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CONNECTICUT REPORTS

Vol. 342

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

IN RE RILEY B.*
(SC 20613)

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

Syllabus

The proposed intervenor, J, filed a motion to intervene subsequent to the termination of her parental rights with respect to her minor child, R, in an effort to obtain a posttermination order of visitation with R. J's parental rights had been terminated on the grounds that she failed to achieve a sufficient degree of personal rehabilitation, as required by the applicable statute (§ 17a-112), and that termination was in R's best interest. During the termination proceedings, J did not request visitation with R in the event that her parental rights were terminated. J appealed from the judgment terminating her parental rights but did not request a stay of execution of that judgment pending appeal. More than six months after that appeal had been filed, J filed a motion for visitation, which the trial court denied, concluding that it did not have authority to order visitation after her parental rights were terminated and that,

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

even if it had such authority, there was no basis for granting visitation under the circumstances. The trial court dismissed her subsequent motion to intervene on grounds of res judicata in light of its decision on her motion for visitation. After the dismissal of J's motion to intervene, the Appellate Court affirmed the judgment terminating J's parental rights. On appeal from the trial court's dismissal of J's motion to intervene, *held* that J's appeal was dismissed for lack of subject matter jurisdiction, J having had no colorable claim to intervention in R's juvenile case as a matter of right: following the termination of her parental rights, J lacked a direct and substantial interest in the subject matter of R's juvenile case to warrant intervention as of right, notwithstanding any emotional bond between J and R, and, therefore, J failed to establish the party status necessary to support this court's jurisdiction to consider her appeal from the dismissal of her motion to intervene; moreover, insofar as J claimed that, as R's biological mother, she was an appropriate person to represent R's interests, that claim ignored both the legal and factual implications of the termination of J's parental rights, as J's parental rights were terminated because there was clear and convincing evidence that she was unable or unwilling to put R's best interests ahead of her own and that there was no reasonable prospect that that fact would change in the near future, and, accordingly, J was in no position to claim a right to represent R's best interests.

Argued November 18, 2021—officially released March 2, 2022**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, and tried to the court, *Marcus*, *J.*; judgment terminating the respondents' parental rights, from which the respondent mother appealed to the Appellate Court; thereafter, the court, *Marcus*, *J.*, denied the respondent mother's motion for posttermination visitation; subsequently, the court, *Marcus*, *J.*, dismissed the respondent mother's motion to intervene, and the respondent mother appealed to the Appellate Court; thereafter, the Appellate Court, *Alvord*, *Moll* and *DiPentima*, *Js.*, affirmed the trial court's judgment terminat-

** March 2, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ing the respondents' parental rights; subsequently, the respondent mother's appeal from the trial court's dismissal of the motion to intervene was transferred to this court. *Appeal dismissed.*

Albert J. Oneto IV, assigned counsel, for the appellant (proposed intervenor).

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

Margaret Doherty filed a brief for the Connecticut Alliance of Foster and Adoptive Familes as amicus curiae.

Opinion

KELLER, J. In *In re Ava W.*, 336 Conn. 545, 248 A.3d 675 (2020), this court held that, if a parent requests posttermination visitation in the course of the proceeding adjudicating the petition for termination of parental rights, the trial court has jurisdiction over such a request and the authority to grant posttermination visitation under appropriate circumstances. See id., 548–49. This court underscored that its decision was limited to this specific procedural posture and explicitly left open the question of whether a trial court has the authority to adjudicate a request for posttermination visitation filed *after* parental rights have been terminated. Id., 590 n.18. The present appeal arises under the circumstances on which we reserved judgment in *In re Ava W.*

The proposed intervenor, Jacquanita B., the biological mother of Riley B., appeals from the trial court's judgment dismissing her posttermination motion to intervene in Riley's juvenile case to obtain an order for

visitation.[1] Jacquanita B. claims that the trial court incorrectly concluded that her motion to intervene was barred by res judicata in light of the court's denial of a previously filed postjudgment motion for posttermination visitation. We conclude that, posttermination, biological parents lack a legally cognizable interest to support a right to intervene in the juvenile case for the purpose of seeking visitation. Therefore, the appeal must be dismissed for lack of subject matter jurisdiction.

The record reveals the following facts, as found by the trial court in its decision terminating Jacquanita B.'s parental rights or that are otherwise reflected in the record, and procedural history. The Department of Children and Families (department) has a long history of involvement with Jacquanita B. and her three biological children—half siblings Nyasia, Corrynn, and Riley—due to mental health issues and a pattern of inflicting physical abuse as discipline. Although this history is not directly relevant to the issue in this appeal, it provides an important context for the legal principles on which we rely.

In 2013, when Jacquanita B.'s eldest child, Nyasia, was six or seven years old, she was removed from Jacquanita B.'s care and placed in her father's custody after evidence came to light that Jacquanita B. had repeatedly physically abused her. Jacquanita B.'s second born child, Corrynn, who was then only an infant, was unharmed at that time and remained in Jacquanita B.'s care.

The department became involved with the family again in 2018, when Corrynn was six or seven years old, after a school nurse reported that she had observed

[1] Jacquanita B. appealed from the trial court's dismissal of her motion to intervene to the Appellate Court. Following oral argument to that court, in which the parties debated the question on which this court had expressly reserved judgment in *In re Ava W.*, the Appellate Court recommended transfer of the appeal to this court pursuant to Practice Book § 65-2, and we thereafter transferred the appeal to this court.

extensive bruising and welts on Corrynn's inner forearms. Corrynn stated that Jacquanita B. had struck her with a belt because she had forgotten to do her homework. Jacquanita B. denied the allegations and minimized the nature of Corrynn's injuries but, eventually, was criminally charged with risk of injury to a child and assault in the second degree.

In June, 2018, following the report of the school nurse, the petitioner, the Commissioner of Children and Families (commissioner), filed a neglect petition as to Corrynn and Jacquanita B.'s youngest child, Riley, after Jacquanita B. repeatedly failed to meet conditions of a safety plan that would have allowed them to remain in her care. The department thereafter received reports that Jacquanita B. had been physically and verbally abusing Corrynn on a regular basis. Jacquanita B. repeatedly thwarted the department's efforts to visit the home to investigate. In July, 2018, after the New Haven police informed the department that Jacquanita B. had been arrested on charges relating to her assault of a neighbor with a crowbar, the department invoked a ninety-six hour hold and obtained an ex parte order of temporary custody of the children. Both children were taken for medical examinations, which revealed that Corrynn had numerous injuries in various stages of healing but that Riley appeared unharmed. In August, 2018, the trial court sustained the order of temporary custody of the children, after Jacquanita B. elected to contest the order but failed to appear for most of the hearing. The children were placed in a nonrelative foster home.

Two months after the children entered the department's care, by which time Riley was almost two years old, Riley was adjudicated neglected and committed to the commissioner's custody.[2] The trial court issued final

[2] By the time proceedings ensued for termination of Jacquanita B.'s parental rights as to Riley, Corrynn had been adjudicated abused, and her approved permanency plan was for her to be reunified with her father.

specific steps for reunification. The department arranged for the provision of mental health and anger management services, but Jacquanita B. never participated and repeatedly asserted that she had never abused Corrynn or anyone else. Jacquanita B. attended weekly supervised visitation with Riley until August, 2018, at which time she ceased attending to evade arrest on a warrant that had been issued in connection with Corrynn's injuries.

In December, 2018, Jacquanita B. was located by the police and taken into custody. The department resumed Jacquanita B.'s supervised visitation with Riley once she was released on bond and continued to provide visitation after she began to serve a two year term of imprisonment in connection with the charges relating to the incidents involving Corrynn and the neighbor.

In 2019, the court approved the commissioner's permanency plan of termination of parental rights and adoption for Riley. The commissioner thereafter filed a petition seeking to terminate Jacquanita B.'s parental rights as to Riley on the ground of failure to rehabilitate.[3] While that petition was pending, Jacquanita B. filed a motion to open and modify the neglect disposition to transfer guardianship of Riley to a maternal relative who lived in New Jersey. The termination petition and the motion to open and modify the disposition were heard together. During the proceedings, Jacquanita B. made no request for visitation with Riley in the event that her parental rights were terminated.

In January, 2020, the trial court issued a memorandum of decision in which it found that the commissioner proved by clear and convincing evidence that Jacqua-

[3] The commissioner simultaneously sought to terminate the parental rights of Riley's father due to abandonment and other grounds. The trial court granted the petition as to the father and rendered judgment terminating his parental rights. He did not appeal from the judgment.

nita B. had failed to rehabilitate pursuant to General Statutes § 17a-112 (j) (3) (B) (i) and that termination of her parental rights was in Riley's best interest. The court cited, among other things, Jacquanita B.'s failure to address her mental health issues, to acknowledge her abuse of her other children, and to refrain from involvement with the criminal justice system. The court noted that it was barred from transferring guardianship of Riley to Jacquanita B.'s relative, despite the department's willingness to consider the relative as a potential adoptive resource, because the study mandated for an out-of-state placement under the Interstate Compact on the Placement of Children; see General Statutes § 17a-175; had not yet been completed.[4] The court rejected Jacquanita B.'s request to stay disposition of the case until the study was completed, finding that a stay would not be in Riley's best interest. It emphasized the importance of achieving permanency for Riley, even if placement with the New Jersey relative ultimately was not approved. The court acknowledged credible testimony that Riley had a bond with Jacquanita B., having lived with her for the first two years of her life, but found that there was no reasonable likelihood that giving Jacquanita B. more time would result in her bringing her performance as a parent within acceptable standards that would allow for reunification. The court therefore denied Jacquanita B.'s motion seeking to transfer guardianship, rendered judgment terminating her parental rights, and appointed the commissioner as Riley's statutory parent.

Jacquanita B. timely appealed from the judgment terminating her parental rights. She did not request a stay of the execution of the judgment pending appeal. See Practice Book § 61-12. In August, 2020, after that appeal

[4] The court noted that, while the study was in process, the department had been transporting Riley to New Jersey for monthly visitation with this relative.

had been pending for more than six months, Jacquanita B. filed a motion for posttermination visitation with Riley. In the motion, she alleged that the department had provided posttermination visitation until February, 2020, at which time the correctional facility where she was incarcerated stopped in person visits due to the COVID-19 pandemic. She further alleged that, following her release from that facility in July, 2020, the department did not resume visitation. She cited this court's recently released decision in *In re Ava W.* as support for the trial court's authority to issue a posttermination of parental rights visitation order and asserted that such an order should issue because visitation would be "in the best interests of the minor child." The commissioner opposed the motion, contending that the court lacked authority to issue such an order and that, even if it had such authority, the basis on which visitation was sought—a generalized best interest of the child standard—was legally insufficient.

The trial court denied the motion for posttermination visitation. It concluded that *In re Ava W.* did not provide it authority to grant the motion because the holding in that case was limited to a request for posttermination visitation made in the course of the termination proceeding. The court further noted that, even if *In re Ava W.* provided authority for the court to order, postjudgment, posttermination visitation, there were neither allegations nor evidence to support the statutory ground on which this court in *In re Ava W.* relied to justify such an order, i.e., that visitation was "necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . ." General Statutes § 46b-121 (b) (1); see *In re Ava W.*, supra, 336 Conn. 549. The court noted that Jacquanita B. had put her own needs ahead of Riley's needs and had not addressed the issues that resulted in the physical abuse

of Riley's half siblings, which put Riley at risk if visits were to occur.

In October, 2020, approximately six weeks after the trial court denied her motion for posttermination visitation, Jacquanita B. filed a "Motion to Intervene Postjudgment and for an Order of Posttermination Visitation" (motion to intervene), in which she again cited *In re Ava W.* as authority for posttermination visitation but now asserted that the failure of the department and Riley's foster parents to ensure visitation was in contravention of Riley's "welfare, protection, proper care, and suitable support." In her accompanying memorandum of law, she asserted that she had standing to seek such an order by virtue of her status as Riley's natural parent, whose ongoing relationship with the child was necessary to secure the child's welfare. The motion was opposed by the commissioner, as well as by Riley's counsel. The trial court "dismissed" the motion to intervene on the ground of res judicata in light of the court's decision on the motion for posttermination visitation.[5] This appeal followed.[6]

[5] "[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim." (Internal quotation marks omitted.) *Girolametti* v. *Michael Horton Associates, Inc.*, 332 Conn. 67, 75, 208 A.3d 1223 (2019). Although the trial court purported to dismiss Jacquanita B.'s motion to intervene on the basis of res judicata, that doctrine is not jurisdictional in nature, and, therefore, the motion should have been denied. See *Labbe* v. *Pension Commission*, 229 Conn. 801, 816, 643 A.2d 1268 (1994); *Zizka* v. *Water Pollution Control Authority*, 195 Conn. 682, 687, 490 A.2d 509 (1985).

[6] In the intervening period between the filing of Jacquanita B.'s appeal from the dismissal of her motion to intervene and oral argument before the Appellate Court in connection with that appeal; see footnote 1 of this opinion; the Appellate Court affirmed the judgment terminating Jacquanita B.'s parental rights. See *In re Riley B.*, 203 Conn. App. 627, 628–29, 248 A.3d 756 (concluding that record was inadequate to review respondent mother's claim that trial court deprived her of substantive due process by terminating her parental rights before parties learned whether guardianship could be transferred to maternal relative), cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

Although the parties make several arguments on appeal, we limit our focus to those implicating subject matter jurisdiction, which ultimately is dispositive. Jacquanita B. contends that res judicata does not apply to her second request for posttermination visitation because the trial court lacked subject matter jurisdiction over her first request. Specifically, she contends that she lacked standing to file her motion for posttermination visitation in the absence of a properly filed motion to intervene and that, because this omission precluded her from being made a party to Riley's juvenile case in connection with the motion for posttermination visitation, the trial court lacked subject matter jurisdiction to consider that motion.

The commissioner agrees with Jacquanita B. on one point—that the lack of a proper motion to intervene is a jurisdictional bar. The commissioner contends, however, that Jacquanita B. has no colorable claim to intervention as of right, and, therefore, her appeal must be dismissed due to the lack of subject matter jurisdiction. We agree with the commissioner.

Unless a specific right to appeal otherwise has been provided by statute, "[a] threshold inquiry of this court upon every appeal presented to it is the question of appellate jurisdiction. . . . It is well established that the subject matter jurisdiction of the Appellate Court and of this court is governed by [General Statutes] § 52-263, which provides that an aggrieved party may appeal to the court having jurisdiction from the final judgment of the court." (Citation omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *King* v. *Sultar*, 253 Conn. 429, 434, 754 A.2d 782 (2000).

When a motion to intervene is denied; see footnote 5 of this opinion; typically two elements of appellate jurisdiction are called into question: whether the movant properly can be viewed as a party to the underlying matter and whether denial of the motion is a final judg-

ment. See *In re Santiago G.*, 325 Conn. 221, 228, 157 A.3d 60 (2017); *In re Brian P.*, 195 Conn. App. 582, 587, 226 A.3d 152 (2020); *In re Joshua S.*, 127 Conn. App. 723, 728, 14 A.3d 1076 (2011). Both elements are assessed under the same standard: "[I]f a would-be intervenor has a colorable claim to intervention as a matter of right . . . both the final judgment and party status prongs of our test for appellate jurisdiction are satisfied." (Citation omitted; internal quotation marks omitted.) *King* v. *Sultar*, supra, 253 Conn. 436.

The present case is atypical, however, because the trial court did not deny intervention on the ground that Jacquanita B. did not meet the requirements for intervention. Cf. *In re Santiago G.*, supra, 325 Conn. 225–26. It did not reach that issue because it concluded that consideration of her motion to intervene was barred by res judicata. A decision that a party's claim is barred by res judicata is deemed a final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983) (otherwise interlocutory order or ruling constitutes appealable final judgment when order or ruling "so concludes the rights of the parties that further proceedings cannot affect them"). See *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011). A denial of a motion to intervene on this basis does not, however, remove the party status jurisdictional impediment to appeal.

Therefore, we turn to the issue of whether Jacquanita B. has a colorable claim to intervention as of right. "In order for a proposed intervenor to establish that [she] is entitled to intervene as a matter of right, the proposed intervenor must satisfy a well established four element conjunctive test: [T]he motion to intervene must be timely, the movant must have a direct and substantial interest in the subject matter of the litigation, the movant's interest must be impaired by disposition of the

litigation without the movant's involvement and the movant's interest must not be represented adequately by any party to the litigation. . . . Failure to meet any one of the four elements . . . will preclude intervention as of right." (Citations omitted; footnote omitted; internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 205–206, 990 A.2d 853 (2010).

"A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . ." (Internal quotation marks omitted.) Id., 209. "[T]he [movant] need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail." (Emphasis omitted; internal quotation marks omitted.) *In re Santiago G.*, supra, 325 Conn. 231. If the movant meets this threshold, the reviewing court has jurisdiction to consider whether the trial court properly denied the motion to intervene.[7]

[7] In the typical case, if the movant makes a colorable claim to intervention as of right, the reviewing court "has jurisdiction to adjudicate both [the movant's] claim to intervention as a matter of right and to permissive intervention." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, supra, 295 Conn. 204; see also *In re Santiago G.*, supra, 325 Conn. 231 ("[i]t is only after we have addressed the jurisdictional threshold inquiry of whether the intervenor has a colorable claim of right to intervention that we turn to the second part of the inquiry of whether the trial court's judgment as to the motion to intervene was proper, namely, the merits of the intervenor's claim to intervene as of right or permissively"). As we previously indicated, however, in the present case, the trial court never reached the issue of whether Jacquanita B. was entitled to intervention as of right or to permissive intervention. If we were to conclude that Jacquanita B. had a colorable claim to intervention as of right, we would then review the trial court's determination that the doctrine of res judicata barred adjudication of the motion to intervene. If Jacquanita B. prevailed on her claim that res judicata was inapplicable, we would need to remand the case to the trial court to determine in the first instance whether Jacquanita B. established the elements for intervention as of right or permissive intervention, unless we were to request supplemental briefing on the issue of whether intervention would be improper as a matter of law. See *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 652–53, 664, 81 A.3d 200 (2013) (concluding that, although plenary review applies to three elements of intervention as of right, timeliness element is reviewed for abuse of discretion, and abuse of discretion applies to ruling on permissive intervention).

See id. Because the trial court did not determine whether Jacquanita B. met the requirements for intervention as of right, our review is plenary. See *Austin-Casares* v. *Safeco Ins. Co. of America*, 310 Conn. 640, 650, 81 A.3d 200 (2013) (review of claim of intervention as of right is plenary, except as to element of timeliness, which is reviewed for abuse of discretion).

A survey of jurisprudence addressing the effect of termination of parental rights yields the inexorable conclusion that, following the rendering of judgment terminating parental rights, a biological parent has no colorable right to intervene in the child's juvenile case to seek posttermination visitation. " 'Termination of parental rights' means the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent . . . ." General Statutes § 17a-93 (5); accord General Statutes § 45a-707 (8). Severance of this legal relationship means that "the constitutional right to direct the child's upbringing, as well as the statutory right to visitation, no longer exists . . . ." (Internal quotation marks omitted.) *In re Ava W.*, supra, 336 Conn. 560. "In effect, the [biological parent] is a legal stranger to the child with no better claim to advance the best interests of the child than any remote stranger." (Emphasis omitted.) *In re Charles R.*, 1993 WL 7528, *1 (Conn. Super. January 8, 1993); see also *A.J.* v. *L.O.*, 697 A.2d 1189, 1191–92 (D.C. App. 1997) (termination of parental rights rendered parents legal strangers to their biological children); *In re Z.O.G.-I.*, 375 N.C. 858, 869, 851 S.E.2d 298 (2020) ("[t]ermination of parental rights . . . render[s] the child a legal stranger to the biological parent" (internal quotation marks omitted)).

Once judgment terminating parental rights is rendered, the court is authorized to issue posttermination orders only to protect the child's interests, not the biological parents' interests. See General Statutes § 46b-

121 (b) (1) ("[i]n juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents . . . guardians, custodians or other adult persons owing some legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the [c]ommissioner"). Posttermination actions by the court, as well as those of the commissioner, as the child's statutory parent, are aimed at one goal—securing a permanent home for the child, preferably through adoption. See General Statutes § 17a-93 (6) (" '[s]tatutory parent' means the [commissioner] or that child-placing agency appointed by the court for the purpose of giving a minor child or minor children in adoption"); General Statutes § 17-112 (o) (charging court with periodic review, posttermination, of statutory parent's progress in implementing permanency plan and finalizing adoption); see also *In re Davonta V.*, 285 Conn. 483, 492, 940 A.2d 733 (2008); *In re Jonathan M.*, 255 Conn. 208, 232, 764 A.2d 739 (2001).

In *In re Ava W.*, this court emphasized the significance of the fact that the respondent mother was a party to the termination proceeding at the time she made her request for posttermination visitation: "[The respondent mother] has a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest shared by the community, because she was a party to the underlying litigation who requested that the trial court act pursuant to its common-law authority. She was not merely a participant in that litigation. . . . She was the respondent in a proceeding in which the [commissioner] sought to terminate her parental rights. In the course of that proceeding, she requested that the trial court permit and

order posttermination visitation with her child."[8] (Citation omitted.) *In re Ava W.*, supra, 336 Conn. 555–56; cf. *In re Jason P.*, 41 Conn. Supp. 23, 30, 549 A.2d 286 (1988) (because termination of father's parental rights would foreclose his right to intervene in subsequent proceeding to terminate mother's parental rights, paternal grandmother could not intervene in that proceeding as of right). Because of her party status in the termination proceeding, the respondent mother had the opportunity to present evidence in that proceeding bearing on whether posttermination visitation would be "necessary or appropriate . . . ." General Statutes § 46b-121 (b) (1); see *In re Ava W.*, supra, 590 n.18.

The temporal distinction that this court alluded to in *In re Ava W.* has been explicitly recognized by several other jurisdictions. They have concluded that the court's ability to adjudicate a biological parent's request for posttermination visitation ceases following the rendering of judgment terminating parental rights. Some jurisdictions have reached this conclusion on the basis of the biological parent's lack of standing.[9] Other jurisdictions

[8] The court in *In re Ava W.* made this point in connection with its analysis of appellate aggrievement. See *In re Ava W.*, supra, 336 Conn. 555.

[9] See, e.g., *In re Adoption of Douglas*, 473 Mass. 1024, 1025–26, 45 N.E.3d 595 (2016) ("Until parental rights have been terminated by entry of a decree, parents have the right to participate in proceedings to determine issues such as placement and visitation arrangements concerning their children. . . . It is only after a decree enters terminating parental rights . . . [that] the parent whose rights have been terminated is without standing to determine the child's future . . . ." (Citations omitted; footnote omitted; internal quotation marks omitted.)); *In re Adoption of Rico*, 453 Mass. 749, 758 n.16, 905 N.E.2d 552 (2009) (emphasizing significance of fact that order addressing father's request for visitation was issued in decision that "was part of the adjudication of a termination proceeding to which the father was a party"); *In re Interest of Ditter*, 212 Neb. 855, 856–57, 859, 326 N.W.2d 675 (1982) (concluding that, after parental rights of father had been terminated, paternal grandparents lacked standing to request visitation rights because they can have no greater rights than those of father); *In re Stacey D.*, 12 Neb. App. 707, 718, 684 N.W.2d 594 (2004) (concluding that, "once [the biological mother's] parental rights are terminated, she has no standing to assert entitlement to continued visitation with [her children]," unless "such request

have cast this issue in terms of the trial court's lack of authority to order postjudgment, posttermination visitation in the absence of a specific statutory grant of authority.[10]

Ignoring this uniform authority rejecting a biological parent's right to be heard on a request for posttermination visitation, Jacquanita B. contends that this court's decisions in *In re Ava W.* and *Michaud* v. *Wawruck*, 209 Conn. 407, 551 A.2d 738 (1988), support a contrary conclusion. She suggests that this court in *In re Ava W.* recognized a parent's "common-law right" to posttermination visitation and asserts that it is this interest that she seeks to vindicate through her motion to intervene.

is made prior to the actual termination"); see also *In Interest of J.P.*, 499 N.W.2d 334, 340 (Iowa App. 1993) (concluding that biological parent "has no enforceable right to visitation with her children once her parental rights are terminated").

[10] See, e.g., *In re Noreen G.*, 181 Cal. App. 4th 1359, 1391, 105 Cal. Rptr. 3d 521 ("The parent-child relationship enjoys no legal recognition after termination of parental rights. . . . Thus, nothing in [the governing statutory scheme] requires the court to address postadoption visitation when terminating parental rights under [the applicable provision], and the court has no authority to essentially modify a termination order by granting visitation to the parent." (Citation omitted.)), review denied, California Supreme Court, Docket No. S180958 (April 22, 2010); *In re Elizabeth D.*, 888 A.2d 281, 282–83 (Me. 2006) (concluding that, although "an order terminating parental rights deprives the court of any authority to impose a condition that preserves contact between the parent and the child," court had authority to grant visitation pending appeal of judgment terminating parental rights, if court stayed judgment (internal quotation marks omitted)); *Division of Youth & Family Services* v. *B.G.S.*, 291 N.J. Super. 582, 594–96, 677 A.2d 1170 (App. Div. 1996) (authority to allow posttermination visitation rests exclusively with state child protection agency); *In re R.J.A.H.*, 101 S.W.3d 762, 764 n.1 (Tex. App. 2003) ("we are unaware of any authority that gives a trial court the power to grant a parent visitation rights to the child after their parental rights have been terminated"); see also *C.W.* v. *State*, 23 P.3d 52, 57–58 (Alaska 2001) ("[W]hen adequate grounds for termination exist, there is no presumption that the parent should have visitation rights. After parental rights have been fully terminated, the former parent has no residual rights at all—certainly the [applicable] statute provides for none. Because the . . . statute does not expressly provide for [posttermination] visitation by biological parents, courts probably lack authority to order [posttermination] visitation." (Footnote omitted.)).

Jacquanita B. misreads that decision. In *In re Ava W.*, this court clearly referred to § 46b-121 (b) (1) as a codification of the *trial court's* common-law authority to issue orders for posttermination visitation to protect the *child's* interests. See *In re Ava W.*, supra, 336 Conn. 577. This court previously has noted that, "[a]t common law, grandparents, or third parties in general, have no right to visitation." *Castagno* v. *Wholean*, 239 Conn. 336, 340, 684 A.2d 1181 (1996), overruled in part on other grounds by *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002). Whether the *trial court's common-law authority* to order posttermination visitation extends postjudgment was not addressed by this court in *In re Ava W.*; however, regardless of whether it would so extend, such authority would not give rise to a biological parent's common-law right to posttermination visitation.

Jacquanita B. also misinterprets this court's decision in *Michaud*. She reads that case to stand for the proposition that a judgment terminating parental rights does not affect the biological parent's ability to invoke the power of the Superior Court in equity, posttermination, to issue orders of visitation with her child. *Michaud* stands for no such proposition. In *Michaud*, a written agreement for visitation had been executed by the child's then foster parents, who were seeking to adopt the child, after the biological mother filed a motion to set aside the judgment terminating her parental rights. See *Michaud* v. *Wawruck*, supra, 209 Conn. 408–409. The biological mother agreed to withdraw her action and to allow the adoption to go forward in exchange for the foster parents' agreement to permit regular visitation postadoption. See id., 409. After the adoption was finalized, the adoptive parents terminated all visitation. See id., 409–10. The biological mother brought an action seeking enforcement of the agreement. See id., 408. The sole issue before this court in *Michaud* was "whether

a written visitation agreement between a [biological] mother and adoptive parents violates the public policy of this state." Id. This court concluded that "the statutory creation of an adoptive family does not automatically require complete severance of the child from all further contact with former relatives" and that, "as long as the best interest of the child is the determinative criterion, public policy does not forbid an agreement about visitation rights between a [biological] parent and adoptive parents." Id., 415. Thus, *Michaud*, as a contract case between private parties, is procedurally and substantively distinguishable from the present case.[11] More-

[11] Jacquanita B. also suggests that intervention is appropriate because, according to her, our case law demonstrates that she alternatively could have initiated an independent action to seek visitation. Insofar as Jacquanita B. principally relies on *In re Jonathan M.*, supra, 255 Conn. 208, for this proposition, she ignores the fact that this court held in that case that the biological father had standing to file a petition for a writ of habeas corpus alleging ineffective assistance of counsel because he ultimately was challenging the termination of his parental rights. Id., 223–24. Although this court also stated in that case that a habeas petition could be used to challenge custody and visitation orders; see id., 223; the case law discussed involved biological parents whose parental rights had not been terminated. See id., 220; see also *Doe* v. *Doe*, 163 Conn. 340, 341, 345, 307 A.2d 166 (1972) (holding that person who had lived with child and mother lacked standing to bring habeas action to obtain custody and visitation because only parents or legal guardians of child have standing to seek such relief). The legislature later conferred statutory standing on foster parents and permitted adoptive parents to petition for a writ of habeas corpus regarding the custody of a child currently or recently in their care for a specified continuous period. See General Statutes § 52-466 (f). Notably, it did not confer such standing on parents whose parental rights had been terminated.

We are mindful that this court in *Michaud* indicated that the biological mother whose parental rights had been terminated could have obtained visitation with the child by filing a petition for right of visitation under General Statutes § 46b-59 and demonstrating that visitation was in the child's best interest. See *Michaud* v. *Wawruck*, 209 Conn. 414. Subsequent to this court's decision in *Michaud*, however, we placed a significant judicial gloss on that statute. See *Roth* v. *Weston*, supra, 259 Conn. 234–35. Section 46b-59 now requires the petitioner to establish, by clear and convincing evidence, that he or she has a parent-like relationship with the child and that the child will suffer real and substantial harm in the absence of visitation. See id. The rights of a biological parent to seek posttermination visitation under § 46b-59 is not at issue in the present case, and, consequently, that statute does not inform our analysis here.

over, the statutory provisions that the legislature subsequently enacted to regulate cooperative postadoption agreements regarding contact with biological parents further underscore the temporal line of demarcation embodied in the authorities previously discussed. See General Statutes § 17a-112 (b) (2) (permitting parties to enter into cooperative postadoption agreements if order has not yet been entered terminating parental rights); General Statutes § 17a-112 (f) (requiring court to include order approving cooperative postadoption agreement in final order terminating parental rights).

The foregoing principles and authorities make it apparent that Jacquanita B. has no colorable claim to intervention as of right in Riley's juvenile case. Although the commissioner has argued that Jacquanita B. cannot satisfy any element of the test for intervention as of right, it suffices to conclude that, as to the second element, she lacks "a direct and substantial interest in the subject matter of the litigation . . . ." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, supra, 295 Conn. 205. Whatever emotional bond that may continue to exist between Jacquanita B. and Riley does not give rise to a direct and substantial interest in Riley's juvenile case. See *In re Joshua S.*, supra, 127 Conn. App. 729–30 (concluding that foster parents did not have colorable claim to intervention as of right and, thus, were not parties entitled to appeal because, "[a]lthough the [trial] court's determination regarding the guardianship of [the child] likely affected the foster parents emotionally, it did not affect any direct or personal rights held by them as a matter of law"); *In re Kristy L.*, 47 Conn. Supp. 273, 289–90, 787 A.2d 679 (1999) (concluding that paternal grandparents had legally insufficient interest to intervene in juvenile case to seek custody or visitation of grandchild after termination of parents' parental rights); see also *In re Santiago G.*, supra, 325 Conn. 234 ("the termination of [the biolog-

ical mother's] parental rights will not cause [the proposed intervenor] irreparable harm or abrogate a right that she currently holds because, even assuming that [she] does have some guardianship interest over [the child], the . . . termination proceeding would in no way affect that interest").

To the extent that Jacquanita B. suggests that she is an appropriate person to represent Riley's interests because she is Riley's biological mother, that argument ignores not only the legal, but also the factual, implications of termination of parental rights. As the trial court's findings in the termination proceedings in the present case plainly demonstrate, when termination of parental rights is deemed the proper disposition, there is clear and convincing evidence that the biological parent is unable and/or unwilling to put her child's best interests ahead of her own and that there is no reasonable prospect that this fact will change in the near term. In this context, the biological parent is in no position to claim the right to represent the child's best interests.[12]

Although we do not discount the possibility that there may be situations in which the provision, postjudgment, of posttermination visitation could be appropriate, the commissioner, or any other statutory parent, is charged with protecting the child's interests and overseeing the child's care until an adoption or other permanent placement is secured.[13] See General Statutes § 45a-718 (b)

[12] In an appeal that was heard on the same day as the present appeal, this court was asked to clarify the nature of proof required to meet the statutory standard under § 46b-121 (b) (1) in cases of posttermination visitation, when sought in termination of parental rights proceedings. See *In re Annessa J.*, Connecticut Supreme Court, Docket No. SC 20614 (appeal filed September 17, 2021).

[13] We also note that the statutory scheme provides an opportunity for children to participate in the development of their permanency plan—directly, if older, or through an appointed representative, attorney, or guardian ad litem, if younger. See General Statutes § 46b-129 (k) (1) (B) (i) and (5).

("[t]he statutory parent shall be the guardian of the person of the child, shall be responsible for the welfare of the child and the protection of the child's interests and shall retain custody of the child until the child attains the age of eighteen unless, before that time, the child is legally adopted"); see also *Nye* v. *Marcus*, 198 Conn. 138, 142, 145, 502 A.2d 869 (1985) (rejecting argument that foster parents who sought to contest return of custody to parent had standing "derivatively . . . to assert the interests of their foster child because of the nature of their relationship with the child and because to deny them standing effectively eliminates the child's ability to assert her own interest," holding that "[i]t is clear that the legislature intended that [the commissioner] safeguard [the child's] best interests regarding custody"). The commissioner could assess any benefit to be gained from visitation in light of the child's emotional needs and paramount interest in permanency, and determine, eventually, whether it would be feasible and would not unreasonably interfere with the child's permanent placement.[14]

We conclude that Jacquanita B. lacks a colorable claim of a direct and substantial interest in the subject matter of the litigation that would warrant intervention as of right. She therefore has failed to establish the party status necessary to support this court's jurisdiction to consider her appeal from the trial court's dismissal of her motion to intervene.

The appeal is dismissed.

In this opinion the other justices concurred.

[14] The Connecticut Alliance of Foster and Adoptive Families filed an amicus brief in which it suggested that foster and adoptive parents are best situated to assist the child in reconnecting with biological family members, where appropriate. It asks this court to hold that a biological parent has no standing, postjudgment, to seek posttermination visitation. We note that nothing in this opinion prevents foster families from facilitating such connections and recognize that, when relatives of the biological parents become a resource for the permanent placement of the child, there often may be continued, informally arranged contact between the child and the biological parents.

MARIANNA PONNS COHEN *v.* BENJAMIN H. COHEN (SC 20605)

McDonald, D'Auria, Mullins, Kahn, Ecker and Keller, Js.

Syllabus

The plaintiff appealed from the trial court's judgment dissolving her marriage to the defendant. During the course of pretrial proceedings, the plaintiff failed to comply with certain of the trial court's standing trial management orders. As a result of numerous motions for continuances, discovery disputes and the plaintiff's failure to comply with the orders, the trial court held several hearings and status conferences during which the plaintiff repeatedly would attempt to speak to the court directly instead of through counsel. In response, the trial court would advise the plaintiff to speak through counsel and granted continuances to allow her to confer with counsel. Throughout trial, the plaintiff continued to fail to comply with trial management orders and failed to submit her more than 500 exhibits to the court in an organized fashion, in violation of the court's pretrial orders concerning the submission of exhibits. Ultimately, the trial court awarded the plaintiff approximately 50 percent of the marital assets but ordered the plaintiff to pay certain of the defendant's legal fees and imposed sanctions on her for her failure to comply with the court's orders regarding the submission of exhibits. On appeal, the plaintiff claimed that the trial court's judgment should be reversed because the court improperly had prejudged her credibility and displayed judicial bias. In support of her claim, the plaintiff referred to two sets of comments that the court had made during the course of the proceedings. Because neither the plaintiff nor her counsel objected to those comments, she sought to prevail on her unpreserved claim under the plain error doctrine. The first set of comments occurred during a telephonic conference when the court was in recess. During that conference, while the plaintiff and her counsel were on hold, the court could be heard on an audio recording saying "I just am not [going to] have that stupid woman talk," and saying to the court clerk during another recess that "[a]t least she'll pay for an expedited report," and that that was "because of [the plaintiff]," and that the plaintiff "was [going to] be a mess until we get it done." The second set of comments occurred during the course of trial, when the trial court stated "[j]ust know it's a complete waste of time" and asked "[a]re you having a good time yet?" On appeal from the trial court's judgment, *held* that the plain error doctrine did not require reversal of the trial court's judgment, as the court's comments did not constitute obvious error resulting in manifest injustice: although the court's comments were intemperate, no reasonable person would question the trial judge's impartiality, as the comments were isolated remarks made on brief occasions, after years of

litigation, during a twenty-eight day trial that took place over the course of one year, and, when the comments were viewed in context, they merely showed a momentarily and understandably exasperated jurist attempting to advance a lengthy and contentious proceeding; moreover, the comments did not reflect an opinion derived from an extrajudicial source, the court awarded the plaintiff approximately 50 percent of the marital assets, and the court repeatedly accommodated the plaintiff and patiently sought to unravel the morass of discovery and procedural issues that occurred during the litigation without declaring a mistrial; furthermore, there was no merit to the plaintiff's claim that the trial court's award of attorney's fees and sanctions for her failure to comply with the trial management orders resulted in a denial of her due process rights to notice and an opportunity to be heard, as the trial court repeatedly gave the plaintiff notice and an opportunity to be heard regarding her failure to comply with the court's orders and gave her multiple opportunities to comply even though she failed to do so.

Argued October 13, 2021—officially released March 8, 2022

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the Regional Family Trial Docket at Middletown, where the case was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dissolving the marriage and granting certain other relief, from which the plaintiff appealed. *Affirmed.*

James P. Sexton, with whom were *Emily Graner Sexton* and, on the brief, *Julia K. Conlin* and *Meryl R. Gersz*, for the appellant (plaintiff).

Sarah E. Murray, with whom were *Eric J. Broder*, *Christopher J. DeMattie* and, on the brief, *Robert Dean Vossler*, for the appellee (defendant).

Opinion

MULLINS, J. This appeal arises from a lengthy divorce proceeding in which the marriage of the plaintiff, Marianna Ponns Cohen, and the defendant, Benjamin H. Cohen, was dissolved. On appeal, the plaintiff asserts

that the judgment of the trial court should be reversed because that court (1) prejudged the plaintiff's credibility and displayed judicial bias, and (2) improperly awarded the defendant $65,000 in legal fees and $5000 in sanctions.[1] We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. On February 3, 2014, the plaintiff filed this dissolution action. The case proceeded to trial in November, 2015. The trial court, *Tindill*, *J.*, heard evidence over the course of four days. Then, in August, 2016, the trial court declared a mistrial.

Thereafter, the case was transferred to the regional family trial docket. In October, 2016, the trial court ordered the parties to comply with the Superior Court for Family Matters standing trial management orders by November 7, 2016, because trial was scheduled to begin in November, 2016. The defendant complied with the trial management orders but the plaintiff did not. In the months that followed, the trial court, *Hon. Barbara M. Quinn*, J., judge trial referee, granted numerous motions for continuances filed by the plaintiff because of issues related to her health and that of her family. During this time, two different attorneys entered appearances on behalf of the plaintiff and then subsequently withdrew. At some points during the pretrial proceedings, the plaintiff, who is herself an attorney, proceeded as a self-represented party. Approximately two months before trial was set to begin in July, 2017, another attor-

[1] The plaintiff also makes two other claims in the appeal. First, the plaintiff asserts that the judgment of the trial court must be reversed because the court denied the plaintiff's request to mark the USB drives submitted by the plaintiff for identification, and that, without these exhibits, the record is not adequate for review on appeal. Second, the plaintiff asserts that the trial court's findings of fact that the plaintiff caused the failure or corruption of the files on the USB drive and that the plaintiff spent $3 million on attorney's fees were clearly erroneous. We have considered these claims and find them to be without merit.

ney entered an appearance on behalf of the plaintiff, and the trial court again granted a continuance to accommodate the scheduling needs of the plaintiff's new attorney. During this pretrial period, the defendant filed numerous motions for sanctions based on the plaintiff's failure to comply with the trial management orders, which required the parties to share and produce their proposed exhibits in a timely and organized fashion. Instead of issuing sanctions at that point in time, the trial court gave the plaintiff more time to comply with the trial management orders, but the plaintiff failed to comply.

As a result of the numerous motions for continuances, discovery disputes and the plaintiff's failure to comply with the court's trial management orders, the trial court held numerous hearings and status conferences. During many of these hearings and conferences, the plaintiff repeatedly attempted to speak to the court herself, despite being represented by counsel. In response, the trial court repeatedly advised the plaintiff to speak through her counsel and recessed the hearings and conferences on multiple occasions to give the plaintiff an opportunity to confer with counsel.

Trial took place over twenty-eight days from August, 2017, through August, 2018. Prior to trial, the court notified the parties that, "if either side is going to introduce more than 100 exhibits, [the court wanted] those exhibits scanned and available to the court on a thumb drive or a [compact disc] . . . ." The plaintiff indicated that she would be able to provide her exhibits in an electronic format, stating that "[i]t seems like a sensible thing to do." Nevertheless, throughout the course of the trial, the plaintiff continued to fail to comply with the trial management orders, and the trial court held additional hearings and conferences, attempting to resolve issues surrounding the plaintiff's exhibits.

During the course of the trial, the plaintiff introduced more than 500 documents as full exhibits and had more

than 260 additional documents marked for identification. Even after the close of evidence, the plaintiff's failure to provide the exhibits in an organized fashion continued, and the court spent considerable time reconciling exhibits and giving the parties an opportunity to do the same. Ultimately, the trial court issued a memorandum of decision, in which it awarded the plaintiff approximately 50 percent of the total marital assets of $47.5 million.[2] In addition, the court ordered the plaintiff to pay the defendant $65,000 in legal fees and $5000 in sanctions for her failure to comply with orders concerning exhibits. This appeal followed.[3]

For the first time on appeal, the plaintiff asserts that the judgment of the trial court should be reversed for plain error because the court improperly prejudged the credibility of the plaintiff and displayed judicial bias. Specifically, the plaintiff points to two sets of comments in which, the plaintiff alleges, the trial court displayed judicial bias. The first set of comments occurred on July 17, 2017, during a telephonic conference, when the court was in recess. The plaintiff claims that these comments indicated that the trial court had predetermined that she was deceitful prior to her testifying at trial. The second set of comments occurred during trial. The plaintiff never raised any objection to either set of comments before the trial court and therefore asks us to reverse the judgment on the basis of plain error. See Practice Book § 60-5.

"The plain error doctrine, which is codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental propor-

[2] The plaintiff was ordered to pay $959,080.25 to the defendant for amounts owed and for assets that could not be divided equally.

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

tion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless [s]he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 101, 25 A.3d 594 (2011). In the present case, the plaintiff cannot prevail under the plain error doctrine.

At the outset, it is important to note that the claim of judicial bias is a serious matter, which we do not take lightly. We do not, however, review such allegations in a vacuum, divorced from the context in which the events took place. In order to understand that context, it is important to understand the following background. During the course of the pretrial period, the plaintiff had at least three different attorneys. In addition, the plaintiff, who is an attorney, also entered an appearance as a self-represented party. The trial court allowed the plaintiff to argue on her own behalf when she was in between attorneys and did not have counsel for a

particular hearing or conference. This was not a case of hybrid representation, however. Once represented by counsel, the trial court repeatedly reminded the plaintiff, during multiple hearings and conferences, that she could not interrupt the proceedings and must speak through her counsel. Despite the court's repeated reminders about not interrupting and speaking through her counsel, the plaintiff continued to interrupt the proceedings.

On July 17, 2017, the trial court held a telephonic status conference. The plaintiff and her attorney both dialed in to the conference from different locations. Therefore, if the plaintiff tried to add anything to the discussion, it resulted in an interruption of the proceedings. After multiple interruptions and admonishments, the trial court agreed to take a recess to allow the plaintiff to confer with her attorney on a separate line. The trial court then announced: "We'll take a recess . . . [a]nd we'll call you back. Bye." The plaintiff suggested that she and her attorney could just put the court on hold, and the trial court agreed. The defendant's attorney then acknowledged that he was still there and would put his phone "on mute, so we can't hear each other." The audio recording of the conference apparently was not stopped or paused during the recess.

As a result, one can hear the trial court whispering during the recess. The plaintiff points to one of the statements made during this recess in support of her plain error claim—namely, the trial court said, "I just am not gonna have that stupid woman talk." Thereafter, the plaintiff's attorney returned to the call and said "[h]ello." The defendant's attorney also said "[h]ello." The trial court then said, "[w]e are returning on to the record then." The conference then continued for more than one hour.

The plaintiff then interrupted again, and the court offered another recess. At that point, the trial court

clearly said, "[t]ake a recess." The plaintiff points to statements made during this recess that can be heard on the audio recording. First, while conversing with the court clerk, off the record, regarding the plaintiff's late disclosure of an expert witness, the trial court commented that, "[a]t least she'll pay for an expedited [report]." One can then hear laughter, and the trial court said, "I know, it's horrible." A few seconds later, the trial court said: "It's because of Marianna . . . . She's not sick." The trial court also said, "[s]he's gonna be a mess until we get it done." After the plaintiff finished consulting with her attorney, the plaintiff's attorney and the defendant's attorney returned to the call, and the trial court clearly stated: "We're back on the record in the matter of Ponns Cohen."

A review of the audio recording reveals that these comments were made by the trial court in frustration during recesses from a telephonic conference, in which the plaintiff repeatedly interrupted the proceedings and ignored the trial court's repeated instructions that she must speak through her counsel. The trial court granted multiple recesses in order to accommodate the plaintiff and to allow the plaintiff to confer with her attorney, but the interruptions continued. Significantly, there is no indication that the trial court's annoyance with the plaintiff's ongoing misbehavior had any effect on the court's rulings; to the contrary, at the end of this conference, the trial court allowed the plaintiff to disclose her expert, despite her failure to comply with the trial management orders regarding the expert disclosure. Furthermore, a review of the entire record demonstrates that the trial court treated the plaintiff fairly and with consideration throughout the lengthy proceedings. Indeed, the trial court granted many of the plaintiff's numerous requests for continuances, over the objections of the defendant's attorney. In doing so, the trial court acknowledged and sympathized with the plain-

tiff's health issues and family emergencies. Therefore, although the trial court's comments were ill-advised, we cannot conclude that they "constitute[d] an error that was so obvious that it affect[ed] the fairness and integrity of and public confidence in the judicial proceedings," and an error "of such monumental proportion that [it] threaten[ed] to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Silva*, 339 Conn. 598, 620–21, 262 A.3d 113 (2021).[4]

With respect to the second set of comments that occurred during the course of the trial itself, in open court, it is undisputed that the plaintiff's attorney did not object to any of these comments during trial.[5] Therefore, the plaintiff again relies on the doctrine of plain error.

Having reviewed these comments, we conclude that they do not constitute obvious error, resulting in manifest injustice. Indeed, "[t]he controlling standard is whether a reasonable person who is aware of all the circumstances surrounding the judicial proceeding would question the judge's impartiality." (Internal quotation marks omitted.) *Barca* v. *Barca*, 15 Conn. App. 604, 607, 546 A.2d 887, cert. denied, 209 Conn. 824, 552 A.2d 430 (1988). We recognize that judges are held to the highest of standards, but we must also recognize that judges are human. To be sure, "[i]f the judge did not form judgments of the actors in those [courthouse]

[4] Although we assume, without deciding, that these comments are on the record and reviewable for purposes of this appeal, we note that our review of the audio recording demonstrates that these comments were made after the trial court clearly stated that the court was in recess and the parties acknowledged that recess. The comments were inadvertently recorded only because the trial court tried to oblige the plaintiff's request that the court put her and her attorney on hold while they conferred.

[5] The plaintiff points to the following comments: "Just know it's a complete waste of time," and "[a]re you having a good time yet?"

dramas called trials, [the judge] could never render decisions." (Internal quotation marks omitted.) *Liteky* v. *United States*, 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994).

In the present case, although we agree with the plaintiff that the comments were intemperate, we cannot conclude that a reasonable person would question the judge's impartiality. The comments were isolated remarks made on brief occasions, after years of litigation, during a twenty-eight day trial that took place over the course of one year. These particular comments, on their face, do not evince a judge that is not impartial and, when viewed in context, show a momentarily, and understandably, exasperated jurist attempting to move along a lengthy and contentious proceeding. As the United States Supreme Court has explained: "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as . . . judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration . . . remain immune." (Citations omitted; emphasis omitted.) Id., 555–56.

In light of the isolated nature of the comments, the fact that they did not reflect an opinion derived from an extrajudicial source, and the trial court's ultimate award to the plaintiff of approximately 50 percent of the marital assets—hardly an outcome bespeaking bias

on the part of the decision maker—we cannot conclude that there was an obvious error that resulted in manifest injustice. These isolated comments would not lead a reasonable person to question the judge's impartiality in this case. Instead, a review of the record reveals that, despite these comments, the trial court repeatedly accommodated the plaintiff and patiently sought to unravel the morass of discovery and procedural issues that occurred during this litigation, without declaring a second mistrial. Accordingly, we cannot conclude that the doctrine of plain error requires reversal in the present case.

The plaintiff also challenges the trial court's award of $65,000 in attorney's fees and $5000 in sanctions for the plaintiff's failure to comply with trial management orders. On appeal, the plaintiff asserts that the trial court denied the plaintiff her due process rights to notice and an opportunity to be heard regarding her failure to comply with trial management orders. Specifically, the plaintiff asserts that the trial court improperly awarded the defendant attorney's fees and sanctions based, at least in part, on the fact that the plaintiff provided the court with a USB drive on which the court could not locate any exhibits in August, 2018, without holding a hearing. We disagree.

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we conclude that the plaintiff's claim regarding the attorney's fees and sanctions for failure to comply with trial management orders has no merit. A review of the voluminous record in the present case, particularly the trial court's repeated hearings, conferences and orders regarding the management of the exhibits in this case, demonstrates that, over the course of approximately two years, the trial court repeatedly gave the plaintiff notice and an opportunity to be heard regarding her failure to comply with the trial management orders

and gave her multiple opportunities to comply, but she repeatedly failed to do so. Accordingly, we cannot conclude that the plaintiff was deprived of due process.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

Vol. 211

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE ALIGHA R.-S. ET AL.*
(AC 44835)

Elgo, Moll and Bishop, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her three minor children. On appeal, she claimed, inter alia, that the trial court had erred in finding that the Department of Children and Families had made reasonable efforts to reunify the family. She also claimed that her trial counsel rendered ineffective assistance. *Held* that the findings of the trial court were sufficiently supported by the evidence and not clearly erroneous; moreover, the respondent mother's ineffective assistance of counsel claim was not supported by the record; accordingly, the judgments were affirmed.

Submitted on briefs January 31—officially released March 2, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Fairfield, Juvenile Matters at Bridgeport, and tried to the court, *Maronich, J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Paul A. Garlinghouse, filed a brief for the appellant (respondent mother).

Nisa Khan, assistant attorney general, *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, filed a brief for the appellee (petitioner).

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

** March 2, 2022, the date this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

PER CURIAM. The respondent mother appeals from the judgments of the trial court rendered in favor of the petitioner,[1] the Commissioner of Children and Families, terminating her parental rights as to her minor children, Aligha R.-S., Alanah S., and Aarin R. On appeal, the respondent claims that the court improperly found that (1) the Department of Children and Families made reasonable efforts to reunify the family, (2) she failed to achieve a sufficient degree of personal rehabilitation pursuant to General Statutes § 17a-112 (j) (3) (B) (i), and (3) termination of her parental rights was in the best interests of the children. In addition, the respondent claims that the court improperly denied her motion to revoke commitment and that her trial counsel rendered ineffective assistance. We affirm the judgments of the trial court.

We note at the outset that the core findings that the respondent challenges are reviewed under deferential standards. See *In re Terrance C.*, 58 Conn. App. 389, 396, 755 A.2d 232 (2000) ("Before a termination of parental rights can be granted, the trial court must be convinced that the department has made reasonable efforts to reunite the child with his or her family. . . . The trial court's ruling on [reasonable efforts] should not be disturbed on appeal unless, in light of the evidence in the entire record, it is clearly erroneous." (Citation omitted; internal quotation marks omitted.)); see also *In re Avia M.*, 188 Conn. App. 736, 738–39, 205 A.3d 764 (2019) ("Our standard of review on appeal is twofold. . . . First, the court's ultimate conclusion of whether a parent has failed to rehabilitate is [reviewed under an evidentiary sufficiency standard], that is, whether the trial court could have reasonably concluded, upon the facts

[1] On December 1, 2021, the attorney for the minor children filed a statement adopting the petitioner's brief.

established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . Second, the standard of review for the court's determination of the best interest of the child is clearly erroneous." (Citations omitted; internal quotation marks omitted.)); *In re Patricia C.*, 93 Conn. App. 25, 31, 887 A.2d 929 (standard of review for denial of motion to revoke commitment is clearly erroneous), cert. denied, 277 Conn. 931, 896 A.2d 101 (2006).

With respect to the respondent's ineffective assistance of counsel claim, our review is guided by the following principles: "In determining whether counsel has been ineffective in a termination proceeding, [this court has] enunciated the following standard: The range of competence . . . requires not errorless counsel, and not counsel judged ineffective by hindsight, but counsel whose performance is reasonably competent, or within the range of competence displayed by lawyers with ordinary training and skill in [that particular area of the] law. . . . The respondent must prove that [counsel's performance] fell below this standard of competency and also that the lack of competency contributed to the termination of parental rights. . . . A showing of incompetency without a showing of resulting prejudice . . . does not amount to ineffective assistance of counsel." (Internal quotation marks omitted.) *In re Peter L.*, 158 Conn. App. 556, 563, 119 A.3d 23 (2015).

After examining the record before us, as well as the briefs and the arguments of the parties on appeal, we conclude that under the applicable standards of review, the court's findings "are sufficiently supported by the evidence and not clearly erroneous." *In re Gabriella C.-G.*, 186 Conn. App. 767, 770, 200 A.3d 1201 (2018), cert. denied, 330 Conn. 969, 200 A.3d 699 (2019). With

respect to the respondent's ineffective assistance of counsel claim, we conclude that this claim is not supported by the record. See *In re Peter L.*, supra, 158 Conn. App. 564 ("[m]ere allegations of ineffectiveness, unsubstantiated by the record, are inadequate to support a finding of ineffectiveness").

The judgments are affirmed.

EDGAR TATUM *v.* COMMISSIONER OF CORRECTION (AC 43581)

Alexander, Clark and Lavine, Js.

Syllabus

The petitioner, who had been convicted of murder, filed a fifth petition for a writ of habeas corpus, claiming, inter alia, that his trial counsel, appellate counsel, and his prior habeas counsel to his first, second, and third petitions had provided ineffective assistance, that his due process rights had been violated at his criminal trial, and that there had been significant developments in the science of eyewitness identification that warranted the court to vacate or modify his conviction or sentence, which the habeas court interpreted as an actual innocence claim. The habeas court rendered judgment dismissing the petitioner's claims of ineffective assistance of his trial counsel, appellate counsel, and first habeas counsel, his claim of due process violations, and his claim of actual innocence. The habeas court held a hearing on the two remaining claims and subsequently dismissed the petitioner's claim of ineffective assistance of his second habeas counsel and denied the petitioner's claim of ineffective assistance of his third habeas counsel, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly concluded that the petitioner's claims concerning ineffective assistance by his trial counsel, appellate counsel, and first habeas counsel were barred by the doctrine of res judicata; the petitioner did not allege that he was seeking different relief than the relief he sought in prior petitions alleging ineffective assistance of counsel or that there were new facts or evidence not reasonably available at the time of his original petition.
2. The habeas court properly determined that the Supreme Court's decisions in *State* v. *Guilbert* (306 Conn. 218) and *State* v. *Dickson* (322 Conn. 410) could not be applied retroactively on collateral review to the petitioner's claims concerning due process violations and actual innocence, and,

therefore, the petitioner's claims were properly dismissed on the basis of res judicata:

a. Although *Dickson* held that first-time, in-court identifications implicated due process protections and must be prescreened by the trial court, this constitutional rule did not apply retroactively on collateral review because it was neither a substantive rule nor a watershed procedural rule.

b. The petitioner could not prevail on his claim that *Guilbert*, in which a nonconstitutional state evidentiary claim involving the reliability of eyewitness identifications was at issue, applied retroactively on collateral review: because *Guilbert* did not announce a new constitutional rule or a new judicial interpretation of a criminal statute, complete retroactive application was inappropriate; moreover, the *Guilbert* framework for evaluating the reliability of an identification that was the result of an unnecessarily suggestive identification procedure did not fall within the narrow watershed exception pursuant to *Teague* v. *Lane* (489 U.S. 288) because the rule was prophylactic, a violation of the rule did not necessarily rise to the level of a due process violation, and the rule amounted to an incremental change in identification procedures.

c. Because the petitioner previously raised and litigated the claims pertaining to the admission of the in-court identification of the petitioner in his direct appeal, the habeas court's dismissal of the petitioner's claims of violations of due process and actual innocence was appropriate.

3. The habeas court's denial of the petitioner's claim alleging ineffective assistance by his third habeas counsel was affirmed on the alternative ground that it was barred by collateral estoppel: the doctrine of collateral estoppel precluded the petitioner from raising the issue of whether his third habeas counsel was ineffective for failing to argue claims against his appellate counsel based on their failure to challenge the witnesses' identifications because it previously had been determined that the admission at trial of the identifications of the petitioner was proper; moreover, the habeas court correctly determined that the petitioner's third habeas counsel did not provide ineffective assistance by failing to allege and prove a claim that trial counsel was ineffective for failing to investigate and present a third-party culpability defense, the petitioner having failed to sufficiently demonstrate that the evidence was adequate to support a viable third-party culpability defense.

Argued October 19, 2021—officially released March 8, 2022

Procedural History

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

Kara E. Moreau and *Emily C. Kaas*, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Maureen T. Platt*, state's attorney, and *Eva Lenczewski*, former supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Edgar Tatum, appeals following the granting of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his fifth amended petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the court improperly (1) dismissed counts one, two, and three of the petition on the basis of res judicata; (2) determined that our Supreme Court's decisions in *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012), and *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), could not be applied retroactively to the identification claims raised in counts six and seven of the petitioner's petition; and (3) denied count five of the operative complaint alleging ineffective assistance against his third habeas counsel. We disagree and, accordingly, affirm the judgment of the habeas court.

The following factual and procedural background is relevant to our resolution of the petitioner's appeal. Of necessity, it is detailed in light of the convoluted history of this case. The petitioner was convicted of murder following a jury trial and sentenced to a term of sixty years of incarceration on April 6, 1990. In *State* v.

[1] The fifth amended petition, which only corrected scrivener's errors in the fourth amended petition, was filed subsequent to the dates of the active return and reply. The habeas court indicated that the parties agreed to allow the earlier return and reply to the fourth amended petition to stand as the responsive pleadings.

Tatum, 219 Conn. 721, 595 A.2d 322 (1991), our Supreme Court affirmed the petitioner's underlying murder conviction and recited the following facts that the jury reasonably could have found in the criminal trial. "At approximately 10:30 p.m. on February 25, 1988, Larry Parrett was shot and killed in his home in Waterbury, where he lived with his girlfriend, Tracy LeVasseur. Anthony Lombardo, who lived on the same street, was also shot and wounded at the same time and place. Earlier that evening, Lombardo had been out walking his dog when he noticed a tall black man, later identified as the [petitioner], knocking on the door of Parrett's apartment. Lombardo approached the [petitioner], after having recognized him as someone he had seen at the apartment on other occasions. When LeVasseur opened the door from within, the [petitioner] forced himself and Lombardo into the living room, where LeVasseur and Parrett were smoking cocaine. LeVasseur recognized the [petitioner] as 'Ron Jackson,' a man from California who, along with other visitors from California, had spent a number of nights at the apartment selling drugs during the months preceding the incident. Parrett also had been involved in the sale of drugs. When the [petitioner] and Parrett began to argue, Lombardo and LeVasseur left the room and went into the kitchen, where three other men were present. A few moments later, Lombardo returned to the living room to find the [petitioner] pointing a gun at Parrett. Lombardo stepped between the two men, thinking that the [petitioner] might be dissuaded from firing. The [petitioner] nevertheless fired four shots from the gun, striking Lombardo in the shoulder and fatally wounding Parrett. . . .

"That night at the Waterbury police station Lombardo was shown a photographic array from which he chose a photograph of a black man named Jay Frazer as that of the man who had shot him and Parrett. The same night LeVasseur also selected a photograph of Frazer

from an array shown to her by the police. Neither array contained a photograph of the [petitioner]. One week later, however, LeVasseur went to the Waterbury police and told them that she had identified the wrong man. A nine person lineup was then conducted in which Frazer participated but the [petitioner] did not. After seeing Frazer in person, LeVasseur told the police that he was definitely not the assailant. Thereafter, the police showed another photographic array to LeVasseur from which she chose the [petitioner's] photograph as that of the person who had shot the victim. Lombardo was subsequently shown a photographic array that included the [petitioner's] picture, but he declined to identify anyone, explaining that he preferred to see the individuals in person. At the probable cause hearing and at trial, both Lombardo and LeVasseur identified the [petitioner] as the man who had shot Lombardo and Parrett." (Footnotes omitted.) *State* v. *Tatum*, supra, 219 Conn. 723–25.

Following his direct appeal, the petitioner filed numerous petitions for a writ of habeas corpus, which we will discuss, as necessary, in addressing each of the petitioner's claims on appeal. The petition that is the subject of the present appeal initially was filed on February 11, 2016. The petitioner filed an amended petition on June 27, 2018, and the respondent, the Commissioner of Correction, moved to dismiss the operative petition on July 20, 2018. The habeas court granted the respondent's motion to dismiss as to counts one (ineffective assistance of trial counsel), two (ineffective assistance of appellate counsel), three (ineffective assistance of first habeas counsel), six (due process), and seven (newly discovered evidence), but denied the motion as to counts four (ineffective assistance of second habeas counsel) and five (ineffective assistance of third habeas counsel). The habeas court held a hearing on the two remaining claims on various dates between January 17

and April 11, 2019, after which the parties were given the opportunity to file posttrial briefs. In a memorandum of decision dated August 28, 2019, the habeas court dismissed count four and denied count five of petitioner's petition. On September 9, 2019, the petitioner filed a petition for certification to appeal. The habeas court granted the petition, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court improperly dismissed counts one (ineffective assistance of trial counsel), two (ineffective assistance of appellate counsel), and three (ineffective assistance of first habeas counsel) of the operative petition on the basis of res judicata. We disagree.

We begin by setting forth our standard of review for a challenge to the dismissal of a petition for a writ of habeas corpus. "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . ." (Citation omitted; internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, 133 Conn. App. 387, 392, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012). "[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.) *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 838, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

With this as our backdrop, we set forth the pertinent legal principles that inform our discussion. "The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 612–13, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, A.3d (2021).

"In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim." *Johnson* v. *Commissioner of Correction*, 168 Conn. App. 294, 305, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016). "Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief. Put differently, two grounds are not identical if they seek different relief."

(Citations omitted.) *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 141, 712 A.2d 947 (1998).

"[T]he doctrine of res judicata in the habeas context must be read in conjunction with Practice Book § 23-29 (3), which narrows its application." *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 235, 965 A.2d 608 (2009). Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition . . . ." Thus, a subsequent petition "alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition." *Kearney* v. *Commissioner of Correction*, supra, 235. "In this context, a ground has been defined as sufficient legal basis for granting the relief sought." (Internal quotation marks omitted.) Id. In other words, "an applicant must show that his application does, indeed, involve a different legal ground, not merely a verbal reformulation of the same ground." (Internal quotation marks omitted.) *Carter* v. *Commissioner of Correction*, supra, 133 Conn. App. 394.

On appeal, the petitioner claims that the habeas court erroneously applied the res judicata doctrine to dismiss his various ineffective assistance of counsel claims "relating to LeVasseur's identification in counts one, two, and three of the operative petition . . . ." The petitioner argues that LeVasseur's identification of the petitioner previously was never raised and litigated, and that the habeas court dismissed other claims in counts one and three on the basis of res judicata, despite

acknowledging that many of the claims brought in the operative petition were factually distinct from those previously raised. He essentially argues that because his allegation of ineffective assistance of his various counsel is premised on factual allegations different from those pleaded in his previous petitions, the claims are not improperly successive.

This court, however, flatly has rejected this argument on numerous occasions. See, e.g., *Gudino* v. *Commissioner of Correction*, 191 Conn. App. 263, 272, 214 A.3d 383, cert. denied, 333 Conn. 924, 218 A.3d 67 (2019) ("in the absence of allegations and facts not reasonably available to the petitioner at the time of the original petition or a claim for different relief, a subsequent claim of ineffective assistance directed against the same counsel is subject to dismissal as improperly successive"); *Damato* v. *Commissioner of Correction*, 156 Conn. App. 165, 174, 113 A.3d 449 ("the grounds that the petitioner asserted are identical in that each alleges ineffective assistance of counsel, and, therefore, the habeas petition was properly dismissed" (internal quotation marks omitted)), cert. denied, 317 Conn. 902, 114 A.3d 167 (2015).

For example, in *Damato* v. *Commissioner of Correction*, supra, 156 Conn. App. 174, the petitioner argued that, although his claim of ineffective assistance against trial counsel had been considered previously, the allegations in support of his new claim of ineffective assistance were different. In addressing the petitioner's argument, this court explained that, "[a]lthough we recognize that the petitioner sets forth *different allegations* in support of his claim of ineffective assistance, the claim still is one of ineffective assistance of counsel involving [trial counsel]." (Emphasis in original.) Id. This court concluded that res judicata barred the petitioner's successive petition. Id.

Here, the petitioner attempts to construe narrowly the ground for counts one, two, and three of his petition as claims "regarding LeVasseur's identification" and "factually distinct from those previously raised" but ignores the fact that these allegations are used to support claims of *ineffective assistance* of trial, appellate, and first habeas counsel, which he already has raised in his first and third habeas petitions.

To be sure, the petitioner's first habeas petition was filed on July 2, 1991, claiming that he received ineffective assistance of counsel at his criminal trial. See *Tatum* v. *Warden*, Docket No. CV-911263, 1999 WL 130324 (Conn. Super. March 3, 1999), aff'd, 66 Conn. App. 61, 783 A.2d 1151 (2001). On November 24, 1997, the petitioner filed an amended petition alleging a litany of instances of Attorney Thomas McDonough's lack of skill and diligence in representing him at trial, including, among other things, that McDonough had a wealth of available information from which to construct a case of third-party culpability or misidentification but failed to use properly this information at trial. The habeas court, *Zarella*, *J.*, dismissed the petition on March 3, 1999, concluding that McDonough "adequately investigated the facts surrounding the crimes committed and defended the petitioner in a manner that meets the standard of a reasonably competent criminal defense attorney." Id., *13.

The petitioner's third petition for a writ of habeas corpus was filed on August 18, 2003, and subsequently was amended on June 23, 2009. See *Tatum* v. *Warden*, Docket No. CV-03-004175-S, 2010 WL 1565487 (Conn. Super. March 23, 2010), appeal dismissed, 135 Conn. App. 901, 40 A.3d 824, cert. denied, 305 Conn. 912, 45 A.3d 98 (2012). The habeas court, *Nazzaro*, *J.*, explained that the petitioner's third amended petition contained numerous claims, including an assertion of various due process violations, right to counsel implications and,

as applicable here, claims regarding the "ineffective assistance by criminal trial, appellate, prior habeas corpus and habeas corpus appellate counsel." Id., *1. The petitioner argued that Attorneys Sally King, Alicia Davenport, and Steven Barry, who represented the petitioner in his direct appeal, failed to bring a claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), challenging the trial court's intent instruction as embracing both specific and general intent. *Tatum* v. *Warden*, supra, 2010 WL 1565487, *9. The habeas court disagreed, concluding that the petitioner failed to demonstrate how appellate counsel "somehow rendered ineffective assistance . . . ." Id., *11. The habeas court similarly concluded that the petitioner failed to demonstrate how Attorney R. Bruce Lorenzen, his first habeas counsel, rendered deficient performance. Id., *2, 12.

Turning our attention to count one of petitioner's operative petition, the petitioner alleges that McDonough, his criminal trial counsel, was ineffective in his representation. The petitioner's allegations largely implicate the identification of the petitioner as the shooter, including, among other things, allegations that trial counsel failed to cross-examine adequately both Lombardo and LaVasseur about variables that could have affected their ability to perceive, remember, and identify him as the shooter; failed to make an adequate record of how many identification procedures Lombardo had participated in, or how many times he had been shown photographs of the petitioner prior to the probable cause hearing; and failed to consult with an eyewitness identification expert who would have aided in his trial preparation. In count two, the petitioner alleges, inter alia, that King, Davenport, and Barry, who represented him in his direct appeal, rendered ineffective assistance by failing to claim that the petitioner's

due process rights were violated by Lombardo's identification of him at the probable cause hearing because it was unduly suggestive and insufficiently reliable, and by LeVasseur's "unduly suggestive and insufficiently reliable" "in-[court] and out-of-court identifications." Finally, in count three, the petitioner claims, inter alia, that Lorenzen, his first habeas counsel, rendered ineffective assistance of counsel by failing to challenge the effectiveness of trial and appellate counsel regarding Lombardo's and LeVasseur's identifications of him as the shooter.

Although the petitioner may have set forth some differing factual allegations in support of his claims of ineffective assistance in his present petition, he cannot gainsay the fact that they are still claims of ineffective of assistance of counsel. See *Alvarado* v. *Commissioner of Correction*, 153 Conn. App. 645, 651, 103 A.3d 169 ("[i]dentical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language" (internal quotation marks omitted)), cert. denied, 315 Conn. 910, 105 A.3d 901 (2014). The petitioner makes no allegations in these counts that he is seeking different relief than the relief he sought in prior petitions alleging ineffective assistance of counsel or that there are newly available facts or evidence not reasonably available at the time of his original petition. Accordingly, we conclude that the court properly declined to reach the merits of counts one, two, and three of the petitioner's successive petition because the doctrine of res judicata barred their consideration.[2]

[2] We note that, in addressing count two of the petitioner's petition, it appears that the habeas court initially recognized that it was a claim of ineffective assistance but then treated it as a freestanding due process claim. The court ultimately dismissed the allegation on the basis of res judicata, concluding that our Supreme Court had previously rejected the claim in the petitioner's direct appeal. Notwithstanding this oversight, we conclude that the habeas court properly dismissed count two on the basis of res judicata, albeit for a somewhat different reason. See *Sanchez* v. *Commissioner of*

II

The petitioner next claims that the court erroneously applied the doctrine of res judicata to his due process claim in count six and his "newly discovered evidence" claim in count seven of his operative petition, arguing that the claims have never been previously raised or litigated, and that the court improperly concluded that our Supreme Court's decisions in *State* v. *Dickson*, supra, 322 Conn. 410, and *State* v. *Guilbert*, supra, 306 Conn. 218, do not apply retroactively to the petitioner's claims. The respondent disagrees, arguing that our Supreme Court explicitly held that the constitutional rule in *Dickson* did not apply retroactively on collateral review and that our jurisprudence forecloses *Guilbert*'s retroactive application. We agree with the respondent.

In count six of the operative complaint, the petitioner alleges that his due process rights under the fourteenth amendment to the United States constitution, and article first, §§ 8 and 9, of the Connecticut constitution were violated, on the basis that the identification procedures used with certain witnesses were unduly suggestive and that the jury instructions were insufficient to educate jurors on the possibility of certain factors that can adversely impact eyewitness identification. He alleges that *Guilbert* and *Dickson* "should be retroactively applied to his case, and justice requires that he receive the benefit of those decisions." The habeas court dismissed count six on the basis of res judicata, concluding that the petitioner previously had raised and litigated in his direct appeal the due process claim concerning the identification procedures used at trial.

In count seven, titled "Newly Discovered Evidence," the petitioner argues that scientific developments not

Correction, 203 Conn. App. 752, 760–61, 250 A.3d 731 ("[i]t is axiomatic that [w]e may affirm a proper result of the trial court for a different reason" (internal quotation marks omitted)), cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

reasonably available to the petitioner at the time of the prior proceedings demonstrate that no reasonable fact finder would find the petitioner guilty of murder. The petitioner requested that the court vacate or modify his conviction or sentence. The court indicated that it was unaware of a habeas claim named "newly discovered evidence" but interpreted it as a claim of actual innocence. In discussing the claim, the court explained that "even giving the petitioner the benefit of the doubt the law requires, he is not actually claiming that there is 'new' evidence, as in a previously undiscovered witness, an unknown video of the incident, or bodily fluids not previously subject to DNA testing." The court stated: "What the claim really amounts to is that subsequent developments in the science of eyewitness identification have changed the information and instructions a jury can be given in a criminal trial and, if the jurors in the petitioner's trial were allowed to apply the 'new' science and instructions to the same 'old' evidence presented at the petitioner's trial, they may have viewed the testimony of the eyewitnesses who identified the petitioner differently and come to a different conclusion." In construing count seven in conjunction with count six, the habeas court explained that the petitioner already had litigated the identification procedures in his direct appeal and that the doctrine of res judicata also prohibited the petitioner "from being able to relitigate this issue by changing the facts to focus on the identification procedures used in connection with witness LaVasseur, because neither the grounds nor the requested relief is any different than the issue raised on appeal." The court emphasized that "the petitioner has not alleged a single new 'fact' related to his case." The court then went on to find that nothing within the *Guilbert* or *Dickson* decisions indicate that they were to be retroactively applied or intended to provide an avenue for collateral relief.

As we have stated, "conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [If] 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 that appear in the record." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, 186 Conn. App. 332, 338, 199 A.3d 1127 (2018), cert. granted, 335 Conn. 901, 225 A.3d 685 (2020). The issue of whether a judicial decision is retroactive is a question of law, also subject to plenary review. See, e.g., *Garcia* v. *Commissioner of Correction*, 147 Conn. App. 669, 674, 84 A.3d 1, cert. denied, 312 Conn. 905, 93 A.3d 156 (2014). "To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous." (Internal quotation marks omitted.) *Boria* v. *Commissioner of Correction*, supra, 338.

On appeal, the petitioner argues that his claims have not been litigated previously because the "rationale for the Supreme Court's decision in [the petitioner's] direct appeal has since been rejected by both *Guilbert* and *Dickson*." He argues further that "[b]ecause [he] has never before raised a claim on the basis of the retroactive application of these cases, any such claim was not previously litigated and is therefore not subject to res judicata." We disagree.

A

We first begin with a discussion of *Dickson*. In *Dickson*, our Supreme Court held that "first time in-court identifications, like in-court identifications that are tainted by an unduly suggestive out-of-court identification, implicate due process protections and must be prescreened by the trial court." *State* v. *Dickson*, supra, 322 Conn. 426. In reaching this conclusion, the court

explained that it was "hard-pressed to imagine how there could be a *more* suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person whom the state has accused of committing the crime, and then asking the witness if he can identify the person who committed the crime." (Emphasis in original.) Id., 423. The court explained that, "because the extreme suggestiveness and unfairness of a one-[on]-one in-court confrontation is so obvious, we find it likely that a jury would naturally assume that the prosecutor would not be allowed to ask the witness to identify the defendant for the first time in court unless the prosecutor and the trial court had good reason to believe that the witness would be able to identify the defendant in a nonsuggestive setting." Id., 425.

In arguing that first-time, in-court identifications are admissible, the state in *Dickson* raised numerous arguments in support of its claim to the contrary. Id., 431. Of relevance to the present case, the state, relying on our Supreme Court's decision in the petitioner's direct appeal; see *State* v. *Tatum*, supra, 219 Conn. 721; argued that "in-court identifications do not violate due process principles because they are necessary and, relatedly, because there is no feasible alternative to them." *State* v. *Dickson*, supra, 322 Conn. 434. Our Supreme Court concluded that "the holding in *Tatum* that it was 'necessary' for the state to present a first time in-court identification of the defendant at the probable cause hearing must be overruled. We simply can perceive no reason why the state cannot attempt to obtain an identification using a lineup or photographic array before asking an eyewitness to identify the defendant in court. Although the state is not constitutionally required to do so, it would be absurd to conclude that the state can simply decline to conduct a nonsuggestive procedure and then

claim that its own conduct rendered a first time in-court identification necessary, thereby curing it of any constitutional infirmity." (Emphasis omitted.) Id., 435–36. Having concluded that first-time, in-court identifications must be prescreened for admissibility by the trial court, the court went on to set forth the specific procedures that the parties and the trial court must follow. Id., 444–52.

In the present case, the petitioner argues that, "[a]lthough the retroactive application of the second part of the *Dickson* holding—the prophylactic rule—has arguably been addressed . . . the court has not yet determined whether this new constitutional rule should be retroactive." Without clearly identifying what other constitutional rule the petitioner is referring to, he argues that he should receive the benefit of society's and our Supreme Court's changes in acceptance and understanding of eyewitness identification, although recognizing that *Dickson*'s holding is "not necessarily a substantive 'rule' as courts tend to interpret that phrase . . . ." He argues, without case law support, that applying *Dickson* retroactively is especially appropriate here because *Dickson* explicitly overruled the holding in the petitioner's direct appeal. He goes on to argue that the "prophylactic rule announced in *Dickson*, regarding the specific procedures surrounding first time in-court identifications, should also apply retroactively, as it is a watershed rule of criminal procedure."

The respondent on the other hand argues that *Dickson* explicitly forecloses the petitioner's argument because it held that this constitutional rule did not apply retroactively on collateral review in that it was neither a substantive rule nor a watershed procedural rule. We agree with the respondent.

Although it appears that the petitioner may be arguing that our Supreme Court did not address the retroactivity

of the constitutional rule that it promulgated in *Dickson*, such argument is meritless. Our Supreme Court explicitly addressed the applicability of its decision, stating: "[T]he new rule that we adopt today applies to the parties to the present case and to all pending cases. It is important to point out, however, that, in pending appeals involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances. . . . If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis omitted; footnotes omitted.) *State* v. *Dickson*, supra, 322 Conn. 450–52.

The court went on to address *Dickson*'s applicability to *collateral* challenges. It stated: "*The new rule would not apply*, *however*, *on collateral review*. This question is governed by the framework set forth in *Teague* v. *Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989). See *Casiano* v. *Commissioner of Correction*, 317 Conn. 52, 62, 115 A.3d 1031 (2015). Under *Teague*, a 'new' constitutional rule, i.e., a rule that 'was not dictated by precedent existing at the time the defendant's conviction became final,' generally does not apply retroactively. . . . Id. There are two exceptions, however, to this general rule. Specifically, a new rule will apply retroactively if it is substantive or, if the new rule is procedural, when it is 'a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . .' . . . Id., 63. Because the rule that we adopt in the present case is a new procedural rule, we must determine whether it is a watershed rule.

To be considered a watershed rule, the rule must 'implicat[e] the fundamental fairness and accuracy of [a] criminal proceeding'; . . . id.; or '[alter] our understanding of the bedrock procedural elements essential to the fairness of a proceeding . . . .' Id. Watershed rules 'include those that raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.' . . . Id. The exception is 'narrowly construed . . . and, in the twenty-five years since *Teague* was decided, [the United States Supreme Court] has yet to conclude that a new rule qualifies as watershed.' Id.; but see id., 64 (this court may construe *Teague* more liberally than United States Supreme Court); id., 69 (concluding that new procedural rule requiring individualized sentencing of juvenile before life sentence may be imposed is watershed rule under *Teague*). In the present case we conclude that the rule requiring prescreening of first-time, in-court identification does not fall within the narrow exception because: (1) as we have explained, the rule is prophylactic and a violation of the rule does not necessarily rise to the level of a due process violation; and (2) the rule is merely an incremental change in identification procedures. Cf. *Beard* v. *Banks*, 542 U.S. 406, 419–20, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) ('the fact that a new rule removes some remote possibility of arbitrary infliction of the death sentence does not suffice to bring it within *Teague*'s second exception'); id., 419 (although new rule was intended to enhance accuracy of capital sentencing, 'because it effected an incremental change, [the United States Supreme Court] could not conclude that . . . [it was] an absolute prerequisite to fundamental fairness' . . .)." (Emphasis added.) *State* v. *Dickson*, supra, 322 Conn. 451 n.34.

Contrary to the petitioner's assertions, it is clear from *Dickson* that the constitutional rule set forth therein was not intended to provide an avenue for collateral

relief. See id. ("[t]he new rule would not apply, however, on collateral review"); see also *Bennett* v. *Commissioner of Correction*, 182 Conn. App. 541, 560, 190 A.3d 877 (in *Dickson*, our Supreme Court "stated that its holding regarding prescreening was to apply only to future cases and pending related cases, and was *not to be applied retroactively in habeas actions*" (emphasis added)), cert. denied, 330 Conn. 910, 193 A.3d 50 (2018). Although our Supreme Court did reject and overrule the rationale it previously employed in *State* v. *Tatum*, supra, 219 Conn. 721 (decision resolving petitioner's direct appeal) in reaching its conclusion in *Dickson*, the petitioner has provided us with no authority, and we have found none, that suggests that the new rule in *Dickson* can apply retroactively to him on collateral review. We similarly reject his invitation to construe more narrowly our Supreme Court's retroactivity analysis in footnote 34 of *Dickson*; see *State* v. *Dickson*, supra, 322 Conn. 451 n.34; "to apply only to the specific facts of the *Dickson* case." We remind him that our Supreme Court "has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by [its] precedent." *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010).

B

We next turn to the petitioner's contention that *Guilbert* applies retroactively on collateral attack and that he should receive the benefit of this decision. In *Guilbert*, the defendant argued that the trial court improperly precluded him from presenting expert testimony on the fallibility of eyewitness identification testimony and asked our Supreme Court to overrule its decisions in *State* v. *Kemp*, 199 Conn. 473, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586, 730 A.2d 1107 (1999), which "concluded that the average juror knows about the factors affecting the reliability of eyewitness identification and that expert testimony on the

issue is disfavored because it invades the province of the jury to determine what weight to give the evidence." *State* v. *Guilbert*, supra, 306 Conn. 220–21. The court in *Guilbert* concluded that *Kemp* and *McClendon* were "out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror." Id., 234. The court observed that "[t]his broad based judicial recognition tracks a near perfect scientific consensus," and that "[t]he extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification." (Footnote omitted.) Id., 234–36. The court concluded that "the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror and that the admission of expert testimony on the issue does not invade the province of the jury to determine what weight to give the evidence. Many of the factors affecting the reliability of eyewitness identifications are either unknown to the average juror or contrary to common assumptions, and expert testimony is an effective way to educate jurors about the risks of misidentification."[3] (Footnote omitted.) Id., 251–52.

[3] On the basis of that comprehensive scientific research, the court listed a nonexclusive list of factors affecting the reliability of eyewitness identifications: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by

The court observed that "federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications—cross-examination, closing argument and generalized jury instructions on the subject—frequently are not adequate to inform them of the factors affecting the reliability of such identifications." Id., 243. The court reiterated that "a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence of the kind contemplated by the New Jersey Supreme Court in *Henderson*; see *State* v. *Henderson*, [208 N.J. 208, 283, 27 A.3d 872 (2011)]; would alone be adequate to aid the jury in evaluating the eyewitness identification at issue." *State* v. *Guilbert*, supra, 306 Conn. 257–58. The court emphasized "that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case," and rejected the "broad, generalized instructions on eyewitness identifications," which it previously approved in *State* v. *Tatum*, supra, 219 Conn. 734–35. *State* v. *Guilbert*, supra, 258.

On appeal, the petitioner argues that "[t]hese changes in scientific—and judicial—understanding of the flaws of eyewitness identification, and the new rules announced to reflect those changes, should apply retroactively here, and [that he] should receive the benefit of this decision." The petitioner categorizes *Guilbert* as setting forth "watershed procedural rules" and that retroactive application is appropriate here. We disagree.

unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54. The court concluded that these factors satisfy the test set forth in *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), for the admissibility of scientific evidence. See *State* v. *Guilbert*, supra, 254.

There can be little dispute that *Guilbert* involved a nonconstitutional state evidentiary claim involving the reliability of eyewitness identifications. See *State* v. *Guilbert*, supra, 306 Conn. 265 n.45 ("[t]he defendant makes no claim—and there is no basis for such a claim —that the impropriety was of constitutional magnitude"). Although our Supreme Court has established "the general rule that 'judgments that are not by their terms limited to prospective application are presumed to apply retroactively . . . to cases that are pending' "; *State* v. *Hampton*, 293 Conn. 435, 457, 462 n.16, 988 A.2d 167 (2009); it generally does not permit complete retroactive application of these judgments on collateral review. Instead, our Supreme Court has clarified that "[c]omplete retroactive effect is most appropriate in cases that announce a new *constitutional* rule or a new judicial interpretation of a criminal statute." (Emphasis added; internal quotation marks omitted.) *State* v. *Turner*, 334 Conn. 660, 677 n.6, 224 A.3d 129 (2020), quoting *State* v. *Ryerson*, 201 Conn. 333, 339, 514 A.2d 337 (1986); see also *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 764, 12 A.3d 817 (2011) (full retroactivity for new judicial interpretation of criminal statute); *Johnson* v. *Warden*, 218 Conn. 791, 798, 591 A.2d 407 (1991) ("there is nothing in *Teague* or *Griffith* [v. *Kentucky*, 479 U.S. 314, 322–23, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)]), that suggests that nonconstitutional rules of criminal procedure are to be given retroactive effect").

Here, because *Guilbert* did not announce a new constitutional rule or a new judicial interpretation of a criminal statute, complete retroactive application is inappropriate. See, e.g., *State* v. *Ryerson*, supra, 201 Conn. 339. Accordingly, we conclude that the nonconstitutional evidentiary rule set forth in *Guilbert* does not apply retroactively on collateral review.

Our discussion, however, does not end there. Following *Guilbert*, our Supreme Court decided *State* v. *Harris*, 330 Conn. 91, 95, 191 A.3d 119 (2018), in which the defendant in that case argued that he was deprived of his right to due process under the federal and state constitutions when the trial court denied his motion to suppress an out-of-court and subsequent in-court identification of him by an eyewitness to the crimes of which the defendant was convicted. The court concluded that, for purposes of the federal constitution, the defendant was not entitled to suppression of the identifications in question. Id., 96. In regard to the state constitution claim, however, the court concluded "that the due process guarantee of the state constitution in article first, § 8, provides somewhat broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony . . . ." (Footnote omitted.) Id. In concluding that the federal analysis set forth in *Neil* v. *Biggers*, 409 U.S. 188, 196–97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), was inadequate to prevent the admission of unreliable identifications that are tainted by an unduly suggestive procedure for purposes of our state constitution, it adopted the *Guilbert* framework, finding it "preferable . . . for state constitutional as well as evidentiary claims involving the reliability of eyewitness identifications." *State* v. *Harris*, supra, 120–21. As the respondent points out in his brief to this court, our Supreme Court essentially treated *Guilbert* as creating a new state constitutional rule of criminal procedure that safeguards the due process protection against the admission of an unreliable identification.

Even if we were to construe *Guilbert*, through the lens of *Harris*, as a "new" constitutional rule of criminal procedure, this rule still would not apply on collateral review. Our conclusion is informed by the framework set forth in *Teague* v. *Lane*, supra, 489 U.S. 288. See

Thiersaint v. *Commissioner of Correction*, 316 Conn. 89, 112, 111 A.3d 829 (2015) (adopting *Teague* framework). As already noted, it is well known that a new constitutional rule will not apply retroactively to cases on collateral review unless one of two exceptions apply: the rule is substantive or, if the new rule is procedural, it must be "a watershed [rule] of criminal procedure . . . implicit in the concept of ordered liberty . . . ." (Internal quotation marks omitted.) *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 63.

Because the rule is clearly procedural as opposed to substantive, we must determine whether it is a "watershed" rule. The watershed exception "is reserved for those rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. . . . Beyond fundamental fairness, the new rule also must constitute a procedure without which the likelihood of an accurate conviction is seriously diminished." (Citation omitted; internal quotation marks omitted.) *Dyous* v. *Commissioner of Mental Health & Addiction Services*, 324 Conn. 163, 181–82, 151 A.3d 1247 (2016). "The United States Supreme Court has narrowly construed [the watershed] exception . . . ." *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 63. In fact, "in the 32 years since *Teague* . . . the [United States Supreme Court] has *never* found that any new procedural rule actually satisfies that purported exception." (Emphasis in original.) *Edwards* v. *Vannoy*, U.S. , 141 S. Ct. 1547, 1555, 209 L. Ed. 2d 651 (2021).[4]

In the present case, we conclude that the *Guilbert* framework for evaluating the reliability of an identification that is the result of an unnecessarily suggestive

[4] In *Edwards* v. *Vannoy*, supra, 141 S. Ct. 1557, the United States Supreme Court recently observed that it "has flatly proclaimed on multiple occasions that the watershed exception is unlikely to cover any more new rules. Even 32 years ago in *Teague* itself, the [c]ourt stated that it was 'unlikely' that additional watershed rules would 'emerge.' "

identification procedure, which was adopted by our Supreme Court in *Harris*, does not fall within the narrow watershed exception pursuant to *Teague* because, like in *Dickson* (1) this rule is "prophylactic and a violation of the rule does not necessarily rise to the level of a due process violation," and (2) the rule amounts to an incremental change in identification procedures. See *State* v. *Dickson*, supra, 322 Conn. 451 n.34. As the court in *Harris* explained, the adopted *Guilbert* framework will "*enhance* the accuracy of the constitutional inquiry into the reliability of an identification that has been tainted by improper state conduct" and allow the "reliability analysis to evolve as the relevant science *evolves*." (Emphasis added.) *State* v. *Harris*, supra, 330 Conn. 120–21. Accordingly, *Guilbert* does not apply on collateral review for these reasons too.

C

In light of our conclusion that the rules announced in *Dickson* and *Guilbert* do not apply retroactively on collateral review, we conclude that the petitioner's count six and count seven claims were properly dismissed on the basis of res judicata. On his direct appeal before our Supreme Court, the petitioner argued that the trial court deprived him of his due process rights by allowing "the admission of an in-court identification of the [petitioner] after an unnecessarily suggestive pretrial identification procedure had been conducted . . . ." *State* v. *Tatum*, supra, 219 Conn. 723. The court concluded, inter alia, that the "identification of him at the probable cause hearing was not the result of an unnecessarily suggestive procedure." Id., 732. Because the petitioner previously has raised and litigated these claims pertaining to his identification, dismissal was appropriate. See *Woods* v. *Commissioner of Correction*, supra, 197 Conn. App. 612.

III

The petitioner's final claim is that the habeas court erred in denying count five of the operative petition, which alleged ineffective assistance against his third habeas counsel. Although the petitioner makes more than a dozen claims of ineffective assistance against his third habeas counsel, he takes issue with the court's determination as to two of them. He argues that count five should not have been denied because the habeas court erred (1) when it disposed of his ineffective assistance claim by way of procedural default for his failure to allege and prove that his appellate counsel were ineffective for failing to challenge LeVasseur's identification on the basis of due process, and (2) when it determined that his "third habeas counsel was not ineffective for failing to allege and prove a claim that trial counsel was ineffective for failing to investigate and present a defense of third-party culpability." For the reasons discussed herein, we conclude denial of count five was proper.

In the habeas court's memorandum of decision, the court addressed the petitioner's factual claim that his third habeas counsel, Paul Kraus, "was ineffective for failing to allege and prove that counsel who handled the petitioner's direct appeal . . . was ineffective for failing to argue that LaVasseur's identification of the petitioner violated his due process rights." The court stated in relevant part: "The court finds that the petitioner has procedurally defaulted on this claim. . . . If the petitioner desired, all of the information necessary to challenge LaVasseur's identification on appeal was available at the time the petitioner raised similar challenges to Lombardo's identification. Appellate counsel was not called to testify, so the reason[s] he chose only to attack only Lombardo's identification are unknown. The petitioner also failed to present any other substantive evidence of the alleged viability of raising claims,

or the specific nature of the claims, that supposedly could have been brought to challenge LaVasseur's identification. Having failed to do so, the petitioner has failed to overcome the presumption that appellate counsel's choice of issues to raise on appeal was based on sound appellate strategy." (Citation omitted.)

On appeal, the petitioner argues that this claim as a matter of law cannot be barred by procedural default. The respondent agrees with the petitioner, conceding that "the petitioner was not required to make a threshold showing of cause and prejudice as a predicate for alleging ineffective assistance of habeas counsel" in this instance. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 570, 941 A.2d 248 (2008) (cause and prejudice test does not apply when petitioner brought habeas claim alleging ineffective assistance of trial counsel). Despite this misstep by the habeas court, the respondent argues that the habeas court was right to deny this claim but for the wrong reasons and argues that this court should affirm the habeas court's ruling on the alternative ground of collateral estoppel.[5] We agree with the respondent.

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel . . . is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly

[5] Affirmance of a judgment on alternative grounds is proper when those grounds present pure questions of law, the record is adequate for review, and the petitioner will suffer no prejudice because he has the opportunity to respond to proposed alternative grounds in the reply brief. *State* v. *Martin M.*, 143 Conn. App. 140, 151–53, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013).

litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered . . . . [C]ollateral estoppel [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 168 Conn. App. 310.

In this appeal, the petitioner essentially argues that he should not be prevented from pursuing the claim that his third habeas counsel, Kraus, failed to allege and prove that appellate counsel, King, Barry, and Davenport, were ineffective for failing to challenge LeVasseur's identification. Upon our review of the record, however, we conclude that the dispositive issue already has been litigated and, thus, is precluded by the doctrine of collateral estoppel. It previously has been determined that admission at trial of the identifications of the petitioner were proper. For example, following his first habeas trial, the habeas court, *Zarella*, *J.*, found that "the state's case was strong with regard to the identification of the petitioner despite the initial misidentifications. Not only did LeVasseur and Lombardo identify the petitioner as being at the scene but a third person, [Charles] Wilson, who was also at the scene of the shooting told the police that he saw the gunman. Despite his reluctance to testify at the criminal trial and his claim of no present recollection, Wilson's sworn

statement to the police described the gunman to the jury as [six feet, three inches] and about 170 pounds. . . . This clearly would have eliminated Frazer as the shooter . . . .'' (Citation omitted.) See *Tatum* v. *Warden*, supra, 1999 WL 130324, *11. The habeas court further explained that, ''[w]hile LeVasseur and Lombardo had both initially identified Frazer as the perpetrator, there existed a plausible and simple explanation for that identification. Frazer had striking facial similarities to the petitioner. However, when LeVasseur viewed Frazer in a lineup, he was eliminated as the perpetrator based upon his height.'' Id. As the habeas court after the first habeas trial explained, ''While Frazer bore a striking facial resemblance to the petitioner, Frazer is approximately [five feet, three inches] or [five feet, four inches] tall and the petitioner is at least [six feet, one inch] tall.'' Id., *4. Additionally, ''both witnesses prior to the events of February 25, 1988, had contact with both the petitioner and Frazer.'' Id., *11.

This previous decision, supported by the facts in the record, in addition to our Supreme Court's decision in the petitioner's direct appeal, which addressed the constitutionality and appropriateness of the identifications in the case, demonstrate that the issue of LeVasseur's identification of the petitioner as the shooter was determined to be reliable and admissible at that time. These previous decisions rejected the argument that trial counsel was ineffective for failing to properly challenge the identifications of the petitioner as the shooter. Because this already litigated issue underlies and is determinative of the petitioner's current ineffective assistance claim against Kraus, we conclude that collateral estoppel bars his claim.

As a final task, we must address the petitioner's related argument that the habeas court improperly concluded that Kraus provided effective assistance of counsel although he failed to allege and prove a claim that

trial counsel was ineffective for failing to investigate and present a defense of third-party culpability. He argues that because "LeVasseur and Lombardo separately identified Frazer within hours of the shooting, development of the third-party culpability claim in this case was critical." We are not convinced.

We begin by setting forth our well settled standard of review governing ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *McClean* v. *Commissioner of Correction*, 103 Conn. App. 254, 262, 930 A.2d 693 (2007), cert. denied, 285 Conn. 913, 943 A.2d 473 (2008).

"Furthermore, it is well established that [a] criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . As enunciated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], this court has stated: It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result

of the proceeding would have been different. . . . [I]n order to demonstrate that counsel's deficient performance prejudiced his defense, the petitioner must establish that counsel's errors were so serious as to deprive the [petitioner] of . . . a trial whose result is reliable. . . . Because both prongs of *Strickland* must be demonstrated for the petitioner to prevail, failure to prove either prong is fatal to an ineffective assistance claim." (Citations omitted; internal quotation marks omitted.) *Llera* v. *Commissioner of Correction*, 156 Conn. App. 421, 426–27, 114 A.3d 178, cert. denied, 317 Conn. 907, 114 A.3d 1222 (2015).

"[J]udicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . In reconstructing the circumstances, a reviewing court is required not simply to give [counsel] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Internal quotation marks omitted.) *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 693, 208 A.3d 1256, cert. denied, 332 Conn. 908, 209 A.3d 644 (2019). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 680, 51 A.3d 948 (2012).

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 637, 212 A.3d 678 (2019).

For assessing claims of ineffective assistance based on the performance of prior habeas counsel, the *Strickland* standard "requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that . . . prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [appellate] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective." (Citations omitted; internal quotation marks omitted.) *Ham* v. *Commissioner of Correction*, 152 Conn. App. 212, 230, 98 A.3d 81, cert. denied, 314 Conn. 932, 102 A.3d 83 (2014).

At the heart of the petitioner's claim is his contention that Kraus was ineffective in failing to allege and prove a claim that trial counsel, McDonough, was ineffective in his investigation of a third-party suspect, namely, Frazer, and presentation of such defense based specifically on Frazer's culpability rather than generally on the misidentification of the petitioner. The petitioner makes various arguments that Kraus' performance was deficient as a result of not challenging trial counsel's

alleged failure (1) to ask Frazer about certain statements that were contained in his police statement, (2) to ask Frazer about his whereabouts on the night in question, (3) to question Frazer about certain equipment that had been at Parrett's apartment, which would have given Frazer a reason to go to that apartment, and (4) to call Wilson, who witnessed the shooting, to testify about certain information in his police statement, including the statement that LeVasseur told him that "the man at the door was the 'same [man] who had recently been arrested by the police.' " According to the petitioner, this information, combined with LeVasseur's and Lombardo's initial identifications of Frazer as the shooter, was sufficient to give a charge on third-party culpability.

On the basis of our review of the record, we agree with the habeas court that the petitioner failed to sufficiently demonstrate that the evidence was adequate to support a viable third-party culpability defense. See *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 590, 867 A.2d 70 ("[w]ithout more, none of those statements contain sufficient substance to support a viable third-party culpability defense, particularly when taken in conjunction with the considerable evidence that instead implicated the petitioner"), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005). Although there is evidence from which a reasonable fact finder could find that Frazer, at some time prior to the day of the crime, was present at the apartment where the shooting occurred, the necessary factual nexus between the crime committed and Frazer is lacking. See *State* v. *Arroyo*, 284 Conn. 597, 610, 935 A.2d 975 (2007) ("[e]vidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination"). The habeas court accurately noted that nothing, other than the initial misidentifications,

raised by the petitioner "connect[ed] [Frazer] to the apartment on the date of this incident." Moreover, certain statements made to the police by Wilson, who allegedly witnessed the shooting, are no more supportive of such defense. As previously discussed, Wilson's statement to police actually identified the shooter as being six feet, three inches tall, which effectively eliminated Frazer, who was five feet, three inches or five feet, four inches tall, as the shooter. Although there is no question that Lombardo and LeVasseur initially identified Frazer as the perpetrator, they corrected their initial identifications to identify the petitioner as the shooter. As the record demonstrates, there existed a plain explanation for that initial identification—Frazer had striking facial similarities to the petitioner. There was nothing more, however, that directly tied Frazer to the crime scene on the night in question. See, e.g., *State* v. *Corley*, 106 Conn. App. 682, 690, 943 A.2d 501 ("although the proposed evidence may have shown that [the third-party suspect] bore a physical resemblance to the defendant, there was no evidence that [the third-party suspect] and the other male were involved in the" crime committed), cert. denied, 287 Conn. 909, 950 A.2d 1285 (2008).

Accordingly, we agree with the habeas court that the petitioner failed to demonstrate that his trial counsel was ineffective on this basis. Because the petitioner has failed to demonstrate that trial counsel was ineffective, the petitioner's claim necessarily fails against his third habeas counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

KACEY LEWIS *v.* COMMISSIONER OF CORRECTION (AC 43381)

Suarez, Clark and Pellegrino, Js.

Syllabus

The self-represented petitioner, who had been convicted of the crimes of kidnapping in the first degree, assault in the third degree, interfering with an officer, and possession of narcotics, sought a writ of habeas corpus. His amended petition set forth seven grounds of alleged error. Grounds I through VI alleged that, at his criminal trial, his constitutional rights to a fair trial, to present a defense, to represent himself, and to counsel were violated and that the prosecutor violated the disclosure requirements of *Brady* v. *Maryland* (373 U.S. 83). Ground VII alleged that the petitioner's appellate counsel, D, provided ineffective assistance during his direct appeal by raising only one claim, namely, that the evidence adduced at trial was insufficient to support the petitioner's conviction of kidnapping in the first degree under *State* v. *Salamon* (287 Conn. 509). The habeas court dismissed grounds I through VI of the amended petition, concluding that the petitioner's claims were procedurally defaulted because he failed to present any evidence, other than his own self-serving testimony, to show cause for failing to raise the claims on direct appeal and to establish that he was prejudiced by the alleged violations of his constitutional rights. The habeas court denied ground VII of the amended petition, concluding that the petitioner failed to establish that D's performance was deficient or that the petitioner suffered any prejudice as a result of D's representation. The petitioner filed a petition for certification to appeal from the judgment of the habeas court with respect only to the issue of whether his constitutional right to the effective assistance of appellate counsel was violated. The habeas court denied the petition, and the petitioner appealed to this court. *Held*:

1. This court declined to review the petitioner's claims that the habeas court improperly denied his motion to sequester D, struck his motion to reconstruct and correct the record, and denied his application to issue a subpoena: an appellate court can review only the merits of the claims specifically set forth in the petition for certification to appeal, and, because the petitioner failed to include such claims in his petition, the habeas court did not have the opportunity to consider such issues in the context of a petition for certification to appeal; accordingly, such claims were not properly before this court and were not reviewable.
2. The habeas court did not abuse its discretion by denying the petition for certification to appeal its dismissal of grounds I through VI of the amended petition and its denial of ground VII of the amended petition because the petitioner failed to raise a claim that met any part of the test for certification to appeal from the denial of his petition:

a. The habeas court properly dismissed the petitioner's claims alleged in grounds I through VI of the amended petition on the ground of procedural default: the petitioner failed to meet his burden of demonstrating that he had satisfied the cause and prejudice standard required to raise such claims in a collateral proceeding because, contrary to his assertions, he provided no specific evidence, other than his own self-serving testimony, to support his claim that he introduced sufficient evidence at the habeas trial to rebut the presumption that his counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, as he did not call D as a witness to explain why he raised only a claim of insufficient evidence in the petitioner's criminal appeal nor did he present any expert testimony or other competent evidence to demonstrate that D's representation was deficient as a result of his failure to raise the claims alleged in grounds I through VI of the petitioner's amended petition.

b. The habeas court did not err by denying ground VII of the petitioner's amended petition: the petitioner failed to adequately brief his claim because, although his principal appellate brief contained a litany of errors that D allegedly committed with respect to the petitioner's criminal appeal, he did not provide any legal analysis regarding how the habeas court erred with respect to those claims, and his self-represented status did not excuse such failure; moreover, the petitioner's attempt to remedy his failure by providing supplemental information in his reply brief was inadequate because such arguments could not be raised for the first time in a reply brief; furthermore, the petitioner failed to demonstrate that the habeas court's finding that he failed to provide evidence, beyond his own self-serving, conclusory testimony, that D provided ineffective assistance was clearly erroneous, as the petitioner failed to call D as a witness or to present expert testimony to demonstrate that D's representation fell below an objective standard of reasonableness.

Argued October 20, 2021—officially released March 8, 2022

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Newson, J.*; judgment dismissing in part and denying in part the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Kacey Lewis, self-represented, the appellant (petitioner).

Margaret Gaffney Radionovas, special deputy assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Jo Anne Sulik* and *David A. Gulick*, senior assistant state's attorneys, for the appellee (respondent).

Opinion

CLARK, J. The self-represented petitioner, Kacey Lewis, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court dismissing in part and denying in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court abused its discretion by (1) denying his motion to sequester a subpoenaed witness, (2) striking his motion to reconstruct and correct the record, (3) denying his request to issue a subpoena, (4) dismissing in part and denying in part his amended petition for a writ of habeas corpus, and (5) denying his petition for certification to appeal. We dismiss the appeal.

The following facts are relevant to our resolution of the petitioner's appeal. The petitioner represented himself at the criminal trial.[1] On December 11, 2009, a jury found him guilty of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), interfering with an officer in violation of General Statutes § 53a-167a (a), and possession of narcotics in violation of General Statutes § 21a-279 (a).[2] See *State* v. *Lewis*, 148 Conn. App. 511, 512, 84 A.3d 1238, cert. denied, 311 Conn. 940, 89 A.3d 349

[1] Attorney Leslie Cavanagh was appointed standby counsel.

[2] The jury found the petitioner not guilty of two counts of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1). *State* v. *Lewis*, 148 Conn. App. 511, 512 n.1, 84 A.3d 1238, cert. denied, 311 Conn. 940, 89 A.3d 349 (2014), cert. denied, 574 U.S. 854, 135 S. Ct. 132, 190 L. Ed. 2d 101 (2014).

(2014), cert. denied, 574 U.S. 854, 135 S. Ct. 132, 190 L. Ed. 2d 101 (2014). The petitioner's convictions arose out of events that took place in Waterbury on the evening of July 20, 2009. Id. At that time, the petitioner and his then girlfriend, Alana Thompson (victim), were driving "around the streets of Waterbury trying to sell heroin." Id. Later in the evening, the two had a disagreement, and the petitioner assaulted and kidnapped the victim in an attempt to force her into his vehicle. Id., 513–14. The petitioner released the victim when two plain-clothes police officers arrived at the scene. Id., 514. As a result of his convictions, the trial court, *Schuman*, *J.*, sentenced the petitioner to a total effective sentence of twenty-five years of incarceration, execution suspended after fifteen years, and five years of probation. Id.

The petitioner appealed from the judgment of conviction, and Attorney Christopher Duby was appointed to represent him. On direct appeal, Duby raised one claim, to wit: the evidence adduced at trial was insufficient to support the petitioner's conviction of kidnapping in the first degree under *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008). See *State* v. *Lewis*, supra, 148 Conn. App. 512. This court affirmed the judgment of conviction; id., 517; and our Supreme Court denied certification to appeal. *State* v. *Lewis*, 311 Conn. 940, 89 A.3d 349 (2014), cert. denied, 574 U.S. 854, 135 S. Ct. 132, 190 L. Ed. 2d 101 (2014).

On December 24, 2014, the self-represented petitioner filed a petition for a writ of habeas corpus. On September 10, 2015, he filed a 100 page document that the habeas court referred to as an amended petition for a writ of habeas corpus (amended petition). The amended petition contained seven claims denominated as grounds I through VII; each ground contained subparts. Grounds I through VI alleged constitutional claims of

juridical error and a violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), that allegedly occurred at the criminal trial.[3] Ground VII alleged that Duby's representation on the criminal

[3] Judge Schuman presided at the petitioner's criminal trial. Other judges presided at pretrial proceedings.

Ground I alleged that the petitioner was deprived of a fair trial and a meaningful opportunity to prepare and defend when (1) the trial court, *Damiani*, *J.*, denied him investigative services, (2) Judge Schuman denied him expert witness services, and (3) Judge Damiani denied his motion for access to an ink pen. It also alleged that the courts' rulings were harmful to the petitioner.

Ground II alleged that the petitioner was denied his right to present a defense when Judge Schuman (1) precluded him during cross-examination from (a) showing the victim her signed statement that was inconsistent and (b) putting the statement into evidence, (2) precluded him from recalling the victim as a witness, and (3) failed to conduct an inquiry into the judicial marshal's "confiscation" of his defense strategy materials.

Ground III alleged that the petitioner's right to self-representation was violated when (1) Judge Schuman (a) forced him to represent himself in leg shackles without exercising juridical scrutiny or placing on the record the reason for the use of restraints and (b) excluded him from a bench conference, (2) standby counsel unduly interfered with the petitioner's presentation and strategy, (3) judicial marshals confiscated the petitioner's defense strategy materials, and (4) Judge Damiani denied his request for an ink pen. The petitioner alleged that the constitutional violations were not subject to harmless error analysis.

Ground IV alleged that the prosecution suppressed exculpatory materials and failed to make a timely disclosure of material impeachment evidence in violation of *Brady* v. *Maryland*, supra, 373 U.S. 87, by (1) withholding photographs of the victim and (2) failing to disclose the criminal records of its witnesses Diane Martell, Amanda Blouin, and the victim.

Ground V alleged that Judge Fasano, Judge Damiani, and Judge Schuman violated the petitioner's constitutional right to counsel by failing to canvass him adequately, by failing to advise him of the mandatory minimum ten year sentence he faced if he were convicted of one of the crimes with which he was charged, and by allowing him to represent himself.

Ground VI alleged that the trial court failed to give him sufficient time to prepare for his criminal trial.

Ground VII alleged that the petitioner was denied the right to the effective assistance of appellate counsel because Duby's "legal representation fell below the objective standard of reasonableness when counsel failed to correct substantial errors and omissions in the record, failed to raise plain error in the record and failed to raise significant obvious errors in the record and such failures constitute[d] ineffectiveness that resulted in prejudice to the petitioner on his direct appeal . . . ."

appeal was ineffective and that such representation prejudiced the petitioner.[4]

On October 4, 2016, the respondent, the Commissioner of Correction, filed a return in which he denied the petitioner's claims and pleaded numerous affirmative defenses, including that the petitioner's claims, with the exception of the ineffective assistance of appellate counsel claim, were in procedural default. On February 23, 2017, the petitioner responded to the allegations of procedural default by amending grounds I though VI. He also denied that his claims were in procedural default and pleaded allegations to establish cause and prejudice.

The petitioner represented himself at the habeas trial that was held on August 22, 2018, and February 28, 2019. The petitioner testified on his own behalf but called no other witnesses. The habeas court, *Newson, J.*, issued a memorandum of decision on May 17, 2019. In its decision, the court first noted that the respondent had raised the affirmative defense of procedural default to many of the petitioner's claims and that Connecticut has adopted the procedural default standard used by the federal courts. "Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is

[4] The petitioner more specifically alleged that Duby only "presented a weak—single—insufficient evidence claim . . . which had the least likelihood of succeeding, while ignoring strong claims—plain error and substantial obvious error in the record." He further alleged that Duby should have raised claims that (1) the trial court erred in denying his (a) motion for an investigator and (b) motion for an expert witness, (2) the prosecutor violated *Brady* v. *Maryland*, supra, 373 U.S. 83, (3) the court violated his right to confrontation by unduly restricting his cross-examination of the victim, and (4) the court committed plain error by forcing him to wear leg shackles at trial and failed to create a record as to the reason for doing so.

designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . . The cause and prejudice requirement is not jurisdictional in nature, but rather a prudential limitation on the right to raise constitutional claims in collateral proceedings. . . . The prudential considerations underlying the procedural default doctrine are principally intended to vindicate two concerns: federalism/comity and finality of judgments." (Citations omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 71, 136 A.3d 596 (2016).

The habeas court found that in grounds I and II of the amended petition, the petitioner alleged certain defects in the rulings of the trial court, including that he was deprived of a fair trial because the court denied his requests for the appointment of an investigator and an expert witness and denied him a writing instrument so that he could take notes during the trial. The petitioner also alleged that several of the trial court's evidentiary rulings interfered with his right to present a defense, such as prohibiting him from introducing the victim's signed statement while he was cross-examining her and failing to hold a hearing to investigate the petitioner's claims that judicial marshals allegedly had confiscated his defense strategy materials.

The court stated that the petitioner's claims of interference with his right to a fair trial, to confront witnesses, and to present a defense were of constitutional magnitude; see *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018) (rights to confront witnesses against defendant and to present defense are guaranteed by sixth amendment to United States constitution); and that they could have been, and should have been, raised on direct appeal.

The court also found that, other than his own self-serving and conclusory testimony, the plaintiff offered no evidence to explain why those constitutional claims were not raised on direct appeal or to establish that he had been prejudiced in any way. Although Duby was in the courtroom during the habeas trial, the petitioner did not call him as a witness. The court stated that, although it is not necessary in every case to call prior counsel as a witness to establish ineffective representation, some evidence of counsel's decision-making process is usually required to overcome the presumption that counsel's decisions were made on the basis of sound legal strategy. See *Boyd* v. *Commissioner of Correction*, 130 Conn. App. 291, 298, 21 A.3d 969 ("[i]t is well established that [a] reviewing court must view counsel's conduct with a strong presumption that it falls within the wide range of reasonable professional assistance and that a tactic that appears ineffective in hindsight may have been sound trial strategy at the time" (internal quotation marks omitted)), cert. denied, 302 Conn. 926, 28 A.3d 337 (2011).

With respect to ground III of the amended petition, the court found that the petitioner alleged that his right to self-representation was violated when he was excluded from a bench conference involving the prosecutor and standby counsel, that standby counsel interfered in his rights to self-representation and to present a defense, and that judicial marshals confiscated his defense strategy materials. The court stated that, because the right to self-representation is one of constitutional magnitude, the petitioner's claims should have been raised before the trial court and on direct appeal. The court, quoting *State* v. *Webb*, 238 Conn. 389, 427, 680 A.2d 147 (1996), noted that "[t]he right to appear [as a self-represented party] exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's

best possible defense. . . . It is also consistent with the ideal of due process as an expression of fundamental fairness. To force a lawyer on a defendant can only lead him to believe that the law contrives against him." (Citation omitted; internal quotation marks omitted.) The court concluded that the petitioner had failed to present any evidence, other than his own self-serving testimony, to show cause for failing to raise grounds I, II, and III on direct appeal and to establish that he was prejudiced by the alleged violations of his constitutional rights.[5]

The habeas court found that ground IV of the amended petition alleged that the state violated the petitioner's rights to due process and a fair trial by withholding certain photographs of the victim and by failing to disclose timely the criminal records of several witnesses

[5] The habeas court examined the trial record and made several findings. With respect to the petitioner's claim that he was denied a writing instrument, the record disclosed that Judge Damiani stated that the petitioner will "have a pen and paper to make all the notes [he] want[s]." Although the petitioner admitted that there is nothing in the record to demonstrate that he was excluded from a bench conference or that he objected to the same, he claimed that facts supporting his claim were removed from the record. As to his claim that judicial marshals confiscated his defense strategy materials, the court found that the petitioner's family delivered documents intended for him to standby counsel in court. Standby counsel knew that the petitioner was incarcerated and that the marshals had to examine anything in the petitioner's possession for security reasons. Standby counsel expressed concern that the package may have contained attorney-client privileged materials. The trial court suggested that the marshals use the metal detector to screen the package for contraband without necessarily examining the contents. The habeas court found no evidence that the marshals confiscated the package as the word "confiscated" is commonly used.

In the present appeal, the petitioner has brought to our attention a portion of the trial transcript that discloses that Judge Schuman held a bench conference with the prosecutor and standby counsel. The petitioner who was representing himself did not object. The transcript also discloses that standby counsel conferred with the petitioner immediately following the bench conference. Because the petitioner did not raise this claim on direct appeal, it is in procedural default, and we therefore need not address it further.

who testified at trial in violation of *Brady* v. *Maryland*, supra, 373 U.S. 83. The court noted that, as a rule, due process requires the state to disclose exculpatory information to a defendant in a timely manner. See *State* v. *Pollitt*, 199 Conn. 399, 414, 508 A.2d 1 (1986) (under *Brady*, evidence required to be disclosed must be disclosed in time for effective use at trial; delayed disclosure of exculpatory material by prosecution, however, is not per se reversible error). The habeas court again found that the petitioner had failed to present any evidence to justify " 'cause' " for not having raised the *Brady* claims on direct appeal and to overcome the presumption that Duby made a reasoned decision not to pursue a *Brady* claim on direct appeal. See *Boyd* v. *Commissioner of Correction*, supra, 130 Conn. App. 297–98. The petitioner also failed to present any evidence of prejudice. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71 (noting our Supreme Court's adoption of cause and prejudice standard).

Ground V of the amended petition alleged that, during the course of the criminal proceedings, several judges failed to canvass the petitioner pursuant to Practice Book § 44-3[6] regarding his decision to represent himself. The petitioner specifically claimed that no court canvassed him to ensure that he was aware that he faced

[6] Practice Book § 44-3, titled "Waiver of Right to Counsel," provides: "A defendant shall be permitted to waive the right to counsel and shall be permitted to represent himself or herself at any stage of the proceedings, either prior to or following the appointment of counsel. A waiver will be accepted only after the judicial authority makes a thorough inquiry and is satisfied that the defendant:

"(1) Has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when so entitled;

"(2) Possesses the intelligence and capacity to appreciate the consequences of the decision to represent oneself;

"(3) Comprehends the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case; and

"(4) Has been made aware of the damages and disadvantages of self-representation."

a ten year mandatory, minimum prison sentence if he were convicted of kidnapping in the first degree.[7] The habeas court noted that the claim is one of constitutional magnitude; see *State* v. *Braswell*, 318 Conn. 815, 828–29, 123 A.3d 835 (2015) (waiver of right to counsel must be knowing and voluntary); and that the petitioner did not raise it at trial or on direct appeal. The court again found that the petitioner had failed to present any evidence to justify cause for not having raised those claims on direct appeal or to overcome the presumption that not pursuing them on direct appeal was the result of Duby's reasoned legal decision. The petitioner also failed to present any evidence to support his claim that he was prejudiced by Duby's representation.

In ground VI, the petitioner alleged that his right to self-representation was impeded when the court failed to provide him with adequate time to prepare for trial. The habeas court once more found that the petitioner had failed to present any evidence as to the cause for his failure to raise this claim on direct appeal. The court therefore concluded that the claim was procedurally defaulted.

In summary, the habeas court dismissed grounds I through VI of the amended petition because the claims were procedurally defaulted. See *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 71 (describing requirements of cause and prejudice standard).

In ground VII of the amended petition, the petitioner alleged that Duby's representation was ineffective because, on direct appeal, he failed to raise any of the claims alleged in grounds I through VI of the amended petition. The habeas court determined that the claim failed for lack of evidence. The petitioner was the only

[7] Kidnapping in the first degree is a class A felony punishable by a term of imprisonment not less than ten nor more than twenty-five years. See General Statutes §§ 53a-92 (a) (2) (A) and 53a-35a (4).

witness to testify in this matter. Duby was present in the courtroom on the second day of trial, but the petitioner chose not to call him as a witness.

The court set forth the legal standard applicable to claims of ineffective assistance of appellate counsel. "[W]hen a petitioner is claiming ineffective assistance of appellate counsel, he must establish that there is a reasonable probability that but for appellate counsel's error, [he] would have prevailed in his direct appeal." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 117 Conn. App. 737, 740, 980 A.2d 933 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). Moreover, it is the petitioner's obligation to present evidence to support a claim of ineffective assistance of appellate counsel. See *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 622–24, 724 A.2d 508, cert. denied, 248 Conn. 905, 731 A.2d 309 (1999). "[W]hen analyzing a claim of ineffective assistance, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . As with any refutable presumption, the petitioner may rebut the presumption on adequate proof of sufficient facts indicating a less than competent performance by counsel." (Citation omitted; internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 83 Conn. App. 543, 551, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004).

The court found that the only evidence the petitioner presented with respect to Duby's performance was his own self-serving conclusions that certain issues should have been raised on direct appeal. The petitioner offered no evidence, however, with respect to the strategic basis for Duby's decisions or the probability that any of the issues alleged would have changed the outcome of his direct appeal. The court concluded that

ground VII failed because the petitioner failed to establish that Duby's performance was deficient or that the petitioner suffered any prejudice as a result of Duby's representation. Consequently, the court denied ground VII of the amended petition.

On the basis of its conclusions regarding the allegations of the amended petition, the court rendered judgment dismissing in part and denying in part the amended petition.

On May 21, 2019, the petitioner filed a petition for certification to appeal from the judgment of the habeas court as to the following legal issues: "Whether the petitioner's constitutional right to the effective assistance of appellate counsel was violated; and . . . [s]uch other errors as are revealed upon a review of the transcripts and record."[8] The habeas court denied the petition for certification to appeal on May 22, 2019.

On May 31, 2019, the petitioner filed an application for waiver of fees, costs and expenses.[9] On June 20,

[8] On appeal, the respondent argues that the petitioner may not use the catchall phrase "[s]uch other errors as are revealed upon a review of the transcripts and record" to bootstrap into the petition any claims he later decides to add on appeal, after the court has denied his petition for certification to appeal. We agree that, following the denial of his petition for certification to appeal, the petitioner is limited to the claims stated in his petition for certification to appeal. "Because it is impossible to review an exercise of discretion that did not occur, [a reviewing court is] confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013).

[9] In his application for waiver of fees and costs, which was filed *after* the court had denied his petition for certification to appeal, the petitioner stated the following grounds for his appeal: (1) whether the habeas court abused its discretion when denying his petition for certification to appeal, (2) whether the court abused its discretion in dismissing and denying the claims raised in the amended petition, (3) whether the court erred in denying the petitioner's motion for default judgment, (4) whether the court abused its discretion in denying the petitioner's motion for summary judgment, (5) whether the court erred in denying the petitioner's motions to subpoena the audio tapes of his criminal trial, (6) whether the court erred in failing

2019, the court found that the petitioner was indigent and granted his application for waiver of fees and costs. In accordance with the petitioner's request, the court did not appoint counsel for the petitioner. The petitioner filed the present appeal on September 10, 2019.

In his principal brief on appeal, the petitioner identified the following claims for review: the habeas court (1) abused its discretion by denying his motion to sequester Duby, (2) erred by striking his motion to reconstruct and correct the record, (3) abused its discretion by denying his application to issue a subpoena, (4) abused its discretion by dismissing in part and denying in part the amended petition, and (5) abused its discretion by denying the petitioner's petition for certification to appeal. In his brief, the respondent has argued that the petitioner's first three claims are not reviewable because the petitioner failed to include them in his petition for certification to appeal. With respect to the petitioner's other claims, the respondent argued that they were inadequately briefed and that the petitioner failed to demonstrate that Duby rendered ineffective assistance. Thereafter, the petitioner filed a reply brief with an appendix of more than 500 pages in which he sought to remedy the deficiencies in his principal brief that were pointed out by the respondent.

"We begin by setting forth the applicable standard of review and procedural hurdles that the petitioner must surmount to obtain appellate review of the merits of a habeas court's denial of the habeas petition following denial of certification to appeal. In *Simms* v. *Warden*, 229 Conn. 178, 187, 640 A.2d 601 (1994), [our

to grant the petitioner's motion to correct and reconstruct the record, (7) whether the court erred in denying the petitioner's oral motion for sequestration of Duby, (8) whether the petitioner's constitutional right to effective assistance of appellate counsel was violated, and (9) such other errors as are revealed on a review of the transcript and record.

Supreme Court] concluded that . . . [General Statutes] § 52-470 (b)[10] prevents a reviewing court from hearing the merits of a habeas appeal following the denial of certification to appeal unless the petitioner establishes that the denial of certification constituted an abuse of discretion by the habeas court. In *Simms* v. *Warden*, 230 Conn. 608, 615–16, 646 A.2d 126 (1994), [our Supreme Court] incorporated the factors adopted by the United States Supreme Court in *Lozada* v. *Deeds*, 498 U.S. 430, 431–32, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), as the appropriate standard for determining whether the habeas court abused its discretion in denying certification to appeal. This standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . A petitioner who establishes an abuse of discretion through one of the factors listed above must then demonstrate that the judgment of the habeas court should be reversed on its merits. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Emphasis in original; footnote added; internal quotation marks omitted.) *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 214–15, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013). We now turn to the petitioner's claims.

I

The petitioner claims that the habeas court improperly (1) denied his motion to sequester Duby, (2) struck his motion to reconstruct and correct the record, and

[10] See footnote 11 of this opinion.

(3) denied his application to issue a subpoena. The respondent argues that those claims are not reviewable because the petitioner failed to list them in his petition for certification to appeal. We agree with the respondent.

"[Section] 52-470 (g) provides: No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies.

"As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was to limit the number of appeals filed in criminal cases and hasten the final conclusion of the criminal justice process . . . . [T]he legislature intended to discourage frivolous habeas appeals. . . . [Section] 52-470 (b)[11] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal." (Footnote in original; internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 414, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

An appellate court, however, reviews only "the merits of the claims specifically set forth in the petition for certification." *Johnson* v. *Commissioner of Correction*, 181 Conn. App. 572, 578, 187 A.3d 543, cert. denied, 329

[11] "Pursuant to No. 12-115, § 1, of the 2012 Public Acts, subsection (b) of § 52-470 was redesignated as subsection (g)." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 414 n.8, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

Conn. 909, 186 A.3d 13 (2018). "This court has declined to review issues in a petitioner's habeas appeal in situations where the habeas court denied certification to appeal and the issues on appeal had not been raised in the petition for certification." (Internal quotation marks omitted.) Id.

The standard of review of "an appeal following the denial of a petition for certification to appeal from the judgment [disposing of] a petition for a writ of habeas corpus is not the appellate equivalent of a direct appeal from a criminal conviction. Our limited task as a reviewing court is to determine whether the habeas court abused its discretion in concluding that the petitioner's appeal is frivolous. Thus, we review whether the issues for which certification to appeal was sought are debatable among jurists of reason, a court could resolve the issues differently or the issues are adequate to deserve encouragement to proceed further. . . . Because it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal. . . .

"It is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at the time that it considered the petition for certification to appeal as a ground on which certification should be granted." (Citation omitted; internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, supra, 199 Conn. App. 416.

In his petition for certification to appeal, the petitioner stated in relevant part that he was petitioning to appeal the following legal issues: "Whether the petitioner's constitutional right to the effective assistance of

appellate counsel was violated; and . . . [s]uch other errors as are revealed upon a review of the transcripts and record." He made no mention in his petition of the habeas court's evidentiary rulings he now seeks to challenge on appeal. Nevertheless, in his reply brief, the petitioner claims that *Johnson* and *Whistnant* are not applicable to the present case because the habeas court actually considered whether to deny his motion to sequester Duby, to strike his motion to reconstruct and correct the record, and to deny his application to issue a subpoena during the habeas trial. The petitioner's argument misapprehends the consideration that is relevant to a petition for certification to appeal. Although the habeas court may have considered and exercised its discretion with respect to rulings it made during the habeas trial, the court did not have an opportunity to consider those issues in the context of a petition for certification to appeal because the petitioner failed to include them in his petition. The only issue the petitioner presented for consideration by the habeas court with respect to the petition for certification to appeal was whether its denial of the petitioner's claim that his appellate counsel was ineffective should be appealed.

Because the habeas court did not have an opportunity to consider the petitioner's appellate claims that it improperly (1) denied his motion to sequester Duby, (2) struck his motion to reconstruct and correct the record and (3) denied his application to issue a subpoena, those claims are not properly before us and, therefore, are not reviewable. "A review of such claims would amount to an ambuscade of the [habeas] judge." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 181 Conn. App. 579–80. We therefore decline to review the petitioner's first three appellate claims.

II

The petitioner's second claim is that the court improperly (1) dismissed grounds I through VI of his amended petition for a writ of habeas corpus because they were procedurally defaulted and (2) denied ground VII because he failed to demonstrate that his appellate counsel rendered ineffective assistance or that he was prejudiced by appellate counsel's representation. We disagree.

A

The petitioner claims that the habeas court erred by dismissing grounds I through VI of the amended petition on the grounds of procedural default.[12] In grounds I through VI of the amended petition, the petitioner alleged that his constitutional rights to a fair trial, to present a defense, to represent himself, and to counsel were violated at the criminal trial. In addition, the petitioner alleged that the prosecutor violated *Brady* v. *Maryland*, supra, 373 U.S. 87. See footnote 3 of this opinion.

"The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent

[12] The petitioner did not specifically include those claims in his petition for certification to appeal. The habeas court dismissed those claims, in part, on the ground that the petitioner had failed to demonstrate good cause for not raising those claims in his direct appeal. In reaching that conclusion, the habeas court found that the petitioner had failed to demonstrate that his failure to raise the claims on direct appeal was caused by Duby's ineffective assistance. As a result, we review these claims because they arguably are subsumed within that part of his petition for certification seeking review of whether his "constitutional right to the effective assistance of appellate counsel was violated . . . ."

that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citations omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 107 Conn. App. 833, 838, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008).

"The appropriate standard for reviewability of [a procedurally defaulted claim] . . . is the cause and prejudice standard. Under this standard, the petitioner must demonstrate good cause for his failure to raise a claim at trial or on direct appeal and actual prejudice resulting from the impropriety claimed in the habeas petition. . . . [T]he cause and prejudice test is designed to prevent full review of issues in habeas corpus proceedings that counsel did not raise at trial or on appeal for reasons of tactics, inadvertence or ignorance . . . .

"Once the respondent has raised the defense of procedural default in the return, the burden is on the petitioner to prove cause and prejudice. . . . [*When*] *no evidence* [*of cause and prejudice*] *has been provided* [*to the habeas court*], [*the reviewing*] *court can independently conclude that the petitioner has failed to meet the cause and prejudice test.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 489–90, 944 A.2d 340 (2008).

On appeal, the petitioner claims that he demonstrated good cause for failing to raise these claims in his direct appeal because he introduced evidence at the habeas trial that was sufficient to rebut the presumption that

counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. He points to no specific evidence, however, to support his position. Instead, he argues in conclusory fashion that, in light of the "compelling—uncontested testimonial and documentary evidence [he] . . . presented at the trial in [the present] case, the habeas court's finding that [he] offered no evidence, other than his own self-serving conclusory testimony is clearly an erroneous factual finding. Any plain reading of the facts in [the present] case makes it clear that the evidence [he] presented . . . was sufficient to rebut the presumption that counsel's assistance was reasonable, and that [he] was prejudiced by counsel's ineffectiveness."

The respondent contends that the habeas court properly dismissed grounds I through VI of the amended petition because the petitioner did not prove that Duby performed deficiently. The petitioner offered no evidence that the reason Duby did not raise certain claims on appeal was attributable to anything other than Duby's reasonable professional judgment.

On the basis of our review of the record and the briefs of the parties, we conclude that the habeas court did not abuse its discretion by denying certification to appeal its dismissal of grounds I through VI of the amended petition. We agree with the habeas court that the petitioner offered no evidence to prove cause and prejudice by overcoming the presumption that Duby provided adequate representation. The petitioner did not call Duby as a witness to explain why he raised only a claim of insufficient evidence in the petitioner's criminal appeal. He presented no expert testimony or other competent evidence that Duby's representation was deficient for failing to raise the claims the petitioner alleged in grounds I through VI. The petitioner failed to carry his burden to prove cause and prejudice. The

court, therefore, properly dismissed the claims alleged in grounds I through VI of the amended petition on the grounds of procedural default.

B

The petitioner also claims that the habeas court erred by denying ground VII of his amended petition, alleging that Duby provided ineffective assistance. We do not agree.

Ground VII of the amended petition alleges that the petitioner was denied the constitutional right to the effective assistance of appellate counsel because Duby's "representation fell below the objective standard of reasonableness when [he] failed to correct substantial errors and omissions in the record, failed to raise plain error in the record and failed to raise significant obvious errors in the record and such failures . . . resulted in prejudice to the petitioner on his direct appeal . . . ."

The two-pronged test of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to claims of ineffective assistance of appellate counsel. See *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 494–95, 84 A.3d 1246, cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014). "*Strickland* requires that a petitioner satisfy both a performance and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 198 Conn. App. 345, 352–53, 233 A.3d 1106, cert. denied, 335 Conn. 948, 238 A.3d 18 (2020).

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) Id., 353. "In a habeas proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) Id., 354.

"To establish that the petitioner was prejudiced by appellate counsel's ineffective assistance, the petitioner must show that, but for the ineffective assistance, there is a reasonable probability that, if the issue were brought before us on direct appeal, the petitioner would have prevailed." Id., 354–55, quoting *Small* v. *Commissioner of Correction*, 286 Conn. 707, 728, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

In his appellate brief, the petitioner has argued that Duby "presented a weak—single—insufficient evidence claim on direct appeal, which had the least likelihood of succeeding, while ignoring strong claims—plain error and substantial obvious error in the record." He claimed that at the habeas trial he demonstrated that Duby was ineffective and that he was prejudiced when Duby ignored important arguable constitutional violations that are obvious from even a cursory reading of the record, i.e., the trial court erred by depriving the petitioner of investigative services, and that counsel was ineffective and the petitioner was prejudiced when Duby failed to raise confrontation violations, a *Brady*

violation, and plain error and also failed to correct substantial errors and omissions in the record. Although the petitioner's principal brief contains a litany of errors Duby allegedly committed with respect to the petitioner's criminal appeal, the petitioner failed to provide any legal analysis as to how the court erred with respect to those claims.

The respondent contends that the petitioner has not adequately briefed his claims. We agree that the petitioner has not provided the type of legal analysis necessary to prevail on appeal. Although the petitioner represented himself at his criminal trial, at his habeas trial, and in the present appeal, his self-represented status does not excuse his failure to provide a factual and legal analysis as to why the habeas court erred when it denied ground VII of the amended petition. See *Turner* v. *Commissioner of Correction*, 201 Conn. App. 196, 224, 242 A.3d 512 (2020), cert. denied, 336 Conn. 945, 250 A.3d 694 (2021).

"This court has always been solicitous of the rights of [self-represented] litigants and . . . will endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Although we will not entirely disregard our rules of practice, we do give great latitude to [self-represented] litigants in order that justice may both be done and be seen to be done. . . . For justice to be done, however, any latitude given to [self-represented] litigants cannot interfere with the rights of other parties, nor can we disregard completely our rules of practice." (Internal quotation marks omitted.) *Shobeiri* v. *Richards*, 104 Conn. App. 293, 296, 933 A.2d 728 (2007).

In his reply brief, the petitioner concedes that he did not adequately brief his claims in his principal brief. He stated: "Although the [self-represented] petitioner

should have more specifically complied with the technical requirements of the Connecticut Practice Book when briefing his challenge to the habeas court's rejection of his claims of ineffective assistance of appellate counsel, this court has an adequate basis on which to review the claim because the evidence is printed in the appendices to the brief(s) filed by the petitioner [in] this appeal."

We acknowledge the petitioner's status as a self-represented party, but it is not the responsibility of this court to comb the record for the petitioner and to invent arguments on his behalf. Moreover, "[i]t is . . . a well established principle that arguments cannot be raised for the first time in a reply brief. . . . [I]t is improper to raise a new argument in a reply brief, because doing so deprives the opposing party of the opportunity to respond in writing." (Citations omitted; internal quotation marks omitted.) *State* v. *Myers*, 178 Conn. App. 102, 106, 174 A.3d 197 (2017).

Notwithstanding the inadequacies of the petitioner's principal brief, on the basis of our review of the record, we conclude that the petitioner has not demonstrated that the habeas court's finding that he failed to provide evidence beyond his self-serving, conclusory testimony that Duby provided ineffective assistance is clearly erroneous. The petitioner failed to call Duby as a witness, and he presented no expert testimony to demonstrate that Duby's representation fell below "an objective standard of reasonableness considering all of the circumstances." (Internal quotation marks omitted.) *Camacho* v. *Commissioner of Correction*, supra, 148 Conn. App. 494. Because the petitioner failed to present the habeas court with evidence that Duby's representation was ineffective, we conclude that the court did not err by denying ground VII of the amended petition.

Because we conclude that the habeas court did not err by dismissing grounds I through VI of the amended

petition or by denying ground VII thereof, and because the petitioner has not raised any claim that meets any part of the test for certification to appeal from the denial of his petition for certification to appeal, we conclude that the habeas court did not abuse its discretion by denying the petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

TAJAY HEYWOOD *v.* COMMISSIONER OF CORRECTION
(AC 44198)

Cradle, Clark and Norcott, Js.

Syllabus

The petitioner, a citizen of Jamaica, sought a writ of habeas corpus, claiming that his trial counsel, R, had provided ineffective assistance by failing to unequivocally advise him that a guilty plea to the charge of risk of injury to a child would subject him to mandatory deportation. The petitioner initially was charged with offenses that exposed him to 160 years of incarceration before he pleaded guilty and received a lesser sentence, with the potential of no jail time, under a plea agreement offered by the state. The habeas court rendered judgment denying the habeas petition, concluding that, although R had rendered deficient performance by failing to clearly and unambiguously convey to the petitioner the certainty of his deportation, the petitioner had failed to demonstrate that he was prejudiced by that performance. Following the granting of the petition for certification to appeal, the petitioner appealed to this court. *Held* that the petitioner could not prevail on his claim that the habeas court improperly concluded that he had failed to satisfy the prejudice prong of *Strickland* v. *Washington* (466 U.S. 668); the court's conclusion that the petitioner had not satisfied the prejudice prong was supported by evidence in the record that the court found to be credible, namely, R's testimony that the petitioner was concerned with both the risk of deportation and the risk of incarceration, the state's case against the petitioner was strong, and it was likely that, if the petitioner had gone to trial and been convicted, the petitioner would have received a sentence of thirty years of incarceration; moreover, the court, having assessed the petitioner's testimony and having considered whether the petitioner rationally would have rejected the plea offer had he known

that accepting it would result in mandatory deportation, did not find the petitioner's testimony to be credible.

Argued December 1, 2021—officially released March 8, 2022

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, *Chaplin, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Mary Boehlert, assigned counsel, for the appellant (petitioner).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*, state's attorney, and *Susan M. Campbell*, assistant state's attorney, for the appellee (respondent).

Opinion

NORCOTT, J. The petitioner, Tajay Heywood, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly concluded that he failed to establish that he was prejudiced as a result of his trial counsel's deficient performance. We disagree and, accordingly, affirm the judgment of the court.

The following facts and procedural history are relevant to this appeal. The petitioner was born in Jamaica and moved to the United States with his family when he was eight years old. The petitioner was a lawful permanent resident of the United States and remained a citizen of Jamaica. On October 6, 2015, the petitioner was arrested as a result of allegations by a thirteen year old girl that he had sexually assaulted her on four

occasions.[1] The petitioner was charged with four counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), and four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). Those charges carried with them a potential maximum term of 160 years of incarceration, including a potential three year mandatory minimum period of incarceration.[2]

The state offered the petitioner a plea agreement pursuant to which the petitioner would plead guilty to one count of sexual assault in the second degree in exchange for a sentence of ten years of incarceration, suspended after four years to serve, with a right to argue down to the nine month mandatory minimum period of incarceration, followed by ten years of probation. The petitioner rejected that offer and intended to proceed to trial. On the day that evidence was set to begin, and after jury selection was completed, the state offered the petitioner a plea agreement with more favorable terms. Specifically, the petitioner would plead

[1] The allegations were made after the victim's mother found text messages from the petitioner on the victim's phone. As a result of the victim's allegations, the Department of Children and Families conducted an investigation, which led to the petitioner's arrest.

[2] General Statutes § 53a-71 (b) provides in relevant part that sexual assault in the second degree is a class B felony if the victim is under sixteen years of age, "and any person found guilty under this section shall be sentenced to a term of imprisonment of which nine months of the sentence imposed may not be suspended or reduced by the court." A violation of General Statutes § 53-21 (a) (2) is also classified as a class B felony.

General Statutes § 53a-35a provides in relevant part: "For any felony . . . the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court as follows . . . (6) For a class B felony . . . a term not less than one year nor more than twenty years . . . ."

For each of the four counts under § 53a-71 (a) (1), the petitioner faced a mandatory minimum term of nine months of incarceration and a maximum term of twenty years of incarceration. For each of the four counts under § 53-21 (a) (2), the petitioner faced a maximum term of twenty years of incarceration.

guilty to one count of risk of injury to a child in exchange for a sentence of ten years of incarceration, execution suspended after four years, with a right to argue for less, followed by ten years of probation. Because the petitioner had the right to argue for a lesser period of incarceration, he potentially could have received no jail time. The petitioner accepted that offer.

On May 31, 2017, the petitioner pleaded guilty to risk of injury to a child in violation of § 53-21 (a) (2). On August 11, 2017, the court, *Devlin*, *J.*, sentenced the petitioner to a total effective term of ten years of incarceration, execution suspended after nine months to serve, followed by ten years of probation. Pursuant to 8 U.S.C. §§ 1101 (a) (43) (A) and 1227 (a) (2) (A) (iii), a conviction under § 53-21 (a) (2) constitutes an aggravated felony for immigration purposes. On completion of his jail term, but while in the custody of the Department of Correction, the petitioner was apprehended by federal immigration officials and subjected to deportation proceedings.

On May 23, 2018, the petitioner, as a self-represented litigant and while in federal immigration detention, filed the present habeas action. On May 25, 2018, the court granted the petitioner's request for the appointment of counsel. On July 5, 2018, the petitioner, through counsel, filed an amended petition for a writ of habeas corpus. The petitioner alleged that Attorney Frank Riccio II, who represented him in the criminal proceedings, provided him with ineffective assistance of counsel. The petitioner claimed in relevant part that Riccio "failed to unequivocally advise [him] . . . that entering a guilty plea under the terms of the plea agreement would make [him] subject to mandatory deportation . . . ."[3]

[3] The petitioner also claimed in his amended petition that Riccio (1) "failed to adequately research the legal issue of the petitioner's immigration status and the probability of [adverse immigration consequences resulting from] the plea agreement"; (2) "inaccurately advised the petitioner that the plea offer included a lesser risk of deportation, because there was a chance that

The petitioner further alleged that "[t]here is a reasonable probability that—but for the petitioner's counsel's deficient performance—the petitioner would not have entered a guilty plea." At some point after filing his initial petition, the petitioner was deported to Jamaica on the ground that he had committed an aggravated felony related to the sexual abuse of a minor.

On September 30 and October 10, 2019, a trial was held before the habeas court, *Chaplin*, *J.* The petitioner presented his testimony[4] and the testimony of (1) Attorney Justin Conlon, an immigration attorney who served as an expert for the petitioner,[5] (2) Riccio, and (3) Attorney Tamara Relis, an immigration attorney who represented the petitioner during his removal proceedings.[6] Riccio testified that, based on the evidence to

the petitioner would receive a fully suspended sentence, which lessened the likelihood that immigration authorities would take action to have the petitioner deported"; (3) "failed to impress upon the petitioner that, once federal authorities apprehended him, deportation was practically inevitable"; (4) "failed to adequately make the petitioner's immigration status and the probability of deportation, removal, and inadmissibility for reentry, part of the plea bargaining process with the prosecuting authority and the judicial authority"; and (5) "failed to negotiate a plea offer with more favorable immigration consequences." In the present appeal, the petitioner does not challenge the court's findings and conclusions as to those claims.

[4] The petitioner testified from Jamaica using videoconferencing technology.

[5] Conlon testified regarding the immigration consequences of pleading guilty to a violation of § 53-21 (a) (2). He testified that "it's pretty clear" that a conviction under § 53-21 (a) (2) constitutes an "aggravated felony," which would make someone convicted under that statute "100 percent deportable." He testified that, after reviewing the petitioner's case, he concluded that "[t]here was no viable legal argument to challenge . . . the grounds of removal charged by the immigration service." He further testified that it would not be accurate to advise someone in the petitioner's position that he would "likely" be deported for pleading guilty to such a crime because "[i]t's certain that the person will be found deportable."

[6] Relis testified regarding the ground for the petitioner's deportation and stated that the petitioner was deported because of his conviction under § 53-21 (a) (2), which constituted an aggravated felony. She further testified that she did not know of any other basis on which he could have been deported.

which he had access prior to jury selection, he believed the case to be "sort of a he said, she said to a degree." Riccio testified that the petitioner wanted to go to trial and challenge the victim's credibility, rather than plead guilty, and that the petitioner did not believe the victim would come to court to testify against him. He testified that, on the day that evidence was set to begin, however, the victim and her mother were present at the courthouse. He testified that, on that same day, he was presented for the first time with a report prepared by the Department of Children and Families (department), which contained the petitioner's admission to a department worker that he had sexually assaulted the victim. Riccio further testified that, prior to obtaining the report, he did not know that it existed and that the petitioner had not told him about it. He testified that the department's report was "pretty thorough" and that the petitioner provided the department worker with details that corroborated the victim's account of the assaults. Riccio characterized this report as "the most damaging evidence" against the petitioner and testified that "[there was] no exception to keep [the petitioner's admissions in the report] out" at trial.

Riccio then testified about the plea offer that the petitioner ultimately accepted. He testified that, in his experience representing criminal defendants, once a case goes on the trial list, the plea agreement offered by the state "virtually never gets better, especially if the evidence in the case improves for the state. Then the offer that was rejected is never reoffered and largely . . . never improves when jury selection is about to begin." Riccio also testified that, in his experience representing clients in sexual assault cases, the state had never offered one of his clients a plea agreement in which his client would plead guilty to a crime that would not be considered an aggravated felony. He testified: "[I]n fact, I don't think I've ever . . . been offered a

nonjail disposition on a case like that. [The petitioner's case] was probably the first and only one [in which there was a] chance of a no jail disposition."

Riccio also testified about his communications with the petitioner regarding the immigration consequences of being found guilty. Several communications from Riccio to the petitioner were entered into evidence as full exhibits at the habeas trial. In a letter dated March 13, 2017, Riccio listed the charges against the petitioner and the maximum possible penalty, and stated that "conviction of any of these offenses will likely result in your deportation." The next day, Riccio sent an e-mail update with the same language. On May 18, 2017, Riccio sent another update, which stated: "The immigration [consequence] of being convicted of a felony is likely deportation." On May 24, 2017, Riccio sent an e-mail with the same language and added: "The only way to truly avoid immigration consequences is to win the trial with eight [not guilty] verdicts." On May 30, 2017, Riccio sent an e-mail to the petitioner noting that he had spoken to the prosecutor about a potential plea agreement that would allow the petitioner to plead guilty to risk of injury to a child and argue for no jail time. Riccio stated: "While it is still a felony, there is a good chance of no jail. I understand that this still creates adverse immigration consequences, however there is a slightly lesser risk of deportation since you will not be incarcerated, thereby making it more difficult for [Immigration and Customs Enforcement (ICE)] to bother you." On May 31, 2017, after the petitioner accepted the state's plea agreement and entered a guilty plea, Riccio sent an e-mail to the petitioner in which he stated: "There will . . . likely [be] immigration consequences due to the felony charge."

Riccio testified that, if the petitioner received a sentence that did not include a period of incarceration, it would not be as easy for ICE to get custody of the

petitioner to deport him. Riccio stated that he had "said to [the petitioner] on a couple of occasions that it's easier for immigration to, essentially, take custody of you and deport you if you're in custody because they simply have to put on a hold versus someone who's not in custody, immigration can't put an automatic hold on a person." Riccio further testified that the petitioner was "concerned and worried" about both jail and deportation and that he "[could not] say that one was more concerning for him than the other." Riccio stated that, after the petitioner entered his guilty plea, but before he was sentenced, he did not bring up the idea of deportation because "[it] was completely understood by him. That's why we didn't talk about it as much as the jail aspect, because it was not a variable, [it] really wasn't . . . anything that could be controlled with an aggravated felony conviction."

The petitioner testified that, since he had moved to the United States in 2006, he had not been back to visit Jamaica and that most of his family did not live in Jamaica. The petitioner was then asked about the e-mails in which Riccio stated that a conviction for the crimes with which he was charged would "likely" result in his deportation. He testified that he understood that advice to mean: "Basically . . . if I do plead to it, it's a chance or maybe a possibility that I could be deported." He then testified that "likely" has a different meaning than "mandatory," which he understood to mean "certain . . . no ifs, ands, or buts." He testified that, throughout the proceedings, he thought that there "was some type of chance of . . . not being deported, the way [Riccio] was making it seem in the e-mails." On cross-examination, he was asked if he "thought to ask . . . Riccio to explain or to clarify the immigration consequences that [Riccio] mentioned," to which he responded, "No." The petitioner testified that he had "no idea" that deportation was mandatory and that, had

Riccio told him that pleading guilty meant agreeing to mandatory deportation, he would have "rather [taken] the full risk" of going to trial. He testified that he thought that, by pleading guilty, he would have served nine months in prison and gone home to "restart" his life.

The petitioner then testified that, on the day that evidence was set to begin, Riccio received the department's report and was "shocked" by the information contained therein. The petitioner testified that he thought Riccio already had seen the report and that Riccio's reaction to it "helped to reverse [his] decision" about going to trial. He stated that, prior to Riccio receiving the report, he was "bullheaded" about having a jury trial "regardless of whatever was going to happen." He later testified that jail was "kinda sorta" a concern for him.

The petitioner acknowledged that, at the hearing at which he entered his guilty plea, Judge Devlin informed him that a conviction "may well have the consequences of your deportation or exclusion from admission to the United States or denial of naturalization as a [United States] citizen," and that, when asked if he understood, he responded, "Yes, sir." He testified that he did not understand that statement by the court to be referencing mandatory deportation. At the sentencing hearing, he asked Judge Devlin to "just grant at least a little bit of leniency . . . and just give me the probation." When asked about this statement at the habeas trial, the petitioner testified that he thought the court might have had the power "to be lenient on immigration."

On March 11, 2020, in a memorandum of decision, the habeas court denied the amended petition for a writ of habeas corpus. Although the court concluded that Riccio's performance was deficient, it concluded that the petitioner failed to demonstrate that he was prejudiced by the deficient performance. The court first analyzed the petitioner's claim that Riccio failed to advise

him unequivocally that pleading guilty would subject him to mandatory deportation and removal from the country. The court found that "Riccio failed to clearly and unambiguously convey to the petitioner the certainty of his deportation in terms the petitioner could understand."[7] Accordingly, the court found that "the petitioner ha[d] demonstrated that . . . Riccio's misadvice regarding the immigration consequences of the plea agreement constituted deficient performance."

The habeas court next analyzed whether the petitioner was prejudiced by Riccio's deficient performance. The court looked to Riccio's testimony at the habeas trial that the petitioner was concerned about jail but also with immigration consequences. The court also looked to Riccio's testimony that his advice to the petitioner about proceeding to trial changed when (1) he received the department's report in which the petitioner's account of the events corroborated the victim's account, and (2) the victim and her mother appeared at court prepared to testify against the petitioner. Riccio testified that, although the strength of the state's case improved dramatically at that point, the state's plea offer improved for the petitioner. The state's revised

[7] The habeas court rejected the first three claims in the amended petition. Specifically, the court found that "[t]he petitioner failed to present any credible evidence that . . . Riccio failed to adequately research the petitioner's legal status and potential adverse immigration consequences." The court next stated that it "[could not] find that . . . Riccio failed to make the petitioner's immigration status and immigration consequences a part of the plea bargaining process." The court then stated that it "[could not] find that . . . Riccio failed to negotiate a plea agreement with more favorable immigration consequences for the petitioner."

In light of the court's finding that Riccio failed to advise the petitioner unambiguously of the immigration consequences of pleading guilty, the court declined to analyze the petitioner's remaining two claims that Riccio rendered deficient performance (1) by inaccurately advising him that the plea agreement exposed him to a lesser chance of deportation because it included the possibility of a fully suspended sentence, and (2) by failing to advise him that deportation was practically inevitable if he were apprehended by federal authorities. As previously noted, the petitioner does not challenge the court's findings and conclusions as to these claims.

plea offer included the potential for a fully suspended sentence, and Riccio testified that he recommended that the petitioner accept the offer, rather than proceed to trial, where, "[had] he . . . lost, he probably would have gotten a thirty year sentence . . . ."

The habeas court then looked to the petitioner's testimony at the habeas trial that he was willing to go to trial, that he was willing to spend more time in prison to avoid deportation, and that Riccio's reaction to the department's report changed his mind about accepting the plea offer. The court also looked to the petitioner's testimony that the potential for a fully suspended sentence with the plea offer did not impact his decision to plead, that jail was "kinda sorta" a concern, and that his request for leniency at his sentencing pertained to immigration consequences and not to jail time. The court stated that it "[did] not credit the petitioner's testimony as to these matters."

The habeas court further stated: "It is undisputed that, had the petitioner proceeded to trial, he would have faced 160 years [of] incarceration, including a seven year mandatory minimum period of incarceration.[8] The court credits Riccio's testimony that the petitioner was very much concerned about jail. The court

[8] The habeas court mistakenly stated that the petitioner faced a seven year mandatory minimum period of incarceration if he proceeded to trial. In making this misstatement, the court presumably relied on Riccio's testimony stating such. Additionally, in multiple e-mails from Riccio to the petitioner, which were entered into evidence, Riccio listed the charges against the petitioner and the potential sentence for each. Riccio stated that each of the four counts under § 53a-71 (a) (1) carried with it a nine month minimum period of incarceration, and that each of the four counts under § 53-21 (a) (2) carried with it a one year minimum period of incarceration. He stated that, in total, the petitioner faced a seven year mandatory minimum period of incarceration. Under § 53-21 (a) (2), however, there is no mandatory minimum period of incarceration when the victim is thirteen years of age or older. Thus, the petitioner only faced a three year mandatory minimum period of incarceration for the four counts under § 53a-71 (a) (1). The court's misstatement does not affect our analysis of the petitioner's claim, nor does the petitioner rely on it in making his argument.

credits the petitioner as to his belief that the victim did not want to testify and that her mother did not believe her. This belief corroborates Riccio's testimony that he initially believed that the state did not have a strong case. This view further corroborates Riccio's testimony that he became aware that the strength of the state's case increased dramatically on his receipt of the [department's report] and the victim and her mother appearing at court to testify. The court credits Riccio's testimony that he advised the petitioner to accept the revised plea offer, rather than risk a significant period of incarceration, which may have included a mandatory minimum period of incarceration. It is further undisputed that the state offered the petitioner a total effective sentence of ten years' incarceration, with a right [for the state] to argue for up to four years or [for the petitioner to argue] as low as a fully suspended sentence, followed by ten years' probation. . . . In the petitioner's allocution at his sentence hearing, he asked the sentencing court to 'grant at least a little bit of leniency on me within this and just give me the probation.' . . . Having considered all of the testimony and exhibits presented at trial, the court finds that the petitioner chose to accept a plea offer with the potential for a fully suspended sentence instead of risking a significant period of incarceration at trial. The court further finds that, had the petitioner known the certainty of his deportation he, nonetheless, would have accepted the state's plea offer to avoid a lengthy jail sentence. Therefore, the petitioner has failed to present sufficient credible evidence to demonstrate that there is a reasonable probability that, absent counsel's failure to advise him in accordance with *Padilla* [v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010)], he would have rejected the state's plea offer and elected to go to trial. As a result, the petitioner has failed to demonstrate that he suffered prejudice as a result of counsel's deficient performance." (Footnote added.)

On May 13, 2020, the habeas court granted the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by noting the legal principles and the standard of review relevant to the petitioner's claim. "A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 277–78, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

"A claim of ineffective assistance of counsel raised by a petitioner who faces mandatory deportation as a consequence of his guilty plea is analyzed more particularly under *Padilla* v. *Kentucky*, [supra, 559 U.S. 356], a case in which the United States Supreme Court held that counsel must inform clients accurately as to whether a guilty plea carries a risk of deportation. . . . *Padilla* recently was analyzed under Connecticut law in *Budziszewski* v. *Commissioner of Correction*, 322

Conn. 504, 507, 142 A.3d 243 (2016), where our Supreme Court concluded that, although there are no precise terms or one-size-fits-all phrases that counsel must use . . . [i]n circumstances when federal law mandates deportation . . . counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty. . . .

"To satisfy the prejudice prong, the petitioner had the burden to prove that, absent counsel's alleged failure to advise him in accordance with *Padilla*, it is reasonably probable that he would have rejected the state's plea offer and elected to go to trial. . . . In evaluating whether the petitioner had met this burden and evaluating the credibility of the petitioner's assertions that he would have gone to trial, it [is] appropriate for the court to consider whether a decision to reject the plea bargain would have been rational under the circumstances." (Citations omitted; internal quotation marks omitted.) *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 885–86, 173 A.3d 525 (2017).

"The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 278–79.

When a petitioner challenges the factual findings of the habeas court, "[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." (Internal quotation marks omitted.) *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014). A "pure credibility determination" made by a habeas court is "unassailable." *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 694, 159 A.3d 1112 (2017).

In the present case, the habeas court found that Riccio's performance was deficient. Consequently, the petitioner challenges only the habeas court's conclusion regarding the prejudice prong of the *Strickland* test. He argues that his testimony at the habeas trial demonstrated that there was a reasonable probability that, in the absence of Riccio's failure to advise him that his guilty plea would result in mandatory deportation, he would have rejected the state's plea offer and elected to go to trial. He states that he "testified unequivocally that he did not want to be deported." He contends that both he and Riccio testified that, at all times prior to pleading guilty, he was "adamant that he wanted to go to trial." He argues that he accepted the plea offer in part because of Riccio's advice that there would be a slightly lesser risk of deportation if he received a sentence that did not include incarceration. The petitioner states: "Given the ties [he] had to the United States, his family, his community, and his future, and the lack of family in and ties to Jamaica, it was rational for [him] to be willing to reject the plea offer and risk going to trial." We reject these arguments, as they fail to demonstrate that the factual findings underlying the

court's conclusion that the petitioner had not proven prejudice are clearly erroneous.

The conclusion of the habeas court that the petitioner had not satisfied the prejudice prong of *Strickland* is supported by evidence in the record that the court found to be credible. Contrary to the petitioner's argument on appeal that his primary concern was deportation, Riccio's testimony, which the court deemed credible, was that the petitioner was also concerned about the risk of incarceration. The state's case against the petitioner was strong, and he faced a substantial period of incarceration if found guilty at trial. Riccio testified that the state's case was strengthened significantly by the department's report and the fact that the victim was present in the courthouse in order to testify on the day evidence was to begin. Although the state's case against the petitioner appeared strong, its plea offer actually improved after the petitioner rejected its initial offer. In fact, the state's new plea offer, which the petitioner ultimately accepted, contained no mandatory minimum prison sentence and allowed him potentially to avoid incarceration altogether. In Riccio's experience, he could not recall a time in which a client in a similar circumstance had received such leniency from the state. Had the petitioner proceeded to trial and lost, he would have faced a maximum sentence of 160 years of incarceration and a mandatory minimum sentence of three years. Riccio testified that he thought it was likely that the petitioner, if convicted, would have received a sentence of thirty years.

The court did not find credible the petitioner's testimony that he would have risked receiving substantially more jail time had he known that pleading guilty to violating § 53-21 (a) (2) would have subjected him to mandatory deportation. As the court set forth in its memorandum of decision, up until the day that evidence was set to begin, the petitioner felt strongly about his

case because he did not think the victim would testify against him, but several events that day changed his mind. First, he became aware that the victim was at the courthouse and, thus, was going to testify. Second, he learned that Riccio saw the department's report for the first time and that it changed Riccio's assessment of the strength of the state's case. In fact, the petitioner testified that Riccio's reaction that day to the department's report "helped to reverse [his] decision" about going to trial. Third, the state offered him a plea agreement that was better than the one he previously had rejected. In light of the overwhelming strength of the evidence against him, which increased the likelihood that he would be found guilty at trial, thereby exposing him to a drastically higher term of incarceration, it would not have been rational for the petitioner to reject the state's improved plea offer.

The court's assessment of the petitioner's testimony at the habeas trial amounts to a "pure credibility determination," which is "unassailable." *Breton* v. *Commissioner of Correction*, supra, 325 Conn. 694. Furthermore, in reaching its decision, the court was permitted to consider whether, under the circumstances, the petitioner rationally would have rejected the plea offer had he known that accepting it would result in mandatory deportation. Our independent review of the record reveals that the court's findings were supported by evidence presented at the habeas trial. We therefore conclude that the habeas court's conclusion that the petitioner was not prejudiced by Riccio's performance is supported by the evidence. Accordingly, the petitioner cannot prevail on his claim that the habeas court improperly concluded that he had failed to satisfy the prejudice prong of *Strickland*.

The judgment is affirmed.

In this opinion the other judges concurred.

ANTHONY C. CARTER *v.* MICHAEL P. BOWLER (AC 43670)

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

Syllabus

The plaintiff sought damages for the alleged deprivation of his due process rights by the defendant, the statewide bar counsel for the Statewide Grievance Committee. The plaintiff had filed two grievance complaints with the committee against R, an attorney. In response to each complaint, the defendant sent a letter to the plaintiff stating that, after review, it was decided to dismiss the plaintiff's complaints without referring them to a grievance panel because the complaints did not allege facts that, if true, would violate the rules governing attorney conduct. The plaintiff alleged that the defendant violated his rights under the federal and state constitutions by dismissing his grievance complaints against R. The trial court granted the defendant's motion to dismiss on the ground of absolute immunity and the plaintiff appealed to this court. *Held* that the trial court properly dismissed the plaintiff's complaint as the defendant was entitled to absolute immunity because his actions in reviewing complaints of attorney misconduct were taken in a quasi-judicial capacity as part of a statewide grievance proceeding: the defendant acted at all times pursuant to the statutory (§ 51-90c) authority vested in his office and in accordance with the applicable rule of practice (§ 2-32), as the statewide bar counsel has the responsibility to exercise judgment and discretion, is vested with investigative authority, ascertains and determines facts, makes decisions affecting the personal or property rights of private persons, and makes binding orders and judgments to either dismiss a complaint or refer it to a grievance panel or an arbitration panel; moreover, because the Office of the Statewide Bar Counsel is a creature of statute entrusted with the responsibility for reviewing complaints of attorney misconduct, a sound public policy existed to recognize the statewide bar counsel's complete freedom of expression that a grant of absolute immunity provided; furthermore, the Office of the Statewide Bar Counsel also acts as an arm of the court to effectuate its inherent authority to regulate attorney conduct and to discipline members of the bar.

Argued November 30, 2021—officially released March 8, 2022

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's constitutional rights, and for other

relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Anthony C. Carter, self-represented, the appellant (plaintiff).

Philip Miller, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendant).

Opinion

ELGO, J. The self-represented plaintiff, Anthony C. Carter, appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Michael P. Bowler. On appeal, the plaintiff claims that the court improperly dismissed his complaint on the ground of absolute immunity.[1] We disagree and, accordingly, affirm the judgment of the trial court.

At all relevant times, the defendant was the statewide bar counsel for the Statewide Grievance Committee (committee). During the summer of 2017, the plaintiff filed two grievance complaints with the committee against Attorney Richard J. Rubino. In response to each complaint, the defendant sent a letter to the plaintiff that stated in relevant part: "The [plaintiff's] complaint has been reviewed by the [O]ffice of the Statewide Bar Counsel, together with an attorney and a non-attorney member of the [committee]. After this review it was decided to dismiss the complaint . . . without referring it to a grievance panel for the following reason(s):

[1] The plaintiff also challenges the court's determination that dismissal of his state constitutional claim was warranted on the alternative ground of sovereign immunity. In light of our conclusion that the court properly determined that the plaintiff's action was barred by the doctrine of absolute immunity, we do not address that alternate basis of dismissal.

The complaint does not allege facts, which, if true, would constitute a violation of any provision of the applicable rules governing attorney conduct. . . .'"[2]

The plaintiff commenced the present action against the defendant on November 29, 2017. In his one count complaint, the plaintiff alleged that the defendant had violated his due process rights under the federal and state constitutions by dismissing his grievance complaints against Rubino. In response, the defendant filed a motion to dismiss pursuant to Practice Book § 10-30, in which he alleged, inter alia, that the doctrine of absolute immunity barred the plaintiff's action. After the parties submitted memoranda of law on that issue, the court granted the motion to dismiss, and this appeal followed.

On appeal, the plaintiff claims that the court improperly dismissed his action on the ground of absolute immunity. We do not agree.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a jurisdictional challenge presents a question of law, our review is plenary." (Citation omitted; internal quotation marks omitted.) *North Sails Group, LLC* v. *Boards & More GmbH*, 340 Conn. 266, 269, 264 A.3d 1 (2021). The doctrine of absolute immunity implicates the subject matter jurisdiction of the court.

[2] In so doing, the defendant's conduct comported with the strictures of Practice Book § 2-32 (a), which provides in relevant part: "Within seven days of the receipt of a complaint, the statewide bar counsel shall review the complaint and process it in accordance with subdivisions (1), (2) or (3) of this subsection as follows . . . (2) refer the complaint to the chair of the Statewide Grievance Committee or an attorney designee of the chair and to a nonattorney member of the committee, and the statewide bar counsel in conjunction with the chair or attorney designee and the nonattorney member shall, if deemed appropriate, dismiss the complaint on one or more of the following grounds . . . (B) the complaint does not allege facts which, if true, would constitute a violation of any provision of the applicable rules governing attorney conduct . . . ."

See *Kenneson* v. *Eggert*, 196 Conn. App. 773, 780, 230 A.3d 795 (2020) ("absolute immunity concerns a court's subject matter jurisdiction" (internal quotation marks omitted)); *Bruno* v. *Travelers Cos.*, 172 Conn. App. 717, 723, 161 A.3d 630 (2017) ("once the defendants raised the issue of absolute immunity . . . and the court then determined that the plaintiff's initial complaint was barred by the doctrine of absolute immunity, the court should have dismissed the case against the defendants"). In addition, we note that, "[i]n reviewing a challenge to a ruling on a motion to dismiss . . . [w]hen the facts relevant to an issue are not in dispute, this court's task is limited to a determination of whether . . . the trial court's conclusions of law are legally and logically correct." (Internal quotation marks omitted.) *Labissoniere* v. *Gaylord Hospital, Inc.*, 182 Conn. App. 445, 452, 185 A.3d 680 (2018).

We begin our analysis by reviewing certain well established precepts. The doctrine of absolute immunity, known also as the litigation privilege; see, e.g., *MacDermid, Inc.* v. *Leonetti*, 310 Conn. 616, 627, 79 A.3d 60 (2013); *Idlibi* v. *Ollennu*, 205 Conn. App. 660, 664, 258 A.3d 121 (2021); "protects against suit as well as liability—in effect, against having to litigate at all." (Internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 786, 865 A.2d 1163 (2005); see also *Simms* v. *Seaman*, 308 Conn. 523, 540–45, 69 A.3d 880 (2013) (discussing expansion of absolute immunity to bar retaliatory civil actions beyond claims of defamation). Our Supreme Court consistently has "applied the doctrine of absolute immunity to . . . actions arising from judicial or quasi-judicial proceedings." *Rioux* v. *Barry*, 283 Conn. 338, 345, 927 A.2d 304 (2007). As the court explained, "[t]he judicial proceeding to which . . . [absolute] immunity attaches . . . includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether

the hearing is public or not. . . . It extends . . . to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, 200 Conn. 243, 246, 510 A.2d 1337 (1986).

The question, then, is whether the proceeding at issue in the present case properly may be considered quasi-judicial in nature. Our Supreme Court has outlined a number of factors that assist in determining whether a proceeding is quasi-judicial in nature. "Among them are whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties. . . . Further, it is important to consider whether there is a sound public policy reason for permitting the complete freedom of expression that a grant of absolute immunity provides." (Citation omitted.) *Kelley* v. *Bonney*, 221 Conn. 549, 567, 606 A.2d 693 (1992). Those factors "are not exclusive nor must all factors militate in favor of a determination that a proceeding is quasi-judicial in nature for a court to conclude that the proceeding is, in fact, quasi-judicial." *Priore* v. *Haig*, 196 Conn. App. 675, 697, 230 A.3d 714, cert. granted, 335 Conn. 955, 239 A.3d 317 (2020).

The Office of the Statewide Bar Counsel exists pursuant to statute. General Statutes § 51-90c provides in relevant part: "(a) The judges of the Superior Court shall appoint an attorney to act as State-Wide Bar Counsel, who shall serve full-time, and such number of attorneys to act as assistant bar counsel as are necessary . . . . (b) In addition to any other powers and duties

set forth in sections 51-90 to 51-91b, inclusive, or by rule of the court, the State-Wide Bar Counsel shall investigate and prosecute complaints involving the violation by any person of any provision of section 51-88." In carrying out that statutory mandate, in accordance with the applicable rules of practice promulgated by the Superior Court; see footnote 2 of this opinion; the statewide bar counsel (1) exercises judgment and discretion, (2) is vested with investigative authority, (3) ascertains and determines facts, (4) makes decisions that affect the personal or property rights of private persons, as a possible consequence of the statewide bar counsel's decision to refer a complaint to the committee is suspension or revocation of a license to practice law in this state; see General Statutes § 51-90g; and (5) makes binding orders and judgments to either dismiss a complaint or refer it to a grievance panel or an arbitration panel. See Practice Book § 2-32 (a). Those responsibilities persuade us that the activities of the statewide bar counsel are quasi-judicial in nature. Moreover, as a creature of statute entrusted with responsibility for reviewing complaints of attorney misconduct, a sound public policy reason exists to recognize the statewide bar counsel's "complete freedom of expression that a grant of absolute immunity provides." *Kelley* v. *Bonney*, supra, 221 Conn. 567.

Furthermore, it bears emphasis that, although established by statute, the Office of the Statewide Bar Counsel acts as an arm of the court to effectuate its "inherent authority to regulate attorney conduct and to discipline the members of the bar." *Heslin* v. *Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 523, 461 A.2d 938 (1983); see also *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 239, 558 A.2d 986 (1989) (statewide bar officials act as "arm of the court" in carrying out duties because "[t]he regulation of attorney conduct is . . . within the court's inherent authority");

cf. *In re Application of Pagano*, 207 Conn. 336, 339, 541 A.2d 104 (1988) ("[t]he proceeding to disbar [or suspend] an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is not the punishment of the offender, but the protection of the court" (emphasis omitted; internal quotation marks omitted)). This court previously has held that "a grievance proceeding is quasi-judicial in nature"; *Cohen* v. *King*, 189 Conn. App. 85, 90, 206 A.3d 188 (2019), cert. denied, 336 Conn. 925, 246 A.3d 986 (2021); and that "statements made in a grievance proceeding [are] shielded by absolute immunity . . . ." Id., 92; see also *Field* v. *Kearns*, 43 Conn. App. 265, 273, 682 A.2d 148 ("we conclude that bar grievance proceedings are quasi-judicial"), cert. denied, 239 Conn. 942, 684 A.2d 711 (1996); *Grant* v. *Quinn*, Docket No. CV-10-5035130, 2011 WL 925441, *4 (Conn. Super. February 8, 2011) ("[t]he proceedings of the [committee] are judicial in nature and its members are entitled to absolute judicial immunity from liability for duties performed in connection with those proceedings"). In light of the foregoing, we conclude that the statewide bar counsel's review of complaints of attorney misconduct is quasi-judicial in nature under Connecticut law.

Federal law similarly has recognized that counsel to attorney discipline committees act in a quasi-judicial capacity. As the United States Supreme Court has observed, "[t]he essentially judicial nature of disciplinary actions . . . has been recognized previously by the federal courts." *Middlesex County Ethics Committee* v. *Garden State Bar Assn.*, 457 U.S. 423, 434 n.13, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982). The United States Court of Appeals for the Second Circuit likewise "has consistently extended . . . 'quasijudicial' immunity to investigators with attorney grievance committees . . . ." *Finn* v. *Anderson*, 592 Fed. Appx. 16, 19 (2d

Cir. 2014); see also *McKeown* v. *New York State Commission on Judicial Conduct*, 377 Fed. Appx. 121, 124 (2d Cir. 2010) ("[p]rosecutors, hearing examiners, and law clerks are eligible for absolute immunity, and those involved in preparing and adjudicating attorney discipline proceedings share analogous roles"); *Napolitano* v. *Saltzman*, 315 Fed. Appx. 351, 351–52 (2d Cir. 2009) (holding that defendant attorney "enjoys absolute immunity for his actions as counsel to the Grievance Committee, which are 'quasi-public adjudicatory [or] prosecutorial' in nature"); *Anonymous* v. *Assn. of the Bar of the City of New York*, 515 F.2d 427, 433 (2d Cir.) (grievance committee "acts as a quasi-judicial body" as arm of court (internal quotation marks omitted)), cert. denied, 423 U.S. 863, 96 S. Ct. 122, 46 L. Ed. 2d 92 (1975); accord *Bishop* v. *State Bar of Texas*, 791 F.2d 435, 438 (5th Cir. 1986) (due to "the importance of the disciplinary process to the judiciary, courts have afforded broad immunity to members of bar grievance committees and their staff"); *Clulow* v. *Oklahoma*, 700 F.2d 1291, 1298 (10th Cir. 1983) ("bar officials charged with duties of investigating, drawing up, and presenting cases involving attorney discipline enjoy absolute immunity from damage claims for such functions"); *Kissell* v. *Breskow*, 579 F.2d 425, 430–31 (D.C. Cir. 1980) (absolute immunity afforded to members of attorney discipline committee); *Clark* v. *Washington*, 366 F.2d 678, 681 (9th Cir.1966) ("[a]s an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an 'integral part of the judicial process' and is therefore entitled to the same immunity which is afforded to prosecuting attorneys in that state").

In order to overcome the absolute immunity afforded in judicial or quasi-judicial proceedings, a plaintiff bears a formidable burden. Allegations of improper motives, bad faith, or malice are not enough. See *Mireles* v. *Waco*,

502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991) (per curiam) (absolute immunity "is not overcome by allegations of bad faith or malice"); *Bernard* v. *County of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) ("the fact that improper motives may influence [attorney's] authorized discretion cannot deprive him of absolute immunity"). Rather, a plaintiff must demonstrate that either (1) the actions in question were not taken in the defendant's judicial or quasi-judicial capacity or (2) the defendant has acted "in the complete absence of all jurisdiction." *Mireles* v. *Waco*, supra, 11–12; see also *Leseberg* v. *O'Grady*, 115 Conn. App. 18, 22, 971 A.2d 86, cert. denied, 293 Conn. 913, 978 A.2d 1110 (2009).

The record before us unequivocally indicates that the defendant's actions in the present case were taken in a quasi-judicial capacity as part of a statewide grievance proceeding, and that the defendant at all times acted pursuant to the authority vested in his office by our General Statutes.[3] His actions, therefore, are protected by absolute immunity. For that reason, the trial court properly granted the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

STEVEN K. STANLEY *v.* ALISON M. WOODARD ET AL.
(AC 44279)

Moll, Alexander and Pellegrino, Js.

Syllabus

The plaintiff appealed to the trial court from the decree of the Probate Court appointing the defendant H as the conservator of the estate of the plaintiff's mother. The trial court dismissed the appeal for lack of subject

[3] We reiterate that the gravamen of the plaintiff's complaint was that the defendant improperly had sent the plaintiff two letters "informing him that his [grievance complaints] had been dismissed."

matter jurisdiction, as it was filed pursuant to the accidental failure of suit statute (§ 52-592 (a)), which does not apply to probate appeals. The plaintiff filed a motion to open and vacate the judgment of dismissal, which the trial court denied. On the plaintiff's appeal to this court, *held* that there was no basis on which to conclude that the trial court abused its discretion in denying the plaintiff's motion to open.

Argued February 10—officially released March 8, 2022

Procedural History

Appeal from the decree of the Probate Court for the district of Tolland appointing the defendant Harold J. Stanley as the conservator of the estate of the defendant Christine Stanley, brought to the Superior Court in the judicial district of Tolland, where the court, *Farley, J.*, rendered judgment dismissing the appeal; thereafter, the court denied the plaintiff's motion to open and vacate the judgment, and the plaintiff appealed to this court. *Affirmed.*

Steven K. Stanley, self-represented, the appellant (plaintiff).

Laura D. Thurston, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellees (named defendant et al.).

Vianca T. Malick, for the appellee (defendant Rebecca Ellert).

Opinion

PER CURIAM. The self-represented plaintiff, Steven K. Stanley, appeals from the trial court's denial of his motion to open and vacate the judgment of dismissal. For the reasons that follow, we affirm the trial court's judgment.

On February 14, 2020, the trial court rendered judgment dismissing for lack of subject matter jurisdiction

the plaintiff's underlying probate appeal,[1] filed pursuant to General Statutes § 52-592 (a), the accidental failure of suit statute, on the ground that § 52-592 (a) does not apply to probate appeals. See *Metcalfe* v. *Sandford*, 271 Conn. 531, 535–40, 858 A.2d 757 (2004). On July 15, 2020, the plaintiff filed a motion to open and vacate the judgment of dismissal (motion to open). On July 27, 2020, in a one word order, the trial court denied the plaintiff's motion to open.[2] This appeal followed.

Notwithstanding the arguments made by the plaintiff in his appellate brief and during oral argument before this court directly attacking the trial court's judgment of dismissal, we first note that the plaintiff did not file an appeal—timely or otherwise—from the judgment of dismissal. Instead, the plaintiff appeals from the trial court's denial of his motion to open. Therefore, the standard of review governing the plaintiff's appeal is one of abuse of discretion rather than the plenary appellate standard of review.

"A motion to open and vacate a judgment . . . is addressed to the [trial] court's discretion, and the action of the trial court will not be disturbed on appeal unless it acted unreasonably and in clear abuse of its discretion. . . . In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably

[1] Although the plaintiff's complaint was titled "Civil Tort Claims Act," it sought, by its express terms, an order of the Superior Court vacating a decree by the defendant Judge Barbara Riordan Gardner of the Probate Court appointing the defendant Harold J. Stanley as the conservator of the estate of the plaintiff's mother, the defendant Christine Stanley. Alison M. Woodard, Lara Stauning, Linda Balfe, Rebecca Ellert, Kevin Stanley, Paul Stanley, and Sophia H. Shaikh were also defendants.

[2] None of the parties sought an articulation from the trial court pursuant to Practice Book § 66-5 following the filing of this appeal.

conclude as it did." (Citations omitted; internal quotation marks omitted.) *Walton* v. *New Hartford*, 223 Conn. 155, 169–70, 612 A.2d 1153 (1992).

On the basis of our review of the record and our consideration of the briefs and argument of the parties, we perceive no basis on which to conclude that the trial court abused its discretion in denying the plaintiff's motion to open.

The judgment is affirmed.

CUMMINGS ENTERPRISE, INC. *v.* MANUEL MOUTINHO, TRUSTEE (AC 44437)

Prescott, Moll and Pellegrino, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant. The trial court granted the defendant's motion to dismiss, concluding that the plaintiff lacked standing to bring a foreclosure action because any mortgage interest the plaintiff had held in the subject property had been foreclosed in an earlier action brought by the defendant, and the plaintiff appealed to this court. After the defendant's attorney, in his brief to this court, refuted certain factual representations made by the plaintiff's attorney in the plaintiff's principal brief, the plaintiff's attorney failed to clarify the matter in the plaintiff's reply brief. During oral argument before this court, when the plaintiff's attorney was questioned about the disputed factual representations, he was unable or unwilling to vouch for the veracity of those statements, did not direct the court's attention to any relevant portion of the record, and did not provide any citation to the record to support those factual assertions. Approximately one month later, the plaintiff's attorney filed a motion with this court for leave to correct the plaintiff's brief. *Held*:

1. The plaintiff could not prevail on its challenge to the trial court's dismissal of its action; because the plaintiff, who was defaulted for failure to appear in the prior foreclosure action brought by the defendant, made no effort to redeem on or before its designated law day, its mortgage interest was extinguished and, after all law days had passed, title to the property vested in the defendant, leaving the property no longer subject to the plaintiff's mortgage.

2. This court denied the motion for leave to correct the plaintiff's brief filed by the plaintiff's attorney as untimely: the plaintiff's attorney waited too long to correct the misrepresentations, and his effort to remedy them in their entirety was lacking; moreover, the plaintiff's attorney was placed on notice that future, similar conduct would result in the imposition of sanctions and/or professional discipline.

Argued January 6—officially released March 8, 2022

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Spader*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed*; *motion denied.*

Kenneth A. Votre, for the appellant (plaintiff).

James M. Nugent, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Cummings Enterprise, Inc., appeals from the judgment of the trial court dismissing for lack of standing its foreclosure action brought against the defendant, Manuel Moutinho, Trustee for the Mark IV Construction Co., Inc., 401 (K) Savings Plan. The court granted the defendant's motion to dismiss, concluding that the plaintiff lacked standing to bring a foreclosure action because any mortgage interest that the plaintiff once may have held with respect to the subject property, an undeveloped building lot in Stratford, had been foreclosed in an earlier foreclosure action brought by the defendant. Because the plaintiff, who was defaulted for failure to appear in the prior foreclosure action, made no effort to redeem on or before its designated law day, its mortgage interest was extinguished, and, after all law days had passed, title to the property vested in the defendant, leaving the property no longer subject to the plaintiff's mortgage.

On appeal, the plaintiff raises a number of convoluted arguments challenging the court's granting of the motion to dismiss. On the basis of our thorough review of the record, briefs, and applicable law, we conclude that the plaintiff's arguments are devoid of merit. Accordingly, we affirm the judgment of the trial court.

Although further discussion regarding the merits of the plaintiff's appeal is unwarranted, we take this opportunity briefly to address certain factual misrepresentations contained in the plaintiff's brief on appeal. The plaintiff's principal argument before the trial court regarding its standing to pursue the underlying foreclosure action was that the law days that the court set in the defendant's previous foreclosure action purportedly had passed without legal effect due to a bankruptcy stay or extension period that arose as a result of the filing of a bankruptcy petition by 10-5th, LLC, an entity that allegedly had acquired an ownership interest in the subject property. In its appellate brief, the plaintiff made the following factual assertions: "10-5th, LLC, is an entity that was a party to the previous foreclosure action and at one point held title to the subject property," and "[t]he trial court, in the previous foreclosure, was asked to reset the law days after the dismissal of 10-5th, LLC's bankruptcy proceeding." The plaintiff provided no citation to the record to support these factual assertions, although the brief contained citations to the record with respect to other factual statements. See Practice Book § 67-4.[1] In its appellee's brief, the defendant stated that these factual representations by the plaintiff were false

[1] Practice Book § 67-4, which governs the content and organization of the appellant's brief, provides in relevant part: "The appellant's brief shall contain the following . . . (d) A statement of the nature of the proceedings and of the facts of the case bearing on the issues raised. The statement of facts shall be in narrative form, *shall be supported by appropriate references to the page or pages of the transcript or to the document upon which the party relies* and shall not be unnecessarily detailed or voluminous. . . ." (Emphasis added.)

and that it is clear from the record that 10-5th, LLC, was never a party to the defendant's foreclosure action and no one ever had asked the trial court to reset the law days after the dismissal of 10-5th, LLC's bankruptcy petition. In its reply brief, the plaintiff's only response to the defendant's assertion that the plaintiff's brief contained false factual representations was that the parties "differ somewhat in their description of the underlying facts in this case." The plaintiff again referred to 10-5th, LLC, as "one defendant" in the previous foreclosure action, implying once again, without any supporting citation to the record, that 10-5th, LLC, was a party to that action.

During oral argument before this court, the panel asked the attorney for the plaintiff, Kenneth A. Votre, about the disputed factual representations and his failure either to clarify the matter in his reply brief or, if necessary, to make corrections to the brief prior to oral argument. Although he asserted on the one hand that he and/or his staff had verified the veracity of the statements in the brief prior to oral argument, he was unwilling or unable to vouch for the veracity of those statements, could not direct the court's attention to any relevant portion of the record, and claimed that, despite the purported efforts to verify the facts, he might still be mistaken. Nearly a month after oral argument, the plaintiff filed a motion with this court titled a "Request For Leave To Correct Appellant's Brief." In that motion, the plaintiff states that, "[a]t oral argument it, albeit late, became apparent to counsel that 10-5th, LLC, was, in fact, not a party to the prior foreclosure action . . . ." There is no explanation for why this error occurred and why, despite it having been brought to counsel's attention by his opponent, Attorney Votre failed to correct the misrepresentations in his reply brief or at oral argument. Instead, counsel took an additional month to correct his error. The motion also makes

no mention of the other factual misstatement in the plaintiff's brief, namely, that, following the dismissal of 10-5th, LLC's bankruptcy action, a request was made to the court in the prior foreclosure action to reset the law days. Nevertheless, this fact is removed from the proposed amended fact section appended to the plaintiff's motion.

Attorneys have an obligation to act fairly and with candor in *all* of their dealings before the court, which includes factual statements made in open court or in pleadings and other written submissions. See, e.g., *Daniels* v. *Alander*, 75 Conn. App. 864, 879, 818 A.2d 106 (2003), aff'd, 268 Conn. 320, 844 A.2d 182 (2004). That obligation is codified in rule 3.3 (a) of the Rules of Professional Conduct, titled "Candor toward the Tribunal," which provides in relevant part: "A lawyer shall not knowingly . . . (1) [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." Although, as stated in the commentary to the rule, "a lawyer in an adversarial proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, *the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false*." (Emphasis added.) Here, the plaintiff's attorney was provided with a number of opportunities in which he could have verified the veracity of the factual representations he made to this court and, if necessary, corrected any misstatements that were made. In our view, counsel for the plaintiff waited far too long to correct the misrepresentations, and his effort to remedy them in their entirety is lacking. Accordingly, because we view his request for leave to correct the appellant's brief as untimely, we deny it. Counsel for the plaintiff is placed on notice

that future, similar conduct will result in the imposition of sanctions and/or professional discipline.

The judgment is affirmed.

KDM SERVICES, LLC *v.* DRVN ENTERPRISES, INC.
(AC 44243)

Alvord, Moll and Alexander, Js.

Syllabus

The plaintiff, which had entered into a written contract in 2014 with the defendant to supply deicing liquid, brought an action alleging, inter alia, that the defendant had breached the contract by failing to pay the plaintiff for services rendered on four occasions in 2018. The defendant filed an answer and special defenses alleging, inter alia, that the contract was satisfied in full prior to the four occasions in question. The trial court rendered judgment in favor of the plaintiff, concluding that, although the parties' written contract had expired, the parties had an implied contract on the basis of their course of dealings over the years since 2014, and the defendant breached that implied contract. Thereafter, the court granted the plaintiff leave to file an amended complaint alleging breach of implied contract, and the defendant appealed. *Held* that the trial court abused its discretion in allowing the plaintiff to amend its complaint after trial to conform to the evidence; although both complaints sought payment for services rendered on specific occasions, the amended complaint alleged an entirely new and different factual situation, as the original complaint was based on the parties' express written contract and sought the outstanding balance allegedly due and the amended complaint alleged an implied contract and sought only the plaintiff's commission, and the defendant was not given the opportunity to defend against the amended complaint by filing amended special defenses, conducting discovery, or calling witnesses at trial to rebut the plaintiff's claim for a commission; accordingly, the defendant was entitled to judgment in its favor.

Argued December 6, 2021—officially released March 8, 2022

Procedural History

Action to recover damages for, inter alia, the defendant's alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Moukawsher*, *J.*;

judgment for the plaintiff; simultaneously, the court granted the plaintiff leave to file an amended complaint, and the defendant appealed to this court. *Reversed*; *judgment directed*.

Teresa Capalbo, with whom was *William S. Shapiro*, for the appellant (defendant).

Kevin M. Blake, with whom, on the brief, was *Lee A. Gold*, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant, DRVN Enterprises, Inc., appeals from the judgment of the trial court, rendered following a trial to the court, in favor of the plaintiff, KDM Services, LLC, in this action related to the sale and supply of deicing liquid at a property located in New London. On appeal, the defendant claims that the court abused its discretion by allowing the plaintiff to amend its complaint after trial. We agree with the defendant and, accordingly, reverse the judgment of the trial court.

The following procedural history and factual allegations from the original complaint are relevant to this appeal. The plaintiff provides wholesale winter deicing products, ice melt for retail, bulk deicing liquids, and mixing service to treat bulk salt. On September 29, 2014, the parties entered into a written contract (contract) pursuant to which the plaintiff agreed to provide its services to the defendant at 200 State Pier Road in New London.[1] The contract provided that full payment was

[1] The contract provided, in its entirety, as follows:

"Scope of work: [The plaintiff] will provide spraying services to coat 8000 to 10,000 tons of salt located at 200 State Pier Rd in New London, CT as described below.

"1. [The plaintiff] will provide a Pug mill, labor and a stacker for coating.

"2. [The plaintiff] will provide the Safe Melt liquid at a rate of 6 gallons per ton to coat the salt.

"[The defendant] will provide necessary labor and equipment to move salt from storage pile to pug mill.

"Spraying price $1.92 per gallon x 6 gallons per ton = $11.52 a ton

"Terms: Full payment due within 15 days of completion of work."

due within fifteen days of completion of the work. By complaint dated February 11, 2019, the plaintiff brought this action alleging that it had performed services pursuant to the contract on January 3, 7, 9, and 16, 2018. The plaintiff alleged that the defendant had failed to pay the plaintiff for its services and claimed that the defendant had an outstanding balance of $132,459.25. The complaint set forth causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and account stated. Each of the counts exclusively relied on the viability of the contract. The defendant filed an answer and special defenses alleging that (1) the contract was satisfied in full prior to January 1, 2018, (2) the plaintiff provided no services of any kind to the defendant in 2018, and (3) the defendant had provided proof that it had used a different vendor for services in January, 2018, and had paid that vendor for those services.

A trial took place on August 27, 2020. At trial, Karl Westerberg, the owner of the plaintiff, testified that the contract was a "guideline" for the start of the relationship between the parties and that, although the contract had been satisfied in 2014, the plaintiff continued to perform services and receive payment from the defendant in 2015, 2016, and 2017. Westerberg further testified that the plaintiff had performed services for the defendant on January 3, 7, 9, and 15, 2018, but the defendant did not pay the plaintiff for those services.[2]

During closing arguments, counsel for the plaintiff argued that the parties' written agreement was the initial memorialization of the terms of the agreement and that "the plan of the parties was that it would continue until terminated by someone." The defendant countered

[2] Westerberg testified that Steven Farrelly, the owner of the defendant, notified him on the evening of January 15, 2018, that he was terminating the parties' agreement. Westerberg sent the plaintiff's final invoice to the defendant on January 16, 2018.

that the complaint in this action was based on the contract, which had been fulfilled. The trial court, in discussing the issue, stated that "the parties did seem to have, regardless of whether the initial written document was fulfilled—I mean, there isn't a claim here that [the defendant] had an ongoing duty to continue this relationship but that at least the evidence is there was a relationship all the way up to 2017, in which material was supplied and invoices were both rendered and paid from the plaintiff . . . ." Counsel for the plaintiff then stated that, if the court deemed it necessary, the plaintiff would amend the complaint to conform to the evidence.

On August 27, 2020, the court issued a decision in which it concluded that, although the contract had expired, a course of dealing had ensued for several years. The court stated that "[the plaintiff] would buy the liquid from a company called [Millennium Roads, LLC (Millennium)] and Millennium and . . . Westerberg would join Millennium workers in mixing it with the solution at [the defendant's] location . . . . For years, [the plaintiff] billed [the defendant] its costs together with a commission of [thirty-three] cents per gallon, and [the defendant] paid the bills. At some point some of the calls for the liquid were made directly to Millennium. Millennium would alert Westerberg and they would go to the site, do the job, and [the plaintiff] [would] bill [the defendant]. During virtually all of these visits [the defendant's] owner Steven Farrelly was present, and he frequently interacted with Westerberg.

"During those years [the plaintiff] and [the defendant] had an implied contract. Millennium would provide the liquid. [The plaintiff] would bill [the defendant] for it and keep its commission. By course of dealing, a call for the liquid to [the plaintiff] or Millennium implied an agreement to pay the [plaintiff's] invoice, including the [plaintiff's] commission."

Without reference to any particular count and on the basis of an implied contract theory, the court thereafter rendered judgment in favor of the plaintiff in the amount of $24,978.03, representing the commission that the plaintiff claimed it was owed.[3] In its decision, the court also granted the plaintiff permission to amend its complaint to conform to the evidence at trial. Thereafter, on September 3, 2020, the plaintiff filed an amended complaint asserting one count of breach of implied contract. Specifically, the amended complaint alleged that, based on the parties' course of dealing over the prior four years, an implied contract existed that created an expectation of future performance and payment until notice of termination of the agreement was made by either party. The plaintiff further alleged that the defendant had breached this implied contract by refusing to pay for the services rendered by the plaintiff in January, 2018. This appeal followed.

On appeal, the defendant argues that the court abused its discretion in allowing the plaintiff to amend its complaint after trial. The defendant points out that the plaintiff's original complaint alleged causes of action exclusively based on the written contract while the amended complaint alleged a cause of action based on an implied contract and course of dealing. The defendant contends that, by permitting the plaintiff to amend its complaint after trial, the court denied the defendant the opportunity to defend the new cause of action. The plaintiff argues, in response, that the defendant was not surprised or prejudiced by the amendment because in both the original and amended complaints, the plaintiff sought payment for services rendered in 2018. We agree with the defendant.

[3] Westerberg acknowledged at trial that the plaintiff was not seeking the original invoice amount of $132,459.25 referenced in the February 11, 2019 complaint.

We first set forth the applicable standard of review. "Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [defendant's] burden . . . to demonstrate that the trial court clearly abused its discretion. . . . A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Fountain Pointe, LLC* v. *Calpitano*, 144 Conn. App. 624, 640, 76 A.3d 636, cert. denied, 310 Conn. 928, 78 A.3d 147 (2013).

"While our courts have been liberal in permitting amendments . . . this liberality has limitations. Amendments should be made seasonably. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial." (Citations omitted; internal quotation marks omitted.) *Farrell* v. *St. Vincent's Hospital*, 203 Conn. 554, 561–62, 525 A.2d 954 (1987). "[I]n exercising their discretion with regard to motions to amend pleadings filed after a judgment has been rendered, trial courts must recognize that such amendments should be permitted sparingly and only when special circumstances exist to warrant them." *Featherston* v. *Katchko & Son Construction Services, Inc.*, 201 Conn. App. 774, 789, 244 A.3d 621 (2020), cert. denied, 336 Conn. 923, 246 A.3d 492 (2021).

In *Billy & Leo, LLC* v. *Michaelidis*, 87 Conn. App. 710, 715, 867 A.2d 119 (2005), an action related to the sale of leased property, the plaintiff's original complaint relied on the alleged breach of a written contract between the parties. The plaintiff filed a request to amend the complaint just prior to trial to allege promissory estoppel resulting from the breach of oral modifications to the contract and partial performance in compliance with the modified contract. Id. In concluding that the trial court did not abuse its discretion in denying the plaintiff's request to amend its complaint, this court stated that, "[i]n an amended complaint, [i]t is proper to amplify or expand what has already been alleged in support of a cause of action, provided the identity of the cause of action remains substantially the same, but where an entirely new and different factual situation is presented, a new and different cause of action is stated. . . . A cause of action is that single group of facts which is claimed to have brought about an unlawful injury to the plaintiff and which entitles the plaintiff to relief." (Internal quotation marks omitted.) Id., 714–15.

Similarly, in *Antonofsky* v. *Goldberg*, 144 Conn. 594, 599, 136 A.2d 338 (1957), our Supreme Court affirmed the decision of the trial court denying the plaintiff permission to amend his complaint, stating that "[w]hile our courts have followed a liberal policy in passing upon claims of variance between pleading and proof, it is still the law that the allegations of the complaint provide the measure of recovery. The plaintiff alleged in his complaint a state of facts and asserted that they spelled out one or more specified acts of negligence which caused his injuries. He sought to recover, however, on proof of materially different facts, on which he asked that the defendant be found guilty of negligent acts not specified in his complaint. The test was whether

the variance misled or prejudiced the defendants on the merits of the case."

On the basis of our review of the original and amended complaints in the present case, we conclude that the court abused its discretion when it allowed the plaintiff to amend its complaint after trial to conform to the evidence. Although the original complaint alleged breach of a written contract and sought the outstanding balance of $132,459.25 pursuant to that contract, the amended complaint alleged an implied contract based on the parties' course of dealing and sought the plaintiff's commission of $24,978.03. Although both complaints sought payment for services rendered in January, 2018, the amended complaint alleged "an entirely new and different factual situation" (internal quotation marks omitted); *Billy & Leo, LLC* v. *Michaelidis*, supra, 87 Conn. App. 714; in that the amended complaint sought the plaintiff's commission for services rendered pursuant to an implied contract and course of dealing. An implied contract and course of dealing, however, were not mentioned in the original complaint, as that complaint was based entirely on the parties' express contract. The special defenses asserted by the defendant necessarily were addressed to the original complaint. The defendant was not given the opportunity to defend against the amended complaint by filing amended special defenses, conducting discovery, or calling witnesses at trial to rebut the plaintiff's claim for a commission. See *AirKaman, Inc.* v. *Groppo*, 221 Conn. 751, 767, 607 A.2d 410 (1992) (trial court did not abuse its discretion by denying request to amend complaint where pleadings had been closed, opposing party had submitted trial brief, and claim would require additional discovery); *Beckman* v. *Jalich Homes, Inc.*, 190 Conn. 299, 303, 460 A.2d 488 (1983) (trial court did not abuse its discretion by denying request to amend that was filed day before trial and would have added

new bases of liability). Under these circumstances, we conclude that the court abused its discretion in allowing the plaintiff to amend its complaint after trial to conform to the evidence.

The judgment is reversed and the case is remanded with direction to render judgment for the defendant.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JEFFREY DANIEL SCHLOSSER
(AC 44270)

Elgo, Alexander and Harper, Js.

Syllabus

The defendant, who had been on probation in connection with his convictions, in two cases, of risk of injury to a child and sexual assault in the fourth degree, appealed to this court from the judgment of the trial court revoking his probation in each case. The parties appeared at a violation of probation hearing before the trial court, which noted that the parties had agreed to an open recommendation for sentencing, explained an open recommendation to the defendant, and canvassed the defendant on his admission to a violation of probation in each case. *Held* that the defendant could not prevail on his unpreserved claim that the trial court violated his due process rights by failing to advise him of his right to maintain a denial of his violation of probation: the defendant's admissions were made knowingly and voluntarily, as the court's comprehensive canvass of the defendant informed him of the maximum sentence, of his right to a violation of probation hearing and the opportunity to present defenses at that hearing, and explained the state's burden of proof; moreover, the defendant indicated to the court that he was not under the influence of drugs or alcohol, that he had discussed the implications of his admissions with his attorney, and that he entered his admissions of his own free will; furthermore, the defendant's experience at his underlying criminal prosecution and a prior probation revocation proceeding supported the inference that his admissions were made knowingly and voluntarily.

Argued November 8, 2021—officially released March 8, 2022

Procedural History

Two informations charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, and transferred to the judicial district of Hartford, geographical area number fourteen, where the defendant was presented to the court, *Williams*, *J.*, on admissions of guilt to violation of probation; judgments revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Sharmese Hodge*, state's attorney, and *Adam Scott*, former assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Jeffrey Daniel Schlosser, appeals from the judgments of the trial court revoking his probation and committing him to the custody of the Commissioner of Correction for five years. On appeal, the defendant claims that the court violated his due process rights by failing to advise him of his right to maintain a denial of his violation of probation. We affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal. At the defendant's sentencing hearing on January 15, 2020, the prosecutor set forth the following information concerning the defendant's prior criminal proceedings, which the defendant does not dispute. On September 27, 2012, the defendant was convicted, in the first case, of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), and, in the second case, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a, and risk of

injury to a child in violation of § 53-21 (a) (2). The defendant received a total effective sentence of ten years of incarceration, execution suspended after thirty months, followed by ten years of probation.

After violating the terms of his probation, the defendant's probation was revoked and the court, on April 17, 2017, sentenced him to seven and one-half years of incarceration, execution suspended after one year, and probation "for the remainder of the time he owed."

Following his subsequent release from custody in the spring of 2018, the defendant was arrested on October 30, 2018, and again charged with violating the conditions of his probation. By December, 2019, the state had extended at least one offer to the defendant to resolve his violation of probation charge, which was not accepted. Because the parties were unable to reach an agreement, a violation of probation hearing was scheduled.

On January 15, 2020, the parties appeared at the violation of probation hearing before the court, *Lynch*, *J.* At the onset of the hearing, defense counsel requested a continuance in order to review newly obtained discovery materials. The court denied that request and, instead, took a recess in order to allow defense counsel to review those materials and to consult with the defendant. Instead of continuing with the violation of probation hearing, the parties appeared before the court, *Williams*, *J.*, which noted for the record that the parties agreed to an "open recommendation" for sentencing. The court explained an "open recommendation" to the defendant and then canvassed the defendant on his admission to the violation of probation. The court revoked his probation and sentenced the defendant to a term of five years of incarceration. This appeal followed.

On appeal, the defendant claims that his admission was not knowing and voluntary because the court failed

to explicitly inform him of his right to maintain a denial of violation of his probation, in violation of his due process rights and Practice Book § 39-10. We disagree.

The defendant concedes that he did not raise this claim before the trial court and seeks review of his unpreserved claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[1]

[1] The defendant alternatively argues that reversal is warranted under the plain error doctrine, codified in Practice Book § 60-5, which "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party." (Internal quotation marks omitted.) *State* v. *Jamison*, 320 Conn. 589, 595–96, 134 A.3d 560 (2016). In light of our conclusions that the present claim fails on its merits under the bypass rule of *Golding* and that the court properly canvassed the defendant on his admission, the defendant cannot demonstrate that plain error exists. See, e.g., *State* v. *Holmes*, 78 Conn. App. 479, 487, 827 A.2d 751 (because "[t]he court's canvass . . . adequately informed [the defendant] that he possessed a right against self-incrimination that guaranteed that he need not incriminate himself by entering a plea of guilty . . . the defendant has failed to establish the existence of plain error"), cert. denied, 266 Conn. 909, 832 A.2d 73 (2003); *State* v. *Peterson*, 51 Conn. App. 645, 659, 725 A.2d 333 ("[p]lain error review is not warranted . . . because the defendant has failed to show that his guilty plea was not entered knowingly or voluntarily"), cert. denied, 248 Conn. 905, 731 A.2d 310 (1999).

Additionally, insofar as the defendant relies on the court's alleged failure to comply with Practice Book § 39-10 in arguing that his unpreserved claim merits plain error review, this reliance is mistaken. Section § 39-10 provides: "If the judicial authority rejects the plea agreement, it shall inform the parties of this fact; advise the defendant personally in open court or, on a showing of good cause, in camera that the judicial authority is not bound by the plea agreement; afford the defendant the opportunity then to withdraw the plea, if given; and advise the defendant that if he or she persists in a guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." By its terms, the provision applies only when a plea has already been accepted. See *King* v. *Commissioner of Correction*, 193 Conn. App. 61, 78, 218 A.3d 1051 (2019) ("§ 39-10 only applies *after* a plea has been initially accepted by the court" (emphasis added)). Despite the defendant's assertion to the contrary, the record makes clear that the court would not consider accepting an admission without the flexibility of an open recommendation with respect to sentencing, a condition agreed to by the defendant with advice of counsel.

"[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "*Golding*'s first two prongs relate to whether a defendant's claim is reviewable, and the last two relate to the substance of the actual review." *State* v. *Dawes*, 122 Conn. App. 303, 320, 999 A.2d 794, cert. denied, 298 Conn. 912, 4 A.3d 834 (2010). We afford review because the record is adequate for review and the claim is of constitutional dimension. See *State* v. *Yusef L.*, 207 Conn. App. 475, 487, 262 A.3d 1017 (defendant's due process rights are implicated if plea is not voluntarily and knowingly made), cert. denied, 340 Conn. 910, 264 A.3d 1002 (2021). We nevertheless conclude that the defendant's claim fails to satisfy *Golding*'s third prong.

The following additional facts are relevant to the defendant's claim. When the defendant elected to forgo his violation of probation hearing before Judge Lynch, the parties appeared before the court and indicated that the defendant wanted to admit to each of his violations of probation.[2] The court, defense counsel, and the defendant participated in the following exchange:

Because there was no agreement between the parties *and the court* as to the disposition prior to the court's canvass and acceptance of the defendant's admission, § 39-10 is inapplicable to the present case.

[2] At the violation of probation hearing, Judge Lynch explained to the parties that, because the hearing had already commenced, the defendant would have to appear before a different judge if he decided to admit to a violation of his probation.

"The Court: The parties at a brief sidebar just a moment ago informed the court that they had come to an agreement. Under these circumstances the court has indicated that if the defendant wishes to admit the second violation of each probation, we could move to sentencing but *there would be no agreement*. This would be an open recommendation. The state and defense may well jointly propose a certain disposition but it would be up to this court . . . .[3]

"The defendant, to be clear, would be exposed to every day of his exposure on each violation of probation which the court was led to believe is six and one-half years in jail on each. *So*, *as long as* [*the defendant*] *knows and is fully aware that he is exposed to the entirety of that six and one-half year sentence*, then I would be happy to accept his admissions and to hear from each party as to sentencing. Is that the agreement?

"[Defense Counsel]: It is, Your Honor, and just for the record [the defendant] is fully aware of his exposure for the six and one-half years in each of his violations of probation.

"The Court: And that's true, sir?

"[The Defendant]: That's right.

"The Court: You understand that?

"[The Defendant]: Yes, yes I do, Your Honor.

"The Court: And you understand that Judge Lynch was prepared to . . . I understand that the state and your lawyer saw Judge Lynch today, and do you understand that Judge Lynch was prepared to hear your violation of probation hearing today, sir?

"[The Defendant]: Yes, I do.

[3] The prosecutor subsequently indicated to the court during the dispositional phase that the parties agreed to jointly recommend a term of three years of incarceration.

"The Court: And it would have been the state's burden to prove by a preponderance of the evidence that it's more likely than not that you violated each of these probations. That would have been their burden. Do you understand that, sir?

"[The Defendant]: Yes, I do.

"The Court: And was the state prepared to put on evidence today, counsel?

"[The Prosecutor]: Yes, Your Honor.

"The Court: All right, and so at that hearing your lawyer could have presented defenses on your behalf and could have contested the charges. Do you understand that, sir?

"[The Defendant]: Yes, I do.

"The Court: All right. And you still wish to go forward with sentencing today?

"[The Defendant]: Yes.

"The Court: Okay, and each counsel is prepared for that?

"[The Prosecutor]: Yes, Your Honor.

"[Defense Counsel]: Yes, Your Honor."

The defendant then entered an admission to each violation of probation. The court continued its canvass:

"The Court: Sir, have you taken any drugs, alcohol or medication that affects your thinking?

"[The Defendant]: No, sir.

"The Court: Have you had enough time to talk to your lawyer about this decision?

"[The Defendant]: Yes, Your Honor.

"The Court: Has your attorney explained to you all the rights to a violation of probation hearing that you are giving up by admitting the violations today, sir?

"[The Defendant]: Yes, Your Honor.

"The Court: Has she also explained to you the evidence that the state says it has against you, what the state would have to prove in order to [be] found in violation of your probation and the maximum penalty you could have gotten?

"[The Defendant]: Yes, Your Honor.

"The Court: You heard what the state says you did to cause you to violate probation. Do you agree that's basically true?

"[The Defendant]: I would be honest, I don't agree with it but it's what, you know, I'll accept it.

"The Court: Do you agree that you have violated your probation?

"[The Defendant]: Yes.

"The Court: Has anyone threatened or forced you to admit that second violation of your probations?

"[The Defendant]: No, Your Honor.

"The Court: Are you doing this of your own free will, sir?

"[The Defendant]: Yes, Your Honor.

"The Court: Once I accept your admissions, you cannot take them back without permission from the court? Do you understand that, sir?

"[The Defendant]: Yes, Your Honor."

"A determination as to whether a plea has been knowingly and voluntarily entered entails an examination of all of the relevant circumstances. . . . [W]e conduct a

plenary review of the circumstances surrounding [a] plea to determine if it was knowing and voluntary." (Internal quotation marks omitted.) *Almedina* v. *Commissioner of Correction*, 109 Conn. App. 1, 6, 950 A.2d 553, cert. denied, 289 Conn. 925, 958 A.2d 150 (2008). In *State* v. *Yusef L.*, supra, 207 Conn. App. 475, this court addressed the issue of whether a defendant's plea was knowingly or voluntarily made after reviewing the canvass conducted by the court. The court observed that "the [trial judge] made it clear to the defendant that he had the right to plead not guilty [and] explicitly stated that if the defendant did not plead guilty he would proceed to trial, at which time he potentially could be found guilty," and that "the defendant, through his responses, indicated that he understood that he had the right to plead not guilty." Id., 488. This court additionally highlighted the defendant's past experience with the criminal justice system as a factor in support of its finding that the defendant's plea was knowing and voluntary. Id., 489. For those reasons, the court concluded that the defendant had failed to satisfy the third prong of *Golding*. Id., 490.

In the present case, the record similarly reflects that the defendant's admission was knowing and voluntary. The court informed the defendant of the maximum sentence, that the defendant had the right to a violation of probation hearing and the opportunity to present defenses at that hearing, and explained the burden of proof that the state would need to establish for him to be found in violation of probation. The defendant indicated to the court that he was not under the influence of drugs or alcohol, that he had discussed the implications of his admission with his attorney, and that he entered his admission "of [his] own free will . . . ." Moreover, the defendant's experience at both his underlying criminal prosecution and the prior probation revocation proceeding, at which he had admitted to a

probation violation, further supports the inference that his admission in the present case was knowingly and voluntarily made. See, e.g., *State* v. *Yusef F.*, supra, 207 Conn. App. 489.

More generally, we emphasize that the defendant came to the sentencing hearing directly from his violation of probation hearing. He was afforded and was prepared to exercise his right to a contested hearing, which necessarily informs our analysis. Cf. *State* v. *Kerlyn T.*, 337 Conn. 382, 393, 253 A.3d 963 (2020) (although formulaic canvass is not required, reviewing court must inquire into "totality of the circumstances" surrounding waiver of right to jury trial (internal quotation marks omitted)). In light of this, as well as the court's comprehensive canvass, the defendant's past history with the criminal justice system and the defendant's assertions that he understood the consequences of entering his admissions, the defendant's specific claim that his admission was not knowing and voluntary must fail.

For the foregoing reasons, we conclude that the defendant has failed to establish the existence of a constitutional violation. His due process claim, therefore, fails *Golding*'s third prong.

The judgments are affirmed.

In this opinion the other judges concurred.

COURTNEY GREEN *v.* BRITTANY B. PAZ ET AL.
(AC 44494)

Moll, Clark and DiPentima, Js.

Syllabus

The plaintiff, who was incarcerated following his conviction on the basis of his guilty plea to multiple counts of assault in the first degree, sought damages for alleged legal malpractice by the defendants, two attorneys and their law firm, who had previously represented the plaintiff in a habeas action concerning his criminal conviction. The trial court granted

the defendants' motion to dismiss and rendered a judgment of dismissal. On the plaintiff's appeal to this court, *held* that the trial court properly dismissed the plaintiff's legal malpractice action for lack of subject matter jurisdiction because it was not ripe for adjudication; this court, applying the exoneration rule set forth in *Taylor* v. *Wallace* (184 Conn. App. 43), and subsequent cases, which holds that a legal malpractice action is not ripe for adjudication when success in that action would necessarily imply the invalidity of a conviction and the underlying conviction has not been invalidated, concluded that, because the plaintiff had been convicted and that conviction had not been invalidated on direct appeal or through a habeas action, his claim was a collateral attack on his underlying conviction, his claim for legal malpractice was not ripe, and the trial court lacked subject matter jurisdiction.

Argued February 14—officially released March 8, 2022

Procedural History

Action to recover damages for legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Courtney Green, self-represented, the appellant (plaintiff).

Cameron L. Atkinson, with whom, on the brief, was *Earl A. Voss*, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented plaintiff, Courtney Green, appeals from the judgment of the trial court rendered in favor of the defendants, Brittany B. Paz, Norman Pattis, and Pattis Law Firm. The plaintiff claims on appeal that the trial court erred in dismissing his legal malpractice action for lack of subject matter jurisdiction on the basis of the exoneration rule, i.e., that a legal malpractice claim is not ripe for adjudication unless the plaintiff can demonstrate that the relevant underlying conviction has been invalidated. The defendants claim that the plaintiff's action is not ripe for

judicial review because his underlying conviction has not been invalidated. For the reasons that follow, we affirm the trial court's judgment.

The plaintiff is currently serving a total effective sentence of twenty years of incarceration in connection with his 2009 judgment of conviction rendered after he pleaded guilty to three counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). See *Green* v. *Commissioner of Correction*, 172 Conn. App. 585, 588, 160 A.3d 1068, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). In February, 2015, in a separate action, the plaintiff filed what became the operative petition for a writ of habeas corpus, alleging that his criminal defense counsel had rendered ineffective assistance of counsel in failing to provide adequate advice regarding his guilty pleas and that the trial court's failure to inquire whether the plaintiff was under the influence of any medications that might impair his judgment rendered his pleas not knowing and involuntary. Id. The habeas court denied the petition. Id., 590. The plaintiff retained the defendants to represent him in his appeal from the judgment of the habeas court denying his petition (habeas appeal). This court affirmed the judgment of the habeas court. Id., 599.

In March, 2019, the plaintiff commenced the present action, asserting three counts sounding in legal malpractice against the defendants stemming from their representation of the plaintiff in the habeas appeal. On May 20, 2019, the defendants filed a motion to dismiss for lack of subject matter jurisdiction on ripeness grounds pursuant to the exoneration rule. On October 28, 2019, the trial court granted the defendants' motion to dismiss, reasoning that "[t]he 'exoneration rule' recently gained recognition in Connecticut," citing, inter alia, *Taylor* v. *Wallace*, 184 Conn. App. 43, 194

A.3d 343 (2018).[1] Applying the exoneration rule to the plaintiff's claims, the trial court dismissed the action, stating that there was "no evidence before the court that the plaintiff's conviction has been overturned or otherwise invalidated . . . ." This appeal followed.

Contrary to the plaintiff's position, this court repeatedly has applied the exoneration rule to the question of whether a legal malpractice claim is ripe for adjudication and, consequently, whether the trial court has subject matter jurisdiction to entertain it. See *Cooke* v. *Williams*, 206 Conn. App. 151, 156–65, 259 A.3d 1211, cert. denied, 339 Conn. 919, 262 A.3d 136 (2021), petition for cert. filed (U.S. February 8, 2022) (No. 21-7075); *Dressler* v. *Riccio*, 205 Conn. App. 533, 544–54, 259 A.3d 14 (2021); *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–52. In the present case, the application of the exoneration rule to the plaintiff's claims does not warrant expansive discussion, as our adoption of the exoneration rule remains good law, and it is undisputed that the plaintiff's conviction, which the plaintiff's legal malpractice claims collaterally attack, presently remains valid. Thus, applying the holding of *Taylor*, as well as its progeny, we conclude that the trial court properly dismissed the plaintiff's legal malpractice action for lack of subject matter jurisdiction.

The judgment is affirmed.

CITY OF HARTFORD *v.* HARTFORD POLICE UNION (AC 44230)

Cradle, Clark and Norcott, Js.

Syllabus

The plaintiff city sought to vacate an arbitration award issued in connection with its alleged breach of a collective bargaining agreement that it had

[1] Although the trial court referred to the exoneration rule as implicating standing, the rule implicates the related justiciability doctrine of ripeness. See, e.g., *Taylor* v. *Wallace*, supra, 184 Conn. App. 51–52.

entered into with the defendant police union. Between March, 2017, and June, 2018, all five of the city's police captains retired and their positions remained vacant until September, 2018, when they were filled simultaneously. The union filed a grievance, alleging that the city had violated the terms of certain appendices to the agreement, which it claimed required the city to maintain five police captain positions at all times. The parties submitted the issue for arbitration. An arbitration panel found that the city had violated the agreement by leaving open the vacancies and awarded each of the employees who were appointed to the position of police captain in September, 2018, an amount equal to the difference between their rate of pay on the date when the first police captain retired and their rate of pay on the date when they were appointed police captain, for the period between March, 2017, and September, 2018, not including any overtime worked during that period. The city filed an application to vacate the arbitration award, which the trial court denied, and the city appealed to this court. *Held*:

1. The trial court properly rejected the city's claim that the panel exceeded its authority in violation of the applicable statute (§ 52-418 (a) (4)) in finding that the city violated the agreement: although the agreement did not explicitly state that the city must employ five police captains at all times, the panel interpreted the language of the agreement in such a manner, such an interpretation was not unreasonable, and the city's disagreement with the interpretation was not sufficient to establish that the panel had exceeded its authority; moreover, the city could not prevail on its claim that the award failed to draw its essence from the agreement or that the panel was dispensing its own brand of industrial justice, because the award referenced only the appendices of the agreement that were referenced in the submission to arbitration and the panel's reference to the contractual requirement that the city fill vacancies within a specified period of time underscored its good faith effort to construe and apply the relevant terms of the agreement in the context of the questions submitted to it.
2. The city could not prevail on its claim that, because the award was inconsistent with the agreement, which explicitly stated that police captains were not entitled to overtime pay, the panel exceeded its authority in fashioning the remedy: the agreement did not provide a remedy for the violation at issue nor did it prohibit back pay and, therefore, back pay was not inconsistent with the agreement; moreover, the agreement did not require a prevailing party who established that he or she should have been promoted at an earlier date to return the salary, including overtime pay, that he or she was previously paid for work performed.

Argued December 1, 2021—officially released March 8, 2022

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of Hartford,

where the matter was tried to the court, *M. Taylor*, *J.*; judgment denying the application to vacate, from which the plaintiff appealed to this court. *Affirmed.*

Alexandra D. Lombardi, deputy corporation counsel, for the appellant (plaintiff).

Marshall T. Segar, for the appellee (defendant).

Opinion

CRADLE, J. The plaintiff, the city of Hartford (city), appeals from the judgment of the trial court denying its motion to vacate an arbitration award finding that it violated its collective bargaining agreement (agreement) with the defendant, the Hartford Police Union (union). On appeal, the city claims that the court erred in concluding that the arbitration panel (panel) did not exceed its authority in violation of General Statutes § 52-418 (a) (4) in (1) finding that the city violated the agreement and (2) ordering retroactive pay as a remedy, in addition to the overtime pay already received for that same time period. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to the city's claims on appeal. As of March 3, 2017, there were five police captains employed by the Hartford Police Department. Beginning on that date those police captains began serially retiring over the course of approximately fifteen months, until the last of the five retired on June 15, 2018. All five of the captain positions remained vacant until September 23, 2018, when they all were filled simultaneously.

On November 15, 2018, the union filed a grievance alleging that, as of March 4, 2017, when the first of the five captains retired, the number of captains fell below the mandated number of captains required by Appendix I of the agreement, which provides in relevant part: "[F]ive (5) Police Captains shall be appointed prior

to August 15, 1994 and the positions authorized for Lieutenant shall be filled prior to January 1, 1995. These positions shall not be decreased to allow for the assigning of Deputy Chief." The union also cited Appendix B of the agreement, which pertains to the compensation of members of the collective bargaining unit.

On April 17, 2019, the parties submitted the following agreed upon issue for arbitration: "Did the city of Hartford violate Appendix I or Appendix B of the [agreement] when the number of captains fell below five (5) effective March 4, 2017? If so, what shall the remedy be?" The union claimed that the city violated the agreement by allowing the number of police captains to decrease below five at any given time, and it sought back pay and benefits for the employees who were subsequently promoted to captain effective March 3, 2017. The city argued that the agreement did not require that the number of police captains must be strictly maintained at five and that the agreement did not provide for an award of back pay.

On December 5, 2019, the panel issued its award, finding that the city violated the agreement by leaving the captain vacancies open until September, 2018, and awarding the employees who were appointed on September 23, 2018, "an amount that represents the difference between their individual rates of pay on March 3, 2017, and the rate of pay they received when appointed captain for the period from March 3, 2017 to September 23, 2018, not including any overtime worked."

On January 3, 2020, the city filed an application to vacate the arbitration award pursuant to § 52-418 (a) (4) on the ground that the panel exceeded its powers or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

By way of a written memorandum of decision filed on August 7, 2020, the court denied the city's application to vacate the arbitration award. In rejecting the city's argument that the panel exceeded its powers or so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made when it found that the city had violated the agreement, the court reasoned: "According to Appendix I of the [agreement], in 1994, five of six police captain positions were required to be filled and were not to be reduced for the appointment of a deputy chief. Although this language does not specifically state that these five positions may not be decreased for any other reason, or must be maintained, or that . . . any such vacancies must be filled immediately, the decision of the panel certainly does not manifest an egregious or patently irrational application of the law.

"Although the court disagrees that the plain meaning of the contract language prohibits the delay of vacancy appointments amongst the ranks of Hartford police captains, it is not an unreasonable interpretation of the contract, taken as a whole. . . . Although the parties have different interpretations of the language of Appendix I, and although its language may be seen as ambiguous, the court will not fault the panel for failing to seek extrinsic evidence of the intent of the parties in this matter involving arbitration." (Citation omitted.)

As to the city's claim regarding the remedy awarded by the panel, the court explained: "The same analysis holds true for the remedy imposed by the panel. The [agreement] provides no remedy for a violation of the contract, as determined by the panel. Although retroactive pay does not appear to be provided for any purpose in Appendix B, it is not prohibited. Although the panel's decision reflects anguish over the elusiveness of an accurate and appropriate measure of damages for a perceived violation of the [agreement], imposing no

remedy for a violation of the [agreement] would provide no real consequence or incentive to ensure future compliance.

"Without a remedy, the city would be free to avoid its responsibilities under the contract, as determined by the panel. Under the facts presented, the city was not required to pay police captains wages to five individuals for approximately three, four, fifteen, seventeen and eighteen months, apparently saving the city just less than a year's worth of wages, on average, for five highly compensated professionals. Instead, pursuant to the decision of the panel, five lieutenants must be retroactively paid the difference between lieutenants' and police captains' salaries for a period of approximately eighteen months. It is unknown whether these payments represent an accurate and actual loss to each of these individuals, had they been selected to fill individual vacancies as they occurred; however, it is neither irrational to provide a measured remedy for a violation of the [agreement], nor is the panel's award unduly punitive in light of the city's apparent savings, resulting from its failure to timely fill these higher salaried positions. Aside from these practical considerations, importantly, the remedy is not inconsistent with any specific prohibition on arbitration within the [agreement] in this unrestricted submission to arbitration." On the basis of the foregoing, the court denied the city's application to vacate the arbitration award. This appeal followed.

On appeal, the city claims that the trial court incorrectly denied its application to vacate the award pursuant to § 52-418 (a) (4) because the panel "exceeded [its] powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." The city challenges the court's denial to vacate the arbitration award both as to the violation of the agreement and the remedy.

We begin by setting forth the applicable standard of review. "The propriety of arbitration awards often turns on the unique standard of review and legal principles applied to decisions rendered in this forum. [Thus, judicial] review of arbitral decisions is narrowly confined. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Parties to an arbitration may make a restricted or an unrestricted submission." (Internal quotation marks omitted.) *Board of Education* v. *New Milford Education Assn.*, 331 Conn. 524, 531, 205 A.3d 552 (2019).

Here, the court correctly concluded, and the parties do not dispute, that the submission to the panel was unrestricted.[1] "[U]nder an unrestricted submission, the [panel's] decision is considered final and binding; thus the courts will not review the evidence considered by the [panel] nor will they review the award for errors of law or fact. . . . Even in the case of an unrestricted submission, however, a reviewing court will vacate an award when an [arbitration panel] has exceeded the power granted to [it] by the parties' submission. . . . [A] claim that [an arbitration panel has] exceeded [its] powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the [panel] manifestly disregarded the law." (Internal quotation marks omitted.) Id., 531–32.

"In considering whether the [panel] exceeded [its] powers on that basis, a reviewing court's inquiry is

[1] " 'A submission is deemed restricted only if the agreement contains express language restricting the breadth of issues, reserving explicit rights, or conditioning the award on court review.' " *Board of Education* v. *New Milford Education Assn.*, supra, 331 Conn. 531.

limited to a comparison of the award to the submission. . . . [A] court cannot base the decision [regarding whether the panel has exceeded its authority] on whether the court would have ordered the same relief, or whether or not the [panel] correctly interpreted the contract. The court must instead focus on whether the [panel] had authority to reach a certain issue, not whether that issue was correctly decided. . . . Because the [panel] is required to consider the submission in light of the parties' agreement, the [panel's] award . . . must draw its essence from the contract and cannot simply reflect the [panel's] own notions of industrial justice. But as long as the [panel] is even arguably construing or applying the contract and acting within the scope of [its] authority, that a court is convinced [it] committed serious error does not suffice to overturn [its] decision. . . . [E]very reasonable presumption and intendment will be made in favor of the award and of the [panel's] acts and proceedings. Hence, the burden rests on the party challenging the award to produce evidence sufficient to show that it does not conform to the submission." (Citations omitted; footnote omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 252–53, 117 A.3d 470 (2015).

"[I]n determining whether the arbitration award draws its essence from the collective bargaining agreement, the reviewing court is limited to considering whether the collective bargaining agreement, rather than some outside source, is the foundation on which the arbitral decision rests. . . . If that criterion is satisfied . . . then [the court] cannot conclude that the [panel] exceeded [its] authority or imperfectly executed [its] duty. . . . Ultimately, [n]either a misapplication of principles of contractual interpretation nor an erroneous interpretation of the agreement in question constitutes grounds for vacatur. . . . It is not [the court's]

role to determine whether the [panel's] interpretation of the collective bargaining agreement was correct. It is enough to uphold the judgment of the court, denying the . . . application to vacate the award, that such interpretation was a good faith effort to interpret the terms of the collective bargaining agreement." (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, 309 Conn. 767, 780, 75 A.3d 1 (2013).

In interpreting an agreement, a panel "may of course look for guidance from many sources, yet [its] award is legitimate only so long as it draws its essence from the collective bargaining agreement. . . . If, for example, there was evidence that revealed that [the panel] had reached [its] decision by consulting a ouija board, [it would] not suffice that the award conformed to the submission. . . . It must be emphasized, however, that merely claiming inconsistency between the agreement and the award will not trigger judicial examination of the merits of the arbitration award. Rather, in the face of such a claimed inconsistency, this court will review the award only to determine whether it draws its essence from the collective bargaining agreement. . . . We will not, however, employ a broader standard of review simply as an alternative means for determining whether the [panel] correctly decided the issues that were submitted to arbitration. . . .

"Finally, we previously have stated that [m]erely because an arbitral decision is not based on the express terms of a collective bargaining agreement does not mean that it is not properly derived from the agreement. An [arbitration panel] is entitled to take cognizance of contract principles and draw on them for guidance in construing an agreement." (Citations omitted; internal quotation marks omitted.) *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 162 Conn. App. 525, 538, 131 A.3d 1238

(2016). With these principles in mind, we turn to the city's claims on appeal.

I

The city first claims that the trial court improperly concluded that the panel did not err in finding that it violated the agreement. We disagree.

The city's challenge to the panel's determination that it violated the agreement is twofold. First, the city argues that "[t]he award at issue here was rendered in excess of the [panel's] authority in violation of § 52-418 (a) (4) because it is inherently inconsistent with the agreement and fails to draw its essence [from the agreement], as evidenced by the panel's own admission in its memorandum that 'nothing in the agreement states that the city must "maintain" five (5) captains, as stated by the union.' " The city contends that, "[b]ecause the panel was unable to cite to a provision of the agreement that 'clearly' required the city to have five captains and admitted that the agreement contained no requirement to maintain five captains, but nonetheless found the city in violation of the agreement for allowing the number of captains to fall below five, one can only conclude that the panel disregarded its obligation to render an award that draws its essence from the agreement." Although the city accurately asserts that the agreement does not explicitly state that there must be five captains employed by the Hartford Police Department at all times, the panel interpreted the language of the agreement requiring the city to hire five captains to mean that the city must maintain five captains at all times. We agree with the trial court that the panel's interpretation of the agreement was not unreasonable. The city's argument in this regard simply reflects its disagreement with the panel's interpretation of the agreement. It is well settled, however, that "[a] mere difference of opinion as to the construction of the [agreement] does not

establish that the [panel] exceeded [its] authority . . . .'' (Internal quotation marks omitted.) *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, supra, 309 Conn. 784.

The city also argues that the panel's award did not conform to the parties' submission. In support of this argument, the city cites the panel's statement that '' '[t]he chief of police should be held responsible for maintaining a promotional list and discuss retirement with current captains, in order to prevent the vacancies that occurred in this case.' '' The city contends that this statement by the panel demonstrates that it went beyond the scope of the submission, which was confined to claimed violations of Appendices B and I of the agreement and, instead, found a violation of Appendix F of the agreement. Because the panel's decision does not reference Appendix F, the city's argument is unfounded. Although the panel may have considered Appendix F, or any other sections of the agreement in interpreting Appendices B and I, which the city acknowledges it was entitled to do, the award's express reference to only Appendices B and I of the agreement underscore the focus of the panel's award. Moreover, the panel's reference to the contractual requirement that the city fill vacancies within a specified period of time underscores its good faith effort to construe and apply relevant terms of the agreement in the context of the questions submitted to it. We therefore disagree with the city's claims that the award failed to draw its essence from the agreement or that the panel was dispensing its own brand of industrial justice. Accordingly, we conclude that the trial court properly rejected the city's claim that the panel exceeded its authority in violation of § 52-418 (a) (4).

II

The city also challenges the remedy awarded by the panel. As stated herein, the panel's award provided that

the five newly promoted captains receive "an amount that represents the difference between their individual rates of pay on March 3, 2017, and the rate of pay they received when appointed captain for the period from March 3, 2017 to September 23, 2018, not including any overtime worked." The city argues that the panel exceeded its authority because the award was "inconsistent with the agreement, which explicitly states that captains are not entitled to overtime pay." We disagree.

In support of this argument, the city cites § 4.2 (A) of the agreement, which provides in relevant part: "Police Captains shall . . . receive five percent . . . of the base rate of their class in lieu of all overtime pay . . . ." Therefore, the city correctly states that police captains are not entitled to overtime pay.

In considering the remedy for the city's violation of the agreement, the panel noted: "[T]here is nothing in the agreement that provides [for] a remedy [for the violation in this case]." The panel reasoned: "It is impossible to request back pay for those who would have taken the position and the exact number of hours they would have worked if they were captain, as opposed to lieutenant. These discrepancies make it difficult to make a determination as to what the remedy should be."

In rejecting the city's claim that the panel exceeded its authority in fashioning its remedy, the court agreed with the panel that the agreement provided no remedy for the violation at issue but that back pay was not prohibited by the agreement and, therefore, was not inconsistent with it. We agree. There is nothing in the agreement prohibiting the award of back pay in the event of a contractual violation; nor is there a provision in the agreement requiring a prevailing party who establishes that he or she should have been promoted at an earlier date to return the salary that he or she was paid for work performed. The submission also was silent

as to the potential remedies available for the panel's consideration. To the extent that the newly promoted captains were permitted to maintain the compensation they received for overtime hours that they worked during the time period at issue, we cannot conclude that panel exceeded its authority in not ordering otherwise.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 211

MEMORANDUM DECISIONS

SCOTT FENSTERMAKER *v.* STEPHEN FENSTERMAKER ET AL.
(AC 44577)

Cradle, Suarez and Bear, Js.

Argued February 23—officially released March 8, 2022

Plaintiff's appeal from the Superior Court in the judicial district of Danbury, *D'Andrea*, *J.*

Per Curiam. The judgment is affirmed.

MASSEY BROTHERS EXCAVATING, LLC *v.* PACILEO'S APIZZA, LLC, ET AL.
(AC 44240)

Alvord, Clark and Harper, Js.

Argued March 1—officially released March 8, 2022

Defendants' appeal from the Superior Court in the judicial district of New Haven, *Hon. Jon C. Blue*, judge trial referee.

Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

CONNECTICUT HOUSING FINANCE AUTHORITY

Notice of Intent to Amend Procedures

In accordance with Section 1-121 of the Connecticut General Statutes, NOTICE IS HEREBY GIVEN that the Connecticut Housing Finance Authority proposes to amend Procedures:

Statement of Purpose:

To amend the Procedures of the Authority, specifically Section III(A) Single Family Housing, Homebuyer Mortgage Program and Section III(G) Single Family Housing, Downpayment Assistance Program (DAP), as described below.

Summary of Proposed Procedure Changes:

Single Family Housing Homebuyer Mortgage Program Procedures are being amended to:

- Modify the implementation process for income and sales price limits
- Modify condominium project eligibility requirements

Single Family Housing Downpayment Assistance Program (DAP) Procedures are being amended to:

- Eliminate the first mortgage maximum loan-to-value requirement
- Eliminate closing costs eligibility

Copies of the proposed Procedures Section III(A) Single Family Housing, Homebuyer Mortgage Program and Section III(G) Single Family Housing, Downpayment Assistance Program) may be obtained by visiting www.chfa.org. All interested persons may submit written data, views and arguments in connection with the above-stated proposed Procedures by email to PublicComment@chfa.org or by mail to attention Lisa Hensley, Connecticut Housing Finance Authority, 999 West Street, Rocky Hill, CT 06067 no later than 30 days after the publication of this notice.

PERSONNEL NOTICE

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

CHIEF STATE'S ATTORNEY
STATE OF CONNECTICUT

Applications are being accepted for the full-time position of Chief State's Attorney for the Division of Criminal Justice, State of Connecticut (PCN 4853).

Pursuant to Article XXIII of the Connecticut Constitution, the Chief State's Attorney shall be the administrative head of the Division of Criminal Justice, and with the thirteen State's Attorneys, shall be in charge of the investigation and prosecution of all criminal matters within the State of Connecticut. For a full job description, follow this link:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/Chief-States-Attorney

Appointment shall be made by the Criminal Justice Commission in accordance with Sec. 51-278 of the Connecticut General Statute. The successful applicant shall hold office from the date of appointment through June 30, 2026, and thereafter be subject to re-appointment to a five (5) year term. The annual salary is $191,408.00

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three (3) years; residency in the State of Connecticut is a prerequisite to appointment. Applicants must be admitted to practice law in the State of Connecticut at the time of appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en. A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: Chief State's Attorney (PCN 4853) and must be postmarked no later than March 25th 2022. In addition, an electronic copy (pdf) of application materials should be sent to DCJ.HR@ct.gov**.** Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

NOTICE

Notice of Reprimand of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on January 28, 2022, this Court reprimanded Attorney Jay M. Wolman, Juris #433791. See UWYCV18-6046436-S, *Erica Lafferty* v. *Alex Emric Jones, et al (Docket entry 675),* UWYCV18-6046437-S, *William Sherlach v. Alex Jones*, et al (Docket entry 529), or UWYCV18-6046438-S, *William Sherlach v. Alex Emric Jones*, et al (Docket entry 505) for the full order of the Court.

Hon. Barbara N. Bellis, *Judge*