the defendant conceded that he had failed to produce the subpoenaed patient records to [the department] but nonetheless moved to vacate the coercive fine based on the impossibility of complying with the court order. The defendant asserted that he could not comply with the court's order because the documents are no longer in existence. The defendant explained that the subpoenaed documents were destroyed under

circumstances which the defendant alleged were outside his knowledge or control.

"The court heard evidence regarding the question of inability to comply on January 11, May 17 and June 25, 2018. Posthearing briefs were submitted by both parties." (Citation omitted; footnote omitted.)

On January 2, 2019, the court issued a memorandum of decision, in which it granted in part and denied in part the defendant's motion to vacate the prior contempt judgment. The court affirmed its prior finding of contempt but vacated the $1000 per day fine. The court issued supplemental orders that the defendant turn over any of the relevant records and that he "permit [the department] full and complete access to [his practice] for the purposes of inspecting and verifying the manner of storage, existence and location of stored patient records and other documents." The court also awarded attorney's fees and costs to the plaintiff pursuant to General Statutes § 52-256b (a), and it invited "[t]he parties [to] contact the court to schedule a hearing to present evidence and argument as to the amount of attorney's fees to be awarded." This appeal followed.[2]

I

The defendant first claims that the court erred in failing to vacate the judgment of contempt against him because his failure to comply was not wilful because "the records had been destroyed as a result of basement flooding and mold contamination and . . . the [plaintiff] failed to refute that evidence in any way." We are not persuaded.

"Contempt is a disobedience to the rules and orders of a court which has power to punish for such an offense. . . . If the underlying court order was suffi-

[2] "[A] civil contempt order requiring the contemnor to incur a cost or take specific action . . . satisfies the second prong of [*State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983)] and, therefore, constitutes an appealable final judgment." *Khan* v. *Hillyer*, 306 Conn. 205, 217, 49 A.3d 996 (2012).

ciently clear and unambiguous, we . . . determine whether the trial court abused its discretion in issuing . . . a judgment of contempt, which includes a review of the trial court's determination of whether the violation was wilful or excused by a good faith dispute or misunderstanding. . . . [T]his court will not disturb the trial court's orders unless it has abused its legal discretion or its findings have no reasonable basis in fact. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . [E]very reasonable presumption will be given in favor of the trial court's ruling, and [n]othing short of a conviction that the action of the trial court is one which discloses a clear abuse of discretion can warrant our interference. . . .

"To constitute contempt, a party's conduct must be wilful. . . . Noncompliance alone will not support a judgment of contempt. . . . The inability of a party to obey an order of the court, without fault on his part, is a good defense to the charge of contempt. . . . The contemnor must establish that he cannot comply, or was unable to do so." (Citations omitted; internal quotation marks omitted.) *Brody* v. *Brody*, 145 Conn. App. 654, 662, 77 A.3d 156 (2013).

Here, the defendant does not challenge the clarity of the court's order that he comply with the subpoena, nor does he contend that he complied with it. The defendant argues only that the court erred in finding that his noncompliance was wilful. In addressing the defendant's claim of wilfulness, the court noted the defendant's testimony that he had a practice of storing, among other things, patient records in the basement of his dental office, and that, on at least two occasions, July 28, 2016 and February 19, 2017, the basement was subject to minor flooding from leaky plumbing. The court stated that "testimony was offered that after one of these occasions, certain materials stored in the basement were discarded, probably including patient records

responsive to the November 16, 2015 subpoena. The court notes that testimony, but does not find that fact to be proven by clear and convincing evidence." Specifically, the court found that "[the defendant's] testimony as to how the subpoenaed records came to be discarded or destroyed is relatively straightforward but ultimately not credible." The court specifically rejected the defendant's testimony that the subpoenaed records were in the basement and that those records were discarded due to the presence of mold. The court further found that "[a] great deal of testimony was offered that strongly suggested the existence of records related to the patients listed on the subpoena other than those that were allegedly stored in the basement of [the defendant's] office," and that the defendant "made little to no effort to locate or produce records responsive to the subpoena." The court reasoned that "several of the patients identified in the subpoena continued in the care of [the defendant's] office after the service of the subpoena, and records would have been kept of those visits. . . . [The defendant's] attempt to explain how patient records were kept and maintained for these returning patients after their files were supposedly sent to the basement was not at all credible, and there is a strong possibility that some or all of the patient records requested by the subpoena still exist and are in use by the dental office." (Footnote omitted.) On those bases, the court concluded that the defendant failed to prove "by clear and convincing evidence that he is unable to comply with the subpoena's request for any and all documents in his possession and control related to the patients in question." The court further concluded that the defendant failed to sustain "his burden of proving a complete inability to comply with the court's order."

In challenging the court's finding of wilfulness, the defendant contends that the court erred in finding that his noncompliance was wilful because his testimony to the contrary was uncontroverted by the plaintiff. The

defendant sets forth all of the evidence that he presented in support of his argument that he was unable to comply with the subpoena—evidence that was expressly discredited by the trial court—and asks this court to draw an alternative conclusion from that evidence. It is not the role of this court to do so. "[T]he trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony . . . and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) *FirstLight Hydro Generating Co.* v. *Stewart*, 328 Conn. 668, 679–80, 182 A.3d 67 (2018). Thus, the court was not required to credit the defendant's testimony or the evidence that he presented, and, because he bore the burden of proving that his noncompliance was not wilful, the plaintiff was not required to present any evidence in opposition to the defendant's claim. Accordingly, the defendant's claim that the court erred in finding that his noncompliance was wilful is unavailing.

II

The defendant next challenges the court's award of attorney's fees. "The authority of the trial court to award attorney's fees following a contempt proceeding is well settled. Once a contempt has been found . . . [§ 52-256b (a)] establishes a trial court's power to sanction a noncomplying party through the award of attorney's fees. . . . The award of attorney's fees in contempt proceedings is within the discretion of the trial court." (Footnote omitted; internal quotation marks omitted.) *O'Toole* v. *Hernandez*, 163 Conn. App. 565, 577, 137 A.3d 52, cert. denied, 320 Conn. 934, 134 A.3d 623 (2016). Section 52-256b (a) provides: "When any person is found in contempt of any order or judgment of the Superior Court, the court may award to the petitioner a reasonable attorney's fee and the fees of the officer serving

the contempt citation, such sums to be paid by the person found in contempt."

The defendant argues that the court abused its discretion in awarding attorney's fees in the absence of a finding of wilful noncompliance. Because the court did, in fact, find that the defendant's noncompliance was wilful, and we have affirmed that finding, the defendant's challenge to the award of attorney's fees fails.

III

The defendant finally claims that the trial court violated his constitutional right to be free from unreasonable searches when it issued an order permitting the plaintiff to search the office of his dental practice without a finding of probable cause or a valid search warrant. Specifically, the defendant argues that the court's order violated the fourth amendment to the United States constitution because our rules of practice, specifically Practice Book § 13-9, do "not authorize the court to order an indiscriminate search of private property to obtain evidence to substantiate a perjury charge."[3] He contends that the order "exceeded the physical inspection authorized by Practice Book § 13-9, and, [thus], violated the fourth amendment's prohibition against general warrants." The defendant's argument is misplaced in that the court did not make any reference

[3] Practice Book § 13-9 (a) provides in relevant part: "In any civil action, in any probate appeal, or in any administrative appeal where the judicial authority finds it reasonably probable that evidence outside the record will be required, any party may serve in accordance with Sections 10-12 through 10-17 upon any other party a request to afford the party submitting the request the opportunity to inspect, copy, photograph or otherwise reproduce designated documents or to inspect and copy, test or sample any tangible things in the possession, custody or control of the party upon whom the request is served or to permit entry upon designated land or other property for the purpose of inspection, measuring, surveying, photographing, testing or sampling the property or any designated object or operation thereon. . . ."

whatsoever to our rules of practice, or, more specifically to Practice Book § 13-9, when it issued its order permitting the plaintiff to search the defendant's property for patient records that were the subject of a subpoena that the defendant refused to comply with.

The plaintiff commenced this action seeking enforcement of the subpoena pursuant to General Statutes § 19a-14, which is entitled, "Powers of department concerning regulated professions." Section 19a-14 (c) affords the department "all powers and duties normally vested with a board in administering regulatory jurisdiction over such professions . . . including, but not limited to, standards for entry and renewal; grounds for discipline; receiving and processing complaints; and disciplinary sanctions . . . ." Specifically, § 19a-14 provides in relevant part: "(a) . . . The department shall . . . (10) Conduct any necessary review, inspection or investigation regarding qualifications of applicants for licenses or certificates, possible violations of statutes or regulations, and disciplinary matters. In connection with any investigation, the Commissioner of Public Health or the commissioner's authorized agent may administer oaths, issue subpoenas, compel testimony and order the production of books, records and documents. If any person refuses to appear, to testify or to produce any book, record or document when so ordered, a judge of the Superior Court may make such order as may be appropriate to aid in the enforcement of this section . . . ." Thus, the court's authority to enforce the subpoena power of the plaintiff is derived from § 19a-14.

Here, the defendant has not challenged the constitutionality of § 19a-14 (a) (10), the authority pursuant to which the plaintiff commenced this action to enforce the subpoena that it had served upon the defendant. Because the defendant has not challenged the court's authority to issue the order under § 19a-14 (a) (10), or the constitutionality of that statute, we cannot review

his challenge to the constitutionality of the order.[4] See *U.S. Bank, N.A.* v. *Armijo*, 195 Conn. App. 843, 846, 228 A.3d 131 (2020).

The judgment is affirmed.

In this opinion the other judges concurred.

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[4] To the extent the defendant maintains that the warrantless search of his office was unreasonable in that it "authorized a nearly unfettered search of [his] private property," that argument is belied by the plain language limiting the scope of the search and the context of the proceeding in which it was ordered. The defendant was afforded several opportunities over the course of several years to comply with the subpoena, but he failed to do so. The plaintiff commenced this action to enforce the subpoena that the defendant had successfully avoided since 2015. Since 2015, his reasons for noncompliance have been fluid, and, most recently, as noted herein, the defendant has claimed that the records sought by the plaintiff no longer exist because they were destroyed after they were contaminated by toxic mold caused by flooding in the basement of his practice, where he allegedly had been storing those and other active and inactive patient files. The court held evidentiary hearings, first on the plaintiff's motion for contempt, then on the defendant's motion to vacate. At both hearings, the defendant was afforded the opportunity to be heard. The hearing on the motion to vacate, which gave rise to the order now at issue, spanned three days, and the defendant testified and presented exhibits in defense of his noncompliance. After finding that the defendant's explanation for noncompliance was not credible, the court issued the order authorizing a search that was limited in scope to allow an inspection of the defendant's records and storage practices.

MEMORANDUM DECISIONS

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CATALINO MORALES *v.* COMMISSIONER OF CORRECTION
(AC 43557)

Moll, Alexander and Suarez, Js.

Argued February 4—officially released February 23, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

THE MORGANTI GROUP, INC. *v.* CONCRETE SUPERSTRUCTURES, INC.
(AC 43451)

Prescott, Cradle and Suarez, Js.

Argued February 8—officially released February 23, 2021

Defendant's appeal from the Superior Court in the judicial district of Danbury, *D'Andrea*, *J.*

Per Curiam. The judgment is affirmed.

RICHARD M. SAUVE *v.* COMMISSIONER OF MOTOR VEHICLES
(AC 44066)

Prescott, Cradle and Suarez, Js.

Argued February 8—officially released February 23, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Cordani*, *J.*

Per Curiam. The judgment is affirmed.

STACY TABER *v.* MICHAEL TABER
(AC 43512)

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

Argued February 4—officially released February 23, 2021

Defendant's from the Superior Court in the judicial district of New Britain, *Caron*, *J.*

Per Curiam. The judgment is affirmed.

GABRIELE MADIGAN *v.* COLUMBIA DENTAL, P.C.
(AC 43590)

Bright, C. J., and Moll and Young, Js.

Argued February 9—officially released February 23, 2021

Plaintiff's appeal from the Superior Court in the judicial district of Waterbury, *Brazzel-Massaro*, *J.*

Per Curiam. The judgment is affirmed.

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Termination of parental rights; claim that trial court committed reversible error by failing to notify respondent father that it would be drawing adverse inference from his decision not to testify; request for this court to exercise its supervisory authority over administration of justice to require notice to parent beyond what is required by rule of practice (§ 35a-7A).

In re Kameron N. (AC 44079) 628

Termination of parental rights; claim that Indian tribe, of which respondent father was member, did not receive adequate notice of termination of parental rights proceeding in violation of Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.).

In re Kameron N. (AC 44086) 637

Termination of parental rights; claim that notice to Indian tribe of involuntary nature of termination of parental rights proceedings was inadequate, in violation of Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.); whether trial court abused its discretion by denying motion to open evidence; whether trial court's determination that termination of respondent mother's parental rights was in child's best interest was clearly erroneous.

In re Marcquan C. 520

Motion to revoke commitment; claim that trial court abused its discretion by ordering respondent mother to participate in psychological evaluation; whether trial court's order requiring respondent to participate in psychological evaluation constituted final judgment for purposes of appeal.

In re November H.. 106

Termination of parental rights; claim that trial court's finding that respondent father lacked normal and healthy parent-child bond with his child was internally inconsistent with finding that there was no parent-child relationship; whether there was clear and convincing evidence that father failed to achieve sufficient degree of personal rehabilitation as would encourage belief that within reasonable time he could assume responsible position in life of child; claim that trial court's finding that additional time was necessary for father to form normal and healthy parent-child bond was clearly erroneous; claim that trial court's finding that

father would be responsible for providing housing and financial support to child within reasonable time was clearly erroneous; whether conduct of child's mother and Commissioner of Children and Families required trial court to consider interference exception to statute (§17a-112 (j) (3) (D)) in determining that father lacked normal and healthy parent-child bond with child; whether trial court made improper comparison between father and child's foster parent in determining that father failed to sufficiently rehabilitate.

Indoor Billboard Northwest, Inc. *v.* M2 Systems Corp. 139

Unjust enrichment; assignment of rights under promissory note; whether trial court improperly rendered judgment in favor of individual who was not plaintiff and had not assigned to plaintiff his interest in promissory note that was executed in his favor; unpreserved claim that trial court could not properly consider setoff issue without first permitting defendant to review plaintiffs' tax returns; whether trial court abused its discretion in rejecting special defense of unclean hands; whether trial court's factual finding that promissory note had been amended was clearly erroneous; whether evidence supported trial court's finding that plaintiffs were entitled to recover under theory of unjust enrichment; claim that plaintiffs failed to prove that defendant unjustly did not pay them for benefit defendant received; claim that plaintiffs did not prove that defendant's failure to pay them was to plaintiffs' detriment; whether trial court's finding that defendant's loan obligation was satisfied in part with use of plaintiffs' funds was clearly erroneous; whether trial court erred in finding that plaintiffs satisfied defendant's debt despite plaintiffs' failure to produce evidence of written discharge of promissory note; whether trial court properly denied plaintiffs' postjudgment motion for attorney's fees and expenses.

Ingram *v.* Commissioner of Correction (Memorandum Decision). 905

International Investors *v.* Town Plan & Zoning Commission 582

Zoning; whether trial court improperly concluded that special permit granted to developer remained valid on basis that it could not be temporally limited; whether zoning statute (§ 8-2 (a)) extended authority to plan and zoning commission to restrict duration of special permit; claim that trial court improperly concluded that special permit, once recorded pursuant to statute (§ 8-3d), "runs with the land" and is valid indefinitely.

Jan G. *v.* Semple. 202

Alleged deprivation of plaintiff inmate's federal constitutional rights; motion to dismiss; claim that trial court improperly concluded that it lacked subject matter and personal jurisdiction over plaintiff's claims brought against defendants in their individual capacities; whether defendants were entitled to statutory (§ 4-165 (a)) immunity; whether trial court properly dismissed plaintiff's claims brought pursuant to federal statute (42 U.S.C. § 1983) on basis of doctrine of qualified immunity; claim that trial court improperly concluded that it lacked subject matter jurisdiction over plaintiff's claims brought against defendants in their official capacities on basis of doctrine of sovereign immunity.

Kaminski *v.* Commissioner of Correction (Memorandum Decision) 902

Kelsey *v.* Commissioner of Correction 21

Habeas corpus; claim that habeas court abused its discretion in dismissing successive petition for writ of habeas corpus for failure to show good cause pursuant to statute (§ 52-470) for unreasonable delay in filing petition; whether habeas court improperly concluded that petitioner failed to sufficiently establish good cause for delay in filing successive petition; whether lack of personal knowledge of statutory deadline set forth in § 52-470 and lack of access to law library or legal resources sufficiently rebutted presumption of unreasonable delay; whether habeas court properly weighed relevant factors in dismissing successive petition.

LaPierre *v.* Mandell & Blau, M.D.'s, P.C. 44

Medical malpractice; motion to dismiss; personal jurisdiction; claim that trial court erred in granting motion to dismiss for lack of personal jurisdiction; whether trial court properly dismissed action for failing to comply with statute (§ 52-190a) that governs medical malpractice actions; whether allegations of complaint satisfied test set forth in Boone *v.* William W. Backus Hospital *(272 Conn. 551) for determining whether claim sounds in medical malpractice.*

Lewis *v.* Freedom of Information Commission 607

Administrative appeal; alleged violation of Freedom of Information Act (§ 1-200 et seq.); whether trial court properly granted motion to dismiss appeal for lack of subject matter jurisdiction on ground that plaintiff failed to file administrative appeal in Superior Court within forty-five days after final decision of defendant

Freedom of Information Commission has been mailed, as required by statute (§ 4-183 (c)).

Madigan *v.* Columbia Dental, P.C. (Memorandum Decision). 907

McCall *v.* Sopneski 616

Negligence; motion for summary judgment; whether trial court properly rendered summary judgment on ground that defendant automobile dealer was immune from liability pursuant to statute (§ 14-60) for damages allegedly caused by vehicle loaned to customer.

Meyers *v.* Middlefield 264

Administrative appeal; employment termination pursuant to statute (§ 20-260); whether trial court improperly determined that record was sufficient to support decision of town's Board of Selectmen to terminate plaintiff's employment as town's building official; claim that board's decision terminating plaintiff's employment violated public policy and constituted wrongful discharge.

Miller *v.* Burby (Memorandum Decision). 901

Morales *v.* Commissioner of Correction (Memorandum Decision) 906

Morganti Group, Inc. *v.* Concrete Superstructures, Inc. (Memorandum Decision) 906

MSW Associates, LLC *v.* Planning & Zoning Dept. 707

Zoning; whether trial court erred by holding that zoning regulations' limitation of solid waste facilities only to those in certain zone and in existence as of certain date violated statute (§ 22a-208b (b)) barring zoning laws from prohibiting construction, alteration or operation of any type of solid waste facility; whether plaintiff lacked standing to claim violation of § 22a-208b (b).

Newtown *v.* Ostrosky 13

Foreclosure; whether trial court properly denied motion to reargue and for reconsideration of judgment of foreclosure by sale; claim that foreclosure judgment should be opened and vacated; claim that default for failure to plead entered by court clerk was invalid and could not serve as basis for foreclosure judgment; adoption of trial court's memorandum of decision as statement of facts and applicable law.

Northeast Builders Supply & Home Centers, LLC *v.* RMM Consulting, LLC. 315

Breach of contract; motion to strike; whether trial court properly granted plaintiff's motion to strike certain counts of defendant's counterclaim because those counts involved different set of facts distinct from those necessary to adjudicate sole issue in complaint; whether trial court's finding that plaintiff was seller of building materials was clearly erroneous; whether trial court's finding that individual defendants were buyers under credit agreement was clearly erroneous; whether trial court applied proper standard in analyzing defendants' defense of revocation; whether trial court misapplied provision (§ 42a-2-714) of Uniform Commercial Code; whether trial court's award of damages was clearly erroneous.

Norwich *v.* Brenton Family Trust (Memorandum Decision) 905

OneWest Bank, N.A. *v.* Ceslik 445

Foreclosure; motion for summary judgment as to liability; motion for judgment of strict foreclosure; motion to dismiss; motion for judgment; standing; reviewability of claim that trial court erred in rejecting defendant's special defense of laches; claim that trial court erred in denying defendant's motion for judgment; whether trial court properly determined that substitute plaintiff had standing to foreclose mortgage; claim that trial court erred in crediting obviously fraudulent and defective assignments of mortgage; claim that trial court erred in denying defendant's motion to dismiss; reviewability of claim that defendant was denied due process in connection with his postappeal motion for judgment.

Palmer *v.* Commissioner of Correction (Memorandum Decision). 902

Reliable Mechanical Contractors, LLC *v.* Ricketts (Memorandum Decision) 902

Roberts *v.* Commissioner of Correction (Memorandum Decision) 904

Rose *v.* Commissioner of Correction 436

Habeas corpus; whether habeas court abused its discretion in dismissing petition for writ of habeas corpus for petitioner's failure to show good cause pursuant to statute (§ 52-470) for delay of more than one year in refiling petition that previously had been withdrawn; claim that habeas court's findings were clearly erroneous as to advice petitioner's counsel had provided about need to refile petition and relevant time limits as it related to refiling.

Sauve *v.* Commissioner of Motor Vehicles (Memorandum Decision). 906

Seaport Capital Partners, LLC *v.* Speer. 487

Writ of error; claim that trial court improperly granted motion for protective order and held plaintiff in error liable to defendant in error for certain sum; reviewabil-

ity of plaintiff in error's claims and dismissal of writ of error for failure to comport brief and appendix with appellate rules of practice.

Seramonte Associates, LLC *v.* Hamden 467

Tax appeal; claim that penalty imposed on property owner by town assessor pursuant to statute (§ 12-63c (d)) for failure to submit certain tax forms by required date was improper; whether trial court properly rendered summary judgment; whether trial court properly granted motion to strike; claim that word "submit" as used in § 12-63c (a) was ambiguous; claim that penalty set forth in § 12-63c (d) violated excessive fines clauses of both federal and state constitutions.

State *v.* Edwards 384

Burglary in first degree; robbery in first degree; conspiracy to commit larceny in first degree; assault in second degree; larceny in second degree; whether evidence was sufficient to support jury's finding that value of stolen property in defendant's possession exceeded $10,000 as required by statute (§ 53a-123); whether victim's testimony on its own was sufficient to support jury's finding of value of property; whether evidence was sufficient to establish that defendant knew property in his possession was stolen; whether trial court improperly admitted hearsay testimony from police detective regarding surveillance video; whether defendant was harmed by admission of challenged testimony; whether trial court abused its discretion in precluding defense counsel from cross-examining victim about unrelated incident in which she was convicted of possession of narcotics; claim that trial court's jury instruction concerning reasonable doubt constituted structural error.

State *v.* Ervin B. 1

Threatening in second degree; claim that evidence was insufficient to support finding that defendant made physical threat against his wife for purposes of conviction of threatening in second degree in violation of statute (§ 53a-62 (a) (1)).

State *v.* Ferrazzano-Mazza 411

Operating motor vehicle while under influence of intoxicating liquor or drugs; operating motor vehicle without license; claim that trial court improperly excluded evidence that defendant had offered to take blood test in lieu of Breathalyzer test and gave jury limiting instruction that it could not consider her offer to take blood test as relevant to any issue in case; whether there was reasonable possibility that jury was misled by trial court's limiting instruction; claim that trial court improperly denied defendant's request to charge jury on field sobriety acts; whether there was reasonable possibility that jury was misled by trial court's refusal to adopt defendant's requested instruction.

State *v.* $4137 in United States Currency (Memorandum Decision) 904

State *v.* Njoku 491

Sexual assault in fourth degree; tampering with witness; claim that trial court abused its discretion in denying motion to modify condition of probation prohibiting defendant from assuming employment position with authority over females and accessing their personal information; whether defendant's claim constituted legally cognizable dispute; claim that trial court's denial of motion to modify condition of probation barring defendant from using social media violated defendant's first amendment rights; whether defendant's claim was ripe for review.

State *v.* Sayles 736

Felony murder; conspiracy to commit robbery in first degree; criminal possession of pistol or revolver; carrying pistol without permit; motion to suppress; whether trial court improperly denied motion to suppress evidence obtained from defendant's cell phone; claim that evidence from cell phone was discovered as result of violation of Miranda *v.* Arizona *(384 U.S. 436); request that this court adopt prophylactic rule under state constitution that would render inadmissible incriminating evidence obtained after criminal suspect invokes right to counsel or to have counsel present and police continue to use deceptive tactics to undermine those rights; whether trial court erred in concluding that police had probable cause to seize cell phone at police station pursuant to exigent circumstances exception to fourth amendment's warrant requirement; claim that police should not have relied on informant's self-serving statements to establish probable cause to search cell phone; reviewability of claim that warrant application to search cell phone contained materially false information pursuant to* Franks *v.* Delaware *(438 U.S. 154).*

State *v.* Williams 355

Larceny in first degree; whether trial court abused its discretion in admitting certain reports into evidence pursuant to statutory (§ 52-180) business records exception to rule against hearsay; whether trial court abused its discretion in sustaining

various evidentiary objections by state to certain documents and testimony that defendant proffered at trial; whether trial court abused its discretion by denying defendant's request for certificates pursuant to statute (§ 54-82i (c)) to subpoena out-of-state witnesses and by considering timeliness of defendant's request.

Taber *v.* Taber (Memorandum Decision) 907

Vogue *v.* Administrator, Unemployment Compensation Act 291

Unemployment compensation; whether trial court properly dismissed appeal from decision of Employment Security Board of Review; whether plaintiff was liable for certain unpaid unemployment compensation contributions under Unemployment Compensation Act (§ 31-222 et seq.); whether board and trial court properly applied part B of ABC test under § 31-222 (a) (1) (B) (ii) (II) in concluding that tattoo artist was plaintiff's employee; whether record contained substantial evidence for board to have determined that provision of tattoo services was within plaintiff's usual course of business and part of its business enterprise; claim that board and trial court focused solely on plaintiff's advertisements and not on other findings that did not support board's determination.

Wittman *v.* Intense Movers, Inc. 87

Corporate dissolution; breach of fiduciary duty; notice to purchase shares of company pursuant to statute (§ 33-900 (b)); motion to enforce settlement agreement; whether defendants established that trial court improperly enforced settlement agreement.

RULES FOR THE SUPERIOR COURT

NOTICE

Notice is hereby given that the following corrections were made to the online versions of the 2021 edition of the Connecticut Practice Book, Appendix of Section 1-9B Changes. These corrections are indicated by brackets for deletions and underlined text for added language.

This material should be used as a supplement to the Connecticut Practice Book until the 2022 edition of the Practice Book becomes available.

Joseph J. Del Ciampo
Counsel, Rules Committee of the Superior Court

APPENDIX OF SECTION 1-9B CHANGES

Practice Book Rules Adopted, Amended or Suspended Under Section 1-9B in Light of the Declared Public Health and Civil Preparedness Emergencies

CHAPTER 2
ATTORNEYS

Sec.
E2-71 ([a] b) (3).—Eligible Claims

CHAPTER 2
ATTORNEYS

Sec. E2-71. ([a] b) (3). —Eligible Claims

Sec. 2-71 ([a] b) (3) requires that claims for reimbursement be filed within four years. Given the suspension of statutes of limitation, it is consistent to suspend this requirement.

(Adopted June 26, 2020, to take effect retroactively March 24, 2020, on an interim basis, but until no later than the duration of the declared emergencies.)

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 21-M: Medication-Administered Treatment (MAT) Benefit Category

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2020, SPA 21-M will amend Attachments 3.1-A, 3.1-B, and 4.19-B of the Medicaid State Plan in order to transfer existing approved Medicaid State Plan provisions regarding MAT into the new mandatory MAT benefit category in section 1905(a)(29) of the Social Security Act, which was added by section 1006(b) of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act (Pub. L. No. 115-271). That federal law provision is currently in effect from October 1, 2020 through September 30, 2025 and this SPA is necessary in order to comply with that federal law provision. This SPA will not make any changes other than moving existing approved Medicaid State Plan language regarding MAT into the new MAT benefit category. Therefore, this SPA will not change the actual services covered or payment rates.

Fiscal Impact

This SPA will not change annual aggregate expenditures because, as noted above, it will only move existing approved Medicaid State Plan language regarding MAT into the new MAT benefit category, without making any substantive changes to coverage or rates.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 21-M: Medication-Administered Treatment (MAT) Benefit Category.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than March 10, 2021.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 21-N: Updates to Alternative Benefit Plan (ABP) for the Medicaid Coverage Group for Low-Income Adults Regarding the Medication-Administered Treatment (MAT) Benefit Category

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS), which will amend the Alternative Benefit Plan (ABP) at Attachment 3.1-L of the Medicaid State Plan.

The ABP is the benefit package that, effective January 1, 2014, is provided to the Medicaid low-income adult population under section 1902(a)(10)(A)(i)(VIII) of the Social Security Act (also known as HUSKY D). Pursuant to section 2001 of the Affordable Care Act, effective January 1, 2014, Connecticut expanded Medicaid eligibility to low-income adults with incomes up to and including 133% of the federal poverty level. The expanded coverage group is referred to as Medicaid Coverage for the Lowest-Income Populations.

Changes to Medicaid State Plan

Effective on or after October 1, 2020, SPA 21-N will amend the ABP (Attachment 3.1-L of the Medicaid State Plan) in order to transfer existing approved ABP Medicaid State Plan provisions regarding MAT into the new mandatory MAT benefit category within the ABP in section 1905(a)(29) of the Social Security Act, which was added by section 1006(b) of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment (SUPPORT) for Patients and Communities Act (Pub. L. No. 115-271). That federal law provision is currently in effect from October 1, 2020 through September 30, 2025 and this SPA is necessary in order to comply with that federal law provision. This SPA will not make any changes other than moving existing approved Medicaid State Plan language regarding MAT into the new MAT benefit category, which corresponds to SPA 21-M, which is making these changes to the underlying Medicaid State Plan (Attachments 3.1-A, 3.1-B, and 4.19-B). Thus, as with SPA 21-M, this SPA also will not change the actual services covered or payment rates.

This SPA will not make any other changes to the ABP than as described above, which will continue to reflect the same coverage in the ABP for HUSKY D Medicaid members as in the underlying Medicaid State Plan. Accordingly, the ABP will continue to provide full access to Early and Periodic Screening, Diagnostic and Treatment (EPSDT) services to beneficiaries under age twenty-one. This includes informing them that EPSDT services are available and of the need for age-appropriate immunizations. The ABP also provides or arranges for the provision of screening services for all children and for corrective treatment as determined by child health screenings. These EPSDT services are provided by the DSS fee-for-service provider network. EPSDT clients are also able to receive any additional health care services that are coverable under the Medicaid program and found to be medically necessary to treat, correct or reduce illnesses and conditions discovered regardless of whether the service is covered in Connecticut's Medicaid State Plan.

Likewise, this SPA will not make any changes to cost sharing for the services provided under the ABP. Connecticut does not currently impose cost sharing on Medicaid beneficiaries. Because there are no Medicaid cost sharing requirements for Connecticut beneficiaries, no exemptions are necessary in order to comply with the cost sharing protections for Native Americans found in section 5006(e) of the American Recovery and Reinvestment Act of 2009.

Fiscal Impact

This SPA will not change annual aggregate expenditures.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 21-N: Update to Alternative Benefit Plan (ABP) for the Medication-Assisted Treatment (MAT) Benefit Category''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than March 25, 2021.

NOTICES

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 December 29, 2020:

Charles J. Smith	Waterbury Hospital/ Prospect Medical Holdings, Inc.

Certified as of January 4, 2021:

Andrew M. Kau	Yale University
Victoria Wang	AQR Capital Management, LLC

Certified as of January 28, 2021

Kanika Sharma	Castleton Commodities International

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Application for Reinstatement to the Bar

On 2/10/21 Joseph Ganim filed in the Superior Court for the Judicial District of Fairfield at Bridgeport in docket number FBT CV03 0404638s an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Robert A. Wilock, II
Chief Clerk, Judicial District of Fairfield at Bridgeport

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar without examination in January 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Barth, Christian Eivind of Milford, CT
Birmingham, Daniel Gerard of Brewster, NY
Blau, Evan Edward of Westport, CT
Blishteyn, Alexander of Westport, CT
Colonese, Courtney Rose of Baltimore, MD
Daniels, Heather Christine of Stamford, CT
Duplessis, Patrick David of Milford, CT
Keris, Matthew Peter of Moosic, PA
Lieb, Douglas Edward of New York, NY
Rothschild, Barry S. of Framingham, MA

CONNECTICUT BAR EXAMINING COMMITTEE

The following individuals applied for admission to the Connecticut bar by Uniform Bar Examination score transfer in January 2021. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Kathleen B. Harrington
Deputy Director, Attorney Services

Ambrogio, Kelly Anne of West Springfield, MA
Carswell, Jihan Iris of Bridgeport, CT
Godwin, Kevin Norman of East Hampton, CT
Locke, Jr., Retley Gene of New York, NY
Prunk, Matthew Steven of Newton, MA
Reville, Patricia Marie of Stamford, CT
Whiteley, Michael James of Norwalk, CT
Zangeneh, Ryan of Highland Beach, FL