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Vol. 344

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

THOMAS PRIORE *v.* STEPHANIE HAIG
(SC 20511)

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

Syllabus

Pursuant to the common law of this state, communications made in the course of and in furtherance of administrative proceedings that are quasi-judicial in nature are absolutely privileged.

Pursuant further to *Kelley* v. *Bonney* (221 Conn. 549), in determining whether an administrative proceeding is quasi-judicial in nature, a court may consider whether the body or entity conducting the proceeding has the discretion to apply the law to the facts and the authority (1) to exercise judgment and discretion, (2) to hear and determine or to ascertain facts and decide, (3) to make binding orders and judgments, (4) to affect the personal or property rights of private persons, (5) to examine witnesses and to hear the litigation of the issues, and (6) to enforce decisions or to impose penalties.

The plaintiff sought to recover damages for, inter alia, defamation in connection with statements that the defendant had made about the plaintiff at a public hearing before a town planning and zoning commission in connection with the plaintiff's application for a special permit to construct a new house and to install a new sewer line on his property. At the hearing, the defendant expressed her concerns regarding the plaintiff's application, stating, inter alia, that the plaintiff had not been trustworthy in prior dealings involving his application, that he had "a serious criminal past," and that he had paid more than $40 million in fines to the federal agency charged with enforcing federal securities

laws. The defendant filed a motion to dismiss the plaintiff's action for lack of subject matter jurisdiction, claiming that her statements were entitled to absolute immunity. The trial court granted the defendant's motion, concluding that her statements were entitled to absolute immunity because the proceeding before the commission was quasi-judicial in nature and the defendant's statements were pertinent to the proceeding. Accordingly, the trial court rendered judgment dismissing the action, from which the plaintiff appealed to the Appellate Court. The Appellate Court affirmed the trial court's judgment, reasoning that the first five factors set forth in *Kelley*, as well as certain public policy interests, weighed in favor of a determination that the proceeding was quasi-judicial. On the granting of certification, the plaintiff appealed to this court. *Held* that the Appellate Court incorrectly determined that the public hearing before the commission was a quasi-judicial proceeding, the defendant's statements therefore were not entitled to absolute immunity, and, accordingly, this court reversed the Appellate Court's judgment and remanded the case for further proceedings: courts charged with determining whether a proceeding is quasi-judicial in nature may consider, in addition to the six factors set forth in *Kelley*, any other factors that are relevant to the particular proceeding, including the procedural safeguards in place to ensure the reliability of the information presented at the proceeding and the authority of the body or entity to regulate the proceeding, and those courts must carefully scrutinize whether there is a sound public policy justification for affording absolute immunity in any given context; in the present case, the commission had discretion, pursuant to well settled principles of administrative law and the applicable municipal code, to apply the law to the facts set forth in the plaintiff's special permit application, the relevant statutes and regulations authorized the commission to approve, deny or table decision on the application, thus empowering the commission to make binding orders, and the commission's action on a special permit application generally would affect the property rights of the applicant or surrounding property owners, such that the first four factors set forth in *Kelley* weighed in favor of a determination that the proceeding at issue was quasi-judicial in nature; nevertheless, this court concluded that the hearing on the plaintiff's special permit application was not quasi-judicial in nature because it lacked procedural safeguards that would have served to ensure the reliability of the information presented, as there was no requirement that a declarant appearing before the commission make his or her statements under oath or otherwise certify that the information conveyed is accurate, there was no practical opportunity to meaningfully challenge the veracity of a declarant's statement, and there was no remedy available to the commission during a hearing if a witness were to convey knowingly false information, such as a charge of perjury; moreover, a local commission generally has limited authority to reject evidence, hold speakers accountable for statements made during the hearing, or other-

wise limit what information is presented to ensure the reliability of the proceeding, and public policy considerations militated against a conclusion that the proceeding at issue was quasi-judicial in nature because the public benefit to be derived from affording absolute immunity to statements made during a commission hearing was not sufficiently compelling in view of the possible damage that untruthful statements may cause to individual reputations, the lack of procedural safeguards in place to ensure reliability, and the protection afforded by the statute (§ 52-196a (b)) permitting a court to dismiss a complaint based on an opposing party's exercise of his or her constitutional right to free speech in connection with a matter of public concern; furthermore, this court's conclusion that the defendant's statements before the commission were not entitled to absolute immunity was consistent with the decisions of sister state courts that have determined that proceedings before a planning and zoning commission are not quasi-judicial in nature.

(Three justices concurring in part in one opinion)

Argued January 10—officially released September 7, 2022*

Procedural History

Action to recover damages for defamation, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Povodator*, *J.*, granted the defendant's motion to dismiss and rendered judgment dismissing the action, from which the plaintiff appealed to the Appellate Court, *Alvord*, *Prescott* and *Pellegrino*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *further proceedings*.

Eric D. Grayson, for the appellant (plaintiff).

Richard W. Bowerman, with whom, on the brief, was *Michael G. Caldwell*, for the appellee (defendant).

Opinion

McDONALD, J. This certified appeal requires us to determine whether a public hearing on a special permit application before a town's planning and zoning com-

* September 7, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

mission is a quasi-judicial proceeding such that public statements made during the hearing are entitled to absolute immunity. The plaintiff, Thomas Priore, brought this defamation action against the defendant, Stephanie Haig, seeking to recover damages for injuries that he claims to have sustained as a result of the defendant's allegedly defamatory statements about the plaintiff made during a hearing before the Greenwich Planning and Zoning Commission. The plaintiff appeals from the judgment of the Appellate Court, which affirmed the trial court's judgment, concluding that the defendant's statements were entitled to absolute immunity. *Priore* v. *Haig*, 196 Conn. App. 675, 695, 712, 230 A.3d 714 (2020). On appeal, the plaintiff contends that the Appellate Court incorrectly concluded that the defendant's statements were entitled to absolute immunity because the hearing before the commission was not quasi-judicial and the statements concerning the plaintiff were not relevant to the subject matter of the commission's hearing. We agree with the plaintiff that the public hearing was not quasi-judicial in nature and, accordingly, reverse the judgment of the Appellate Court.

The record and the Appellate Court's opinion set forth the facts and procedural history; see id., 677–83; which we summarize in relevant part. In "2015, the plaintiff, through a limited liability company, purchased a property located at 15 Deer Park Meadow Road in Greenwich . . . . The property is part of a private subdivision known as the Deer Park Association . . . ." Id., 677. After purchasing the property, the plaintiff intended to demolish the existing house and build a new house. In addition to constructing the new house, the plaintiff agreed to replace an inaccessible sewer line that ran through the middle of his property and serviced a number of up-line users. Through an easement that the plaintiff agreed to grant, the new sewer

line would be available to other members of the association for access and repairs.

As part of the process for obtaining the commission's approval to construct the new house and to place the new sewer line on his property, the plaintiff was required to submit an application for a special permit. The plaintiff submitted the application and a final site plan, and, in January, 2016, the commission held a public hearing on the plaintiff's application. The hearing was to be the final hearing concerning the approval of the plaintiff's application. The primary issue to be addressed at the hearing was the location of the new sewer line. The record is silent as to whether the plaintiff attended the hearing.

The plaintiff's engineer, Anthony D'Andrea, attended the hearing and was the first person to address the commission concerning the plaintiff's application. He discussed various aspects of the plan to install the sewer line, including the way in which the installation of the sewer line might affect certain trees still existing on the property. "D'Andrea stated that trees had been 'removed during the demolition of the house' and that . . . a planting plan would be submitted 'that [would] include at least twenty [new] trees.' " Id., 678. D'Andrea also stated that the placement of the sewer line would protect the trees in the area, and the goal was to maximize the number of trees that could be preserved.

Thereafter, members of the public were invited to address the commission. The president of the Deer Park Association spoke first and informed the commission, among other things, that "subsequent speakers . . . would address the commission about trees that were important to members of the association. According to the president, the trees were important because they 'provide[d] privacy [and were] part of the character' of the neighborhood." Id. Michael Finkbeiner, a surveyor

and consulting professional forester retained by a member of the Deer Park Association, next addressed the commission. He stated that certain trees had already been cut down on the plaintiff's property and, "as a result of the plaintiff's representations [in his filings], the commission may have 'been deceived into thinking [that the trees shown in a topographic survey are] existing trees, but they are no more.' " Id., 679.

Later in the hearing, the defendant, the plaintiff's neighbor to the west, addressed the commission. She explained that she was worried that the plaintiff's proposed "sewer line would impact the health of the trees that she claimed to 'co-own' with the plaintiff. She also stated that the plaintiff had been 'very disrespectful of the neighbors' " throughout the process. Id. Important to the present appeal, the defendant went on to state that the plaintiff "does have a criminal past. I will not go into the exact details of it, but it's a serious criminal past. He's paid [more than] $40 million in fines to the [Securities and Exchange Commission]." In response, a planning and zoning commission member stated, "[t]hat's not of relevance to the [commission]." The defendant then concluded her remarks by expressing her desire for the commission to provide "real good oversight" of the project "because [the plaintiff] has not been trustworthy in the first dealings with us, and there are many more dealings to go."

D'Andrea again addressed the commission and acknowledged that a drawing of the property submitted by the plaintiff failed to indicate that certain trees had already been cut down. He also claimed, however, that the trees that the plaintiff had removed were present on the property at the time the application was submitted. In response, a member of the commission noted that the drawing the plaintiff had submitted was incomplete because it did not accurately depict the trees. The chairperson of the commission asked D'Andrea to

reconcile the drawing in light of the information that Finkbeiner had submitted. D'Andrea agreed to do so.

The commission adjourned the hearing and "tabl[ed] the decision on whether to approve the application until the plaintiff or his representatives provided it with the clarifications and information that it had requested." *Priore* v. *Haig*, supra, 196 Conn. App. 680. Thereafter, "the commission ultimately approved the plaintiff's [special permit] application 'with very little change or requirements from the town . . . .' " Id.

The plaintiff commenced this action in October, 2016. In his second revised complaint, sounding in libel per se, libel per quod, slander per se, slander per quod, and defamation, the plaintiff alleged that he had suffered "reputational damage . . . in his standing in the community and in his profession" because, during the January, 2016 public hearing, the defendant falsely accused him of prior criminal misconduct and of being untrustworthy. The defendant filed an answer and special defenses, denying the allegations and asserting, among other things, that she was immune from suit for defamation because she made those statements in the course of a quasi-judicial proceeding. The plaintiff moved to strike that defense.

The defendant then filed an objection to the plaintiff's motion to strike and, in the same document, moved to dismiss the plaintiff's action, claiming, among other things, that the trial court lacked subject matter jurisdiction over the plaintiff's action because the statements she made during the commission's hearing were entitled to absolute immunity. The plaintiff filed an objection to the defendant's motion to dismiss.

In January, 2018, the trial court granted the defendant's motion to dismiss. The trial court reasoned that it did not have jurisdiction over the plaintiff's claims because the statements that the defendant made about

the plaintiff at the commission's hearing were entitled to absolute immunity. In reaching this conclusion, the court determined that the commission's hearing on the special permit application constituted a quasi-judicial proceeding. The court also determined that the defendant's statements were pertinent to the subject matter of the hearing because they concerned the plaintiff's credibility. The court reasoned that the commission had to weigh the plaintiff's credibility when reviewing the representations that the plaintiff and his agents made to the commission in order to decide whether to approve his application. The plaintiff subsequently filed a motion to reargue and for reconsideration, which the trial court denied.

Thereafter, the plaintiff appealed to the Appellate Court, which affirmed the judgment of the trial court. *Priore* v. *Haig*, supra, 196 Conn. App. 712. The Appellate Court agreed with the trial court's conclusion that the defendant's statements were entitled to absolute immunity because the hearing before the commission was quasi-judicial and the defendant's statements were pertinent to the hearing. See id., 690–91, 705, 711. In reaching its conclusion that the hearing was quasi-judicial, the Appellate Court applied the six factors enumerated by this court in *Kelley* v. *Bonney*, 221 Conn. 549, 567, 606 A.2d 693 (1992); see *Priore* v. *Haig*, supra, 696–703; and determined that the first five factors weighed in favor of the determination that the hearing was quasi-judicial. Id., 697. The Appellate Court also concluded that public policy interests further supported this conclusion. Id., 705. In so concluding, however, the court also stated: "[W]e take this occasion to express our concern that this case arguably lies near the outer boundaries of the public policy justifications that underlie the absolute litigation immunity doctrine." Id., 711.

The plaintiff subsequently filed a petition for certification to appeal, which we granted, limited to the follow-

ing issue: "Did the Appellate Court correctly conclude that the defendant's public statements about the plaintiff at the meeting of the [commission] were entitled to absolute immunity, depriving the trial court of subject matter jurisdiction over the plaintiff's defamation action?" *Priore* v. *Haig*, 335 Conn. 955, 955–56, 239 A.3d 317 (2020).

On appeal, the plaintiff contends that the defendant's statements at the hearing are not entitled to absolute immunity because the hearing before the commission was not quasi-judicial. The plaintiff argues that, notwithstanding the *Kelley* factors, the "focus of whether a hearing is truly quasi-judicial should be centered on whether it . . . resembles a court or tribunal proceeding and has procedural safeguards [that] promote reliability and due process." The plaintiff contends that there were no procedural safeguards in place at the commission's hearing, and, as a result, it was not quasi-judicial. Even if the hearing was quasi-judicial, the plaintiff contends, the defendant's statements were not entitled to absolute immunity because the statements were not relevant to the hearing.[1] The defendant disagrees and contends that the Appellate Court properly applied the *Kelley* factors to conclude that the hearing was quasi-judicial and correctly concluded that the defendant's statements were pertinent to the hearing.

Before addressing the merits of the plaintiff's claim on appeal, we note the standard that governs our review in this case. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the

[1] The plaintiff also contends that the Appellate Court improperly applied a "pertinence" standard when it should have applied a "relevance" standard. Because we conclude that the hearing was not quasi-judicial, we need not address this contention. See footnote 8 of this opinion.

face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Styslinger* v. *Brewster Park, LLC*, 321 Conn. 312, 316, 138 A.3d 257 (2016). "In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015). The parties do not dispute that absolute immunity implicates the trial court's subject matter jurisdiction. See, e.g., *Scholz* v. *Epstein*, 341 Conn. 1, 8–9, 266 A.3d 127 (2021). In addition, the determination of whether a public hearing on a special permit application before a town's planning and zoning commission constitutes a quasi-judicial proceeding presents a question of law, over which our review is plenary. See, e.g., *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 83, 856 A.2d 372 (2004). "Within this limitation, however, whether a particular proceeding is quasi-judicial in nature, for the purposes of triggering absolute immunity, will depend on the particular facts and circumstances of each case." Id., 83–84.

This court has long held that "communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Gallo* v. *Barile*, 284 Conn. 459, 466, 935 A.2d 103 (2007); see, e.g., *Charles W. Blakeslee & Sons* v. *Carroll*, 64 Conn. 223, 232, 29 A. 473 (1894) (recognizing privilege), overruled in part on other grounds by *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986). The effect of such an absolute privilege is that damages cannot be recovered for the publication of a privileged statement, even if the statement

is defamatory. See, e.g., *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 84.

"The policy underlying the privilege is that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . The rationale underlying the privilege is grounded [on] the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of [actions seeking damages for statements made by such participants in the course of the judicial proceeding]." (Citations omitted; internal quotation marks omitted.) *Hopkins* v. *O'Connor*, 282 Conn. 821, 838–39, 925 A.2d 1030 (2007). "Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial . . . proceedings. This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit." *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005).

"[L]ike the privilege which is generally applied to pertinent statements made in formal judicial proceedings, an absolute privilege also attaches to relevant statements made during administrative proceedings which are quasi-judicial in nature. . . . Once it is determined that a proceeding is [quasi-judicial] in nature, the absolute privilege that is granted to statements made in furtherance of it extends to every step of the proceeding until final disposition." (Citations omitted; internal quotation marks omitted.) *Kelley* v. *Bonney*, supra, 221 Conn. 565–66. We have repeatedly explained, however, that "[t]he . . . proceeding to which [absolute] immunity attaches has not been defined very exactly. It includes any hearing before a tribunal which performs a judicial function, ex parte or otherwise, and whether

the hearing is public or not. It includes . . . lunacy, bankruptcy, or naturalization proceedings, and an election contest. It extends also 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.) Id., 566. The uncertainty as to which proceedings are quasi-judicial in nature persists to this day. See, e.g., *Kenneson* v. *Eggert*, 196 Conn. App. 773, 782, 230 A.3d 795 (2020).

This court has formulated various standards for determining whether a proceeding is quasi-judicial. First, in *Petyan* v. *Ellis*, supra, 200 Conn. 243, we described the test for determining whether a proceeding before a board or commission is quasi-judicial as an inquiry into whether the board or commission "ha[s] powers of discretion in applying the law to the facts which are regarded as judicial or quasi-judicial, in character." (Internal quotation marks omitted.) Id., 246. Applying that test, we concluded that information provided by a defendant employer on a " 'fact-finding supplement' " form of the employment security division of the state Department of Labor was entitled to absolute immunity. Id., 247–48. We reasoned that, "[i]n the processing of unemployment compensation claims, the administrator, the referee and the [E]mployment [S]ecurity [B]oard of [R]eview decide the facts and then apply the appropriate law. . . . The employment security division of the . . . department, therefore, acts in a quasi-judicial capacity when it acts [on] claims for unemployment compensation." (Citations omitted; footnotes omitted.) Id., 248–49.

In *Kelley* v. *Bonney*, supra, 221 Conn. 549, this court next considered whether a teaching certificate revocation proceeding before the state Board of Education was quasi-judicial in nature. See id., 566–71. After reiter-

ating the rule from *Petyan* that a proceeding may be quasi-judicial when the body or entity conducting the proceeding has the discretion to apply the law to the facts, this court went on to identify additional factors that could "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." Id., 567. These "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." (Internal quotation marks omitted.) *Carter* v. *Bowler*, 211 Conn. App. 119, 123, 271 A.3d 1080 (2022). We have made clear that these factors are "[i]n addition" to, not in lieu of, the application of the law to fact requirement. *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 85. Indeed, the first two factors largely mirror *Petyan*'s law to fact requirement. See *Petyan* v. *Ellis*, supra, 200 Conn. 246. This court, in *Kelley*, went on to conclude that the teaching certificate revocation proceeding was quasi-judicial. *Kelley* v. *Bonney*, supra, 571. Specifically, the court pointed to the "significant regulatory authority to conduct proceedings of a [quasi-judicial] nature. The detailed procedures, which ensure the reliability of teacher decertification proceedings, and the compelling public policy concern for the protection of [school-age] children persuade us that the decertification proceedings before the state [B]oard of [E]ducation were [quasi-judicial] in nature . . . ." Id.

The plaintiff contends that, although not specifically enumerated in the *Kelley* factors, our case law also

looks to the procedural safeguards that attend to the proceeding and the authority of the entity to regulate the proceeding, which promote reliability and due process, as part of the analysis to determine whether a proceeding is truly quasi-judicial in nature.[2] We agree.

For example, in *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 78, this court, in concluding that an investigation by a police department's internal affairs division constituted a quasi-judicial proceeding; see id., 93; expressly relied on out-of-state case law that considered "the procedural safeguards provided by the statutory scheme governing disciplinary proceedings [that] were adequate to minimize the occurrence of defamatory statements." (Internal quotation marks omitted.) Id., 91. This court explained that the internal affairs investigation at issue in *Craig* provided procedural safeguards, namely, "[t]he witnesses give sworn statements to the investigator during the investigation, and the form on which they sign their statement[s] informs the witness that he or she can be criminally liable for filing a false statement." Id., 87. Moreover, "[a]t the formal hearing, the [police] officer has a right to be represented by counsel. . . . In addition, the [police] department subpoenas witnesses to testify at the formal hearing, and . . . it is undisputed that the witnesses complied with the subpoena and testified before the hearing offi-

[2] The plaintiff also asks us to adopt the standard articulated by the Court of Appeals of Maryland in *Gersh* v. *Ambrose*, 291 Md. 188, 434 A.2d 547 (1981). In *Gersh*, the court explained that the nature and scope of administrative proceedings are "too varied to be circumscribed by specific criteria. Rather, we have decided that whether absolute witness immunity will be extended to any administrative proceeding will have to be decided on a case-by-case basis and will in large part turn on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements." Id., 197. We decline the plaintiff's invitation to adopt this test to replace an analysis based on the other considerations our case law has identified. We think the better course is to consider procedural safeguards as part of a broader quasi-judicial analysis, as our case law has consistently done.

cer. Witnesses who testify at the formal hearing are sworn and must testify under oath. The [police] officer also has the right to cross-examine the witnesses. In addition, at the formal hearing, a city attorney is present in order to rule on questions of evidence. During the hearing, the hearing officer takes notes on the testimony and evidence presented and, thereafter, transcribes his notes into typed form, which constitutes the record for the purposes of the hearing. After the hearing is concluded, the hearing officer makes findings and a recommendation of decision regarding the appropriate punishment." Id., 88.

Similarly, in *Kelley*, this court looked to the nature of the procedural safeguards that were incorporated in the structure of the proceeding and noted that "a request for revo[king] . . . [a teaching certificate had to be] made under oath . . . . Upon receipt of such request, the state board of education had to conduct a preliminary inquiry to determine whether probable cause for revocation of the certificate existed." *Kelley* v. *Bonney*, supra, 221 Conn. 568–69. In the event the state Board of Education held a hearing, "the holder [of the teaching certificate] was entitled to be heard, to examine the records of investigations, to be present throughout the hearing, to be represented by counsel, to call and cross-examine witnesses and to present oral argument." Id., 570.

In *Petyan*, this court also looked to the procedural safeguards involved and found it significant that the state employment security division possessed subpoena power and that the defendant was required to certify that the information he forwarded to the state was true and correct. See *Petyan* v. *Ellis*, supra, 200 Conn. 250, 251. Finally, in *Hopkins* v. *O'Connor*, supra, 282 Conn. 821, we concluded that a commitment proceeding was judicial in nature "[b]ecause of the significant procedural protections" afforded by the proceeding. Id., 831;

see also id., 831 n.3 (noting that procedural protections include respondent's right to be present at hearing, right to appointed counsel, right to cross-examine witnesses, and right to appeal from adverse decision).

We think it eminently reasonable for courts to consider the procedural safeguards attendant to a proceeding because "[s]tatements made during proceedings that lack basic [due process] protections generally do not engender fair or reliable outcomes." *Spencer* v. *Klementi*, 136 Nev. 325, 333, 466 P.3d 1241 (2020). As a result, proceedings that lack such procedural safeguards do not adequately protect a critical public policy undergirding the doctrine of absolute immunity—to encourage robust participation and candor in judicial and quasi-judicial proceedings while providing some deterrent against malicious falsehoods. In an analogous context, we look to, among other things, the "procedural safeguards [that exist] in the system that would adequately protect against [improper] conduct by [a government] official" when determining whether the official should be accorded absolute judicial immunity. (Internal quotation marks omitted.) *Gross* v. *Rell*, 304 Conn. 234, 249, 40 A.3d 240 (2012). Accordingly, we agree with the plaintiff that the procedural safeguards of the proceeding and the authority of the entity to regulate the proceeding, which promote reliability and due process safeguards to ensure that accusatory or unflattering allegations are subject to the requirements of reliability, are relevant considerations that are part of a court's analysis of whether a particular proceeding is quasi-judicial in nature.[3] See, e.g., 50 Am. Jur. 2d 667–68, Libel and Slander § 283 (2017) ("[w]hether the

[3] Although not explicitly enumerated in *Kelley*, we note that a consideration of the procedural safeguards of a proceeding and the authority of the entity to regulate the proceeding are similar to the fifth *Kelley* factor—whether the entity or the body conducting the proceeding has the power to "examine witnesses and [to] hear the litigation of the issues on a hearing . . . ." *Kelley* v. *Bonney*, supra, 221 Conn. 567.

statements in an administrative proceeding are within the ambit of absolute privilege is decided on a case-by-case basis and turns on the nature of the public function of the proceeding and *the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements*" (emphasis added)). Indeed, given that the *Kelley* factors do not represent an exhaustive list of considerations, there may well be additional considerations relevant in other circumstances.

Finally, in each case in which this court has evaluated whether a proceeding is quasi-judicial, we have explained that it is also "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." (Internal quotation marks omitted.) *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 85; see, e.g., *Hopkins* v. *O'Connor*, supra, 282 Conn. 839; *Kelley* v. *Bonney*, supra, 221 Conn. 567. In considering the public policy rationale, we are mindful that "[a]bsolute immunity . . . is strong medicine . . . ." (Internal quotation marks omitted.) *Gallo* v. *Barile*, supra, 284 Conn. 471. In most cases, the policy considerations require balancing the public interest of encouraging public participation and candor, on the one hand, and the private interest of protecting individuals from false and malicious statements, on the other. Cf. id. ("whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests" (internal quotation marks omitted)); *Rioux* v. *Barry*, 283 Conn. 338, 346, 927 A.2d 304 (2007) (same).

In sum, a quasi-judicial proceeding is one in which the entity conducting the proceeding has the power of discretion in applying the law to the facts within a framework that contains procedural protections against defamatory statements. As part of their inquiry into whether a proceeding is truly quasi-judicial, courts may consider the relevant factors enumerated by this court

in *Kelley* to determine whether the entity exercises powers akin to a judicial entity. See *Kelley* v. *Bonney*, supra, 221 Conn. 567. Courts may also consider other factors that are relevant to a given proceeding, including the procedural safeguards of the proceeding and the authority of the entity to regulate the proceeding. Finally, courts must always carefully scrutinize whether there is a sound public policy justification for the application of absolute immunity in any particular context.

With this in mind, we turn to the facts of this case. It is well settled that, when acting on a special permit application, a town's planning and zoning commission acts in an administrative capacity. See, e.g., *A.P. & W. Holding Corp.* v. *Planning & Zoning Board*, 167 Conn. 182, 184–85, 355 A.2d 91 (1974). It is also well settled that, when acting in this administrative capacity on a special permit application, a planning and zoning commission has "discretion to determine *whether* the proposal meets the standards set forth in the regulations. If, during the exercise of its discretion, the . . . commission decides that all of the standards enumerated in the special permit regulations are met, then it can no longer deny the application. The converse is, however, equally true. Thus, the . . . commission can exercise its discretion during the review of the proposed special [permit], as it applies the regulations to the specific application before it." (Emphasis in original.) *Irwin* v. *Planning & Zoning Commission*, 244 Conn. 619, 628, 711 A.2d 675 (1998). Indeed, in the present case, the Greenwich Municipal Code requires the commission to exercise its discretion in deciding whether to approve the special permit application. See Greenwich Municipal Code § 6-17 (a) (2016) ("[c]ommission shall determine that the proposed use conforms with the overall intent of these regulations and the purposes of each zone"); id., § 6-17 (d) (commission "shall consider all the standards contained in [§] 6-15 (a)," and it "shall

consider" twelve enumerated attributes of proposed use in special permit application); id., § 6-17 (e) ("[c]ommission may require applicants for special permit to prepare and submit any additional data and studies as necessary to allow the [c]ommission to arrive at its determinations"). Accordingly, we conclude that the commission has the discretion to apply the law, in this case, zoning regulations, to the facts set forth in the application before it. This conclusion militates in favor of a determination that the hearing was quasi-judicial.

Turning to the *Kelley* factors, we note that the first two factors are encompassed in our discussion regarding the commission's powers of discretion to apply the law to the facts. See *Kelley* v. *Bonney*, supra, 221 Conn. 567 (first two *Kelley* factors are "whether the body has the power to . . . (1) exercise judgment and discretion . . . [and] (2) hear and determine or to ascertain facts and decide"). We agree with the Appellate Court's conclusion that the third and fourth factors—whether the commission was empowered to "make binding orders and judgments" and whether the commission had the power to "affect the personal or property rights of private persons"; id.—also weigh in favor of a determination that the hearing was quasi-judicial. *Priore* v. *Haig*, supra, 196 Conn. App. 701–702. The relevant statutes and regulations authorize the commission to approve, deny, or table decision on the plaintiff's application. Thus, the commission is empowered to make binding orders. Moreover, we have explained that "[z]oning regulations . . . are in derogation of [common-law] property rights . . . ." *Planning & Zoning Commission* v. *Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). Therefore, whatever action the commission takes on a special permit application affects the property rights of the applicant or surrounding property owners. For example, if the commission denies a special permit

application, it would restrict a property owner's ability to use his property in the manner he desires.

Significantly, however, the hearing before the commission had almost no procedural safeguards in place to ensure the reliability of the information presented at the proceeding. Unlike the proceedings in *Craig* and *Petyan*, there is no requirement that a declarant before the commission make her statements under oath or otherwise certify that the information is true and correct.[4] See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 87; *Petyan* v. *Ellis*, supra, 200 Conn. 250; cf. *DeLaurentis* v. *New Haven*, 220 Conn. 225, 264, 597 A.2d 807 (1991) ("[although] no civil remedies can guard against lies, the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness' statements"). "The fact that statements [made during a planning and zoning commission hearing] are not under oath occasionally results in knowingly false statements which may affect the application." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 20:11, p. 611. There is also no practical opportunity to meaningfully challenge the veracity of a statement made by a member of the

[4] Indeed, speakers at a planning and zoning commission public hearing are not witnesses in the traditional sense. Our case law typically recognizes that it is "*parties* to or *witnesses* before judicial or quasi-judicial proceedings [who] are entitled to absolute immunity for the content of statements made therein." (Emphasis added; internal quotation marks omitted.) *Preston* v. *O'Rourke*, 74 Conn. App. 301, 311, 811 A.2d 753 (2002). This is logical because "[a] witness' reliability is ensured by his [or her] oath, the hazard of cross-examination and the threat of prosecution for perjury." *Bruce* v. *Byrne-Stevens & Associates Engineers, Inc.*, 113 Wn. 2d 123, 126, 776 P.2d 666 (1989); see, e.g., *Briscoe* v. *LaHue*, 460 U.S. 325, 333–34, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983) ("the [truth-finding] process is better served if the witness' testimony is submitted to the crucible of the judicial process so that the [fact finder] may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies" (internal quotation marks omitted)). There are often no such constraints on a speaker before a planning and zoning commission to ensure the truthfulness of her statements.

public.[5] Cf. id., § 20:3, p. 593 (public hearing before municipal administrative agency is not required to follow rules of evidence). Additionally, there is no remedy available to the commission during a hearing with respect to a witness who gives knowingly false information, such as a charge of perjury, as there is to a judge during a judicial proceeding. See, e.g., *Stega* v. *New York Downtown Hospital*, 31 N.Y.3d 661, 671, 107 N.E.3d 543, 82 N.Y.S.3d 323 (2018) ("[F]or absolute immunity to apply in a quasi-judicial context, the process must make available a mechanism for the party alleging defamation to challenge the allegedly false and defamatory statements. . . . [A]ny 'character assassination' that occurs in a judicial proceeding is at least in principle subject to charges of perjury."). The lack of procedural safeguards weighs heavily against a conclusion that the hearing was quasi-judicial. For these reasons, we also conclude that the commission did not have the power to "examine witnesses and [to] hear the litigation of the issues," in the traditional sense, as contemplated by the fifth *Kelley* factor. *Kelley* v. *Bonney*, supra, 221 Conn. 567.

Moreover, with respect to the authority of the entity to regulate the proceeding, the commission does not have discretion to reject the admission of evidence or testimony that is submitted, it cannot strike information from the record, and it does not have the power to subpoena witnesses. See, e.g., 9 R. Fuller, supra, § 21:5, p. 646 (In a proceeding before a land use agency, "[t]here is no effective mechanism for excluding evidence based [on] the considerations that apply to court

[5] We recognize that applicants before a planning and zoning commission may have limited opportunities to assert that a witness' statements are false. For example, following a comment made by a member of the public, an applicant could assert that the speaker was not being truthful. We conclude that this limited opportunity is not sufficient to appropriately protect either the private interest in minimizing the occurrence of defamatory statements or the public interest in ensuring reliable public participation.

proceedings. Evidence presented will not be excluded based on claims that it is not relevant, not the best evidence or that it amounts to hearsay.''). Rather, sorting through potentially false or misleading public comments is left, informally, to commission members who may be ''experienced in considering statements made by opponents, know[ing] their bias and the nature of their interest in the proceeding . . . .'' Id., § 20:12, p. 616. Furthermore, administrative agencies, such as planning and zoning commissions, ''may consider evidence which would normally be incompetent in a judicial proceeding, as long as the evidence is reliable and probative.'' Id., § 20:11, p. 612. Indeed, there are no rules of evidence applicable during a hearing on a special permit application. See, e.g., id., § 20:3, p. 593 (''Public hearings before a municipal administrative agency are not required to follow the same procedures required for trial of a civil action in court. Proceedings are informal and conducted without following rules of evidence applying to court proceedings.''); see also, e.g., id., § 20:11, p. 611 (''[m]unicipal land use hearings in Connecticut do not follow the rules of discovery and evidence used in court proceedings''). In short, the commission has limited authority to ensure the reliability of information received during the hearing and has no authority to hold speakers accountable for statements made during the hearing. This conclusion also weighs against a determination that the hearing was quasi-judicial.

Turning to the public policy considerations, we acknowledge the Appellate Court's concern that a conclusion that the hearing was not quasi-judicial may serve as a disincentive to citizen participation in local governments by chilling free speech. *Priore* v. *Haig*, supra, 196 Conn. App. 705. ''The rationale for extending the absolute [immunity] to statements made during quasi-judicial proceedings rests in the public policy that every

citizen should have the unqualified right to appeal to governmental agencies for redress without the fear of being called to answer in damages . . . .'' 50 Am. Jur. 2d, supra, § 283, pp. 666–67. The importance of ensuring public participation cannot be overstated. This public policy consideration, however, must be considered along with the private interest of protecting individuals from false and malicious statements. Cf. *Rioux* v. *Barry*, supra, 283 Conn. 346 (''the public interest of encouraging complaining witnesses to come forward must be balanced against the private interest of protecting individuals from false and malicious claims''). This is particularly important when, as we explained, the proceeding has minimal procedural safeguards in place to ensure the reliability of the information presented at the proceeding. After all, ''[t]he absolute [immunity] for communications in the context of quasi-judicial proceedings is intended to protect the integrity of the process and [*to*] *ensure that the quasi-judicial decision-making body gets the information it needs*.'' (Emphasis added.) 50 Am. Jur. 2d, supra, § 283, p. 667. In other words, the purpose of promoting citizen participation is, in large part, to ensure that the decision-making entity obtains accurate information to reach the correct result.

Moreover, the concern that declining to extend absolute immunity to statements made in these proceedings would discourage public participation is ameliorated, in some respects, by our state's statutory protection against a ''strategic lawsuit against public participation,'' also known as a SLAPP lawsuit.[6] See General

[6] ''SLAPP is an acronym for strategic lawsuit against public participation, the distinctive elements of [which] are (1) a civil complaint (2) filed against a nongovernment individual (3) because of their communications to government bodies (4) that involves a substantive issue of some public concern. . . . The purpose of a SLAPP [lawsuit] is to punish and intimidate citizens who petition state agencies and have the ultimate effect of chilling any such action.'' (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

Statutes § 52-196a. Under this statutory scheme, a party may file a special motion to dismiss when the opposing party's complaint is based on the moving party's exercise of, among other things, the right of free speech or the right to petition the government in connection with a matter of public concern. See General Statutes § 52-196a (b); see also General Statutes § 52-196a (e) (3) (describing circumstances under which trial court must grant party's special motion to dismiss). Although the statutory protection against SLAPP lawsuits does not create a substantive right, the procedural mechanism that § 52-196a establishes, namely, the special motion to dismiss, provides a moving party with the opportunity to have the lawsuit dismissed early in the proceeding and stays all discovery, pending the trial court's resolution of the special motion to dismiss. See General Statutes § 52-196a (d). If the court grants the special motion to dismiss, the moving party is also entitled to costs and reasonable attorney's fees. See General Statutes § 52-196a (f) (1). Thus, speakers at a public hearing before a planning and zoning commission are afforded a procedural vehicle to more quickly vindicate their right to freely participate in planning and zoning commission public hearings in the event that they are subjected to unwarranted litigation seeking to silence their exercise of free speech. Indeed, the legislative history of § 52-196a indicates that the legislature contemplated that this statutory scheme would apply in precisely this type of situation to ensure speech was not chilled.[7] During the debate on the bill, the bill's

[7] We note that subsection (h) (6) of § 52-196a contains a list of instances in which the statute does not apply, including "to a common law or statutory claim for bodily injury or wrongful death, except the exclusion provided in this subdivision shall not apply to claims for (A) emotional distress unrelated to bodily injury or wrongful death or conjoined with a cause of action other than for bodily injury or wrongful death, or (B) *defamation, libel or slander*." (Emphasis added.)

Representative William Tong explained that "the purpose of the statute and the way that it operates is to provide that a plaintiff can dismiss a claim—let's just say for defamation—because they're exercising their constitutional

sponsor, Representative William Tong, explained that one situation in which the statute would apply is when "somebody speaks out often on a zoning issue about a development. They're a private citizen and they oppose a development for example and the developer has comparatively more resources to try to shut down that opposition and they do so by filing a defamation claim. It's sort of [a] textbook definition of what is colloquially known as a [libel] bully and they'll go and . . . initiate litigation to try to spend down the defendant and try to use the litigation process to pressure [the defendant] into standing down. That's the other situation in which we see this." 60 H.R. Proc., Pt. 16, 2017 Sess., pp. 6900–6901; see also 60 S. Proc., Pt. 6, 2017 Sess., pp. 2236–37, remarks of Senator John A. Kissel (explaining reasons for statute, including instances in which "certain folks, developers, if you went to a planning and zoning meeting and spoke against the development, that developer would slap a lawsuit on you and therefore [would be] chilling the public debate on developments . . . . So, what this legislation does is it creates a special mechanism to try to get these [lawsuits] taken out and dismissed as early as possible."); id., p. 2237, remarks of Senator Kissel ("this is a really good mechanism to help free flow of ideas so that folks aren't intimidated, [such as when] . . . someone with a lot of money . . . wants to develop property").

right to free speech. With that [having been] said, we wanted to make sure that this couldn't—that this special motion to dismiss could not otherwise be contorted to be used to dismiss a valid claim of a plaintiff for bodily injury, so a plaintiff shows up and files an action for wrongful death, bodily injury based on environmental pollution for example. You wouldn't want the defendant who might otherwise be guilty of that claim to be able to move to dismiss that claim for bodily injury. With that [having been] said, what we want to make sure is that if there is a counterclaim against the original plaintiff for defamation, [libel], or slander that that person could still use this motion to dismiss [or] . . . the [counterclaim], which is impairing that person's right to speak on initial public concern like for example environmental pollution." 60 H.R. Proc., Pt. 16, 2017 Sess., pp. 6950–51.

Given the absence of procedural safeguards to ensure the reliability of a proceeding before a planning and zoning commission, the public benefit to be derived from statements made by the public during a special permit application hearing before such a commission is not sufficiently compelling to outweigh the possible damage that untruthful statements may cause to individual reputations to warrant granting absolute immunity to such statements. See, e.g., *Burns* v. *Davis*, 196 Ariz. 155, 161, 993 P.2d 1119 (App. 1999) (board of adjustment proceeding was not quasi-judicial because "public policy dictates that [the] need to ensure complete and truthful testimony must be balanced against extending protection to administrative hearings in which a volunteer may defame someone under the guise of protecting the public" (internal quotation marks omitted)), review denied, Arizona Supreme Court, Docket No. CV-99-0365-PR (February 8, 2000). Thus, in balancing the competing policy interests, we conclude that public policy considerations militate against a conclusion that the hearing was quasi-judicial.

In light of the foregoing, we recognize that the commission has discretion to apply the law to the facts of the application before it and that certain *Kelley* factors weigh in favor of a determination that the hearing was quasi-judicial. Nevertheless, the lack of procedural safeguards, the limited authority of the commission to reject evidence or otherwise limit what information is brought before it to ensure the reliability of the proceeding, and the lack of a public policy rationale for extending the "strong medicine" of absolute immunity in this context lead us to conclude that a public hearing on a special permit application before a town's planning and zoning commission is not quasi-judicial.[8]

[8] Because we conclude that the hearing was not quasi-judicial, we need not address the plaintiff's contention that the defendant's statements were not relevant to the hearing.

Other jurisdictions have similarly concluded that proceedings before a planning and zoning commission are not quasi-judicial. For example, under circumstances similar to the present case, the Supreme Court of Nevada recently concluded that the plaintiff's neighbor was not entitled to absolute immunity for statements made during the public comment period of a planning commission meeting. *Spencer* v. *Klementi*, supra, 136 Nev. 325. The court reasoned that, "[d]uring the [public comment] period of . . . meetings [before a board and a planning commission], the public is invited to speak about relevant community issues. Although both proceedings provided parties the opportunity to present personal testimony during this period, neither required an oath or affirmation. Further, although [the speakers] were allowed to speak freely during the [public comment] periods, neither was subject to cross-examination or impeachment. Because these [public comment] periods lacked the basic [due process] protections we would expect to find in a court of law, they were not quasi-judicial in nature." Id., 332. The court went on to explain that "[e]xtending the [judicial proceedings] privilege to such statements thus does not comport with the privilege's policy to promote the [truth-finding] process in a judicial proceeding. . . . Based on our conclusion that the [public comment] periods . . . lacked basic [due process] protections, we conclude that public policy considerations do not weigh in favor of applying the [judicial proceedings] privilege . . . ." (Citation omitted; internal quotation marks omitted.) Id., 333.

The New Hampshire Supreme Court has also concluded that proceedings before a zoning board are not quasi-judicial. The court reasoned that "[z]oning boards and commissions are created by the legislature as a part of an administrative organization designed to effect flexible application of zoning rules, regulations and restrictions. They are delegated administrative power

with respect to permits, variances and nonconforming uses in order to provide a forum to individual property owners and others to voice the pro and con of zoning law, its application and administration. . . . Still, many elements of a true judicial proceeding [that] afford safeguards to the participants therein are not made a part of the required procedure at hearings held before such boards and commissions. . . .

"We find meager support for [the speaker's] contention that her remarks made before the zoning board of adjustment were entitled to the protection of an absolute privilege. . . . Nor do we feel that the public or private interests sought to be effectuated by public hearings held prior to the allowance or refusal of a petition for a variance dictate that such total immunity should obtain. The occasion determines the existence and scope of the privilege, if any . . . and the availability of an absolute privilege must be reserved for those situations [in which] the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a [speaker's] motives." (Citations omitted.) *Supry* v. *Bolduc*, 112 N.H. 274, 275–76, 293 A.2d 767 (1972). We find the rationale of our sister state courts persuasive.

Accordingly, having concluded that a hearing on a special permit application before a town's planning and zoning commission is not quasi-judicial in nature, we also conclude that the Appellate Court incorrectly determined that the defendant's statements were entitled to absolute immunity. Thus, the Appellate Court improperly affirmed the judgment of the trial court dismissing the plaintiff's action for lack of subject matter jurisdiction.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the trial court's judgment and to remand the

case to the trial court for further proceedings according to law.

In this opinion MULLINS, KAHN and KELLER, Js., concurred.

D'AURIA, J., with whom ROBINSON, C. J., and ECKER, J., join, concurring in part and concurring in the judgment. I agree with the majority that the defendant in the present case, Stephanie Haig, has not established that the public hearing on the special permit application submitted by the plaintiff, Thomas Priore, before the Planning and Zoning Commission of the Town of Greenwich (commission) was a quasi-judicial hearing. Like the majority, I therefore conclude that she has not demonstrated that her statements before that commission are entitled to absolute immunity under the litigation privilege. I write separately, however, for two reasons.

First, although I agree with the majority's ultimate holding, I do not agree with certain aspects of its analysis. In short, I believe that the majority (1) understates the benefit of the plaintiff, an applicant before the commission, within that very same forum, being able to refute any false statements made about him at the public hearing, (2) overemphasizes the need for "due process" safeguards within that forum, and (3) overstates protections afforded to the defendant by Connecticut's "strategic lawsuits against public participation" (anti-SLAPP) statute, General Statutes § 52-196a. Second, the defendant's statements might be covered by an absolute immunity of a different strain. Specifically, although there are no clear precedents in this state, I believe that a public hearing on a special permit application before a town's planning and zoning commission may constitute a legislative proceeding, and, as such, comments made during and relevant to such a proceeding may be entitled to absolute immunity. Because that

issue has not been raised either in the trial court or in this court, however, that is an issue for another day.

I

The majority supports its conclusion that the public hearing on the plaintiff's special permit application was not a quasi-judicial proceeding in part by its description of the plaintiff's ability to refute the defendant's statement before the commission as a "limited opportunity . . . ." Although I conclude that this opportunity is not a sufficient procedural safeguard to assist the defendant in demonstrating that the commission undertakes a quasi-judicial function, I believe that the majority understates this opportunity.

Proceedings before such local agencies are not known for formality. The defendant made her statement during a period devoted to public comment on the plaintiff's application to, among other things, relocate a sewer line that ran through his property and serviced a number of "up-line users." A number of people, including the defendant, spoke against the application because of how it would affect trees in the neighborhood. The majority notes that the "record is silent on whether the plaintiff attended the hearing." If he chose to attend, the plaintiff undoubtedly could have responded to the defendant's allegation that he had a "serious criminal past," including that he had "paid [more than] $40 million in fines to the [Securities and Exchange Commission]." (Internal quotation marks omitted.) In fact, the plaintiff's engineer, Anthony D'Andrea, who did attend the hearing, responded to a number of assertions made by those who opposed the application. And, even if the plaintiff was not at the hearing, there does not appear to be anything that would have prevented him from correcting the record after the hearing. In fact, we know, as the majority observes, that the commission "adjourned the hearing and tabl[ed] the decision on

whether to approve the application until the plaintiff or his representatives provided it with the clarifications and information that it had requested." (Internal quotation marks omitted.) Surely, with that requested information, the plaintiff could have, if he wished, provided the commission with information explaining that the defendant's statement was false. Specifically, he could have informed the commission, as he informed the trial court in his memorandum of law in support of his motion to strike the defendant's special defenses, that, in an action entitled *Securities & Exchange Commission* v. *ICP Asset Management, LLC*, United States District Court, Docket No. 10 Civ. 4791 (LAK) (S.D.N.Y. September 6, 2012), he personally was assessed only a "modest" civil fine of approximately $487,000.[1]

Although it cannot be disputed that it was not the commission's responsibility, or perhaps not within its jurisdiction, to adjudicate the truthfulness of the defendant's statement about the plaintiff's supposed criminal

[1] In support of his memorandum of law in support of his motion to strike, the plaintiff attached as an exhibit the final judgment in *Securities & Exchange Commission* v. *ICP Asset Management, LLC*, supra, United States District Court, Docket No. 10 Civ. 4791 (LAK). He also provided this exhibit in the appendix to his brief to this court. Pursuant to that judgment, the plaintiff was found liable for disgorgement in the amount of $797,337, prejudgment interest in the amount of $215,045, and a civil penalty in the amount of $487,618, for a total amount due of $1,500,000. As to the other defendants in that federal securities case, the final judgment held ICP Asset Management, LLC, and Institutional Credit Partners, LLC, liable, jointly and severally, for disgorgement in the amount of $13,916,005 and prejudgment interest of $3,709,028; held ICP Asset Management, LLC, liable for a civil penalty in the amount of $650,000; and held ICP Securities, LLC, liable for disgorgement in the amount of $1,637,581, prejudgment interest in the amount of $301,893, and a civil penalty in the amount of $1,939,474. In total, the final judgment required the defendants to pay $23,653,981. The plaintiff in the present case, Priore, consented to the entry of this final judgment on behalf of himself and on behalf of all other defendants as president/CEO of those companies. This consent judgment was specifically limited to resolving civil liability. This court is not aware, however, of any criminal action brought in relation to this case.

past, this "limited opportunity" for the plaintiff to respond could have helped ensure the accuracy of the information placed before the commission in two ways: (1) The plaintiff, who had the greatest interest in making sure that the commission received accurate information to reach the right result on his application, could have corrected the record, and (2) once the plaintiff disputed or refuted the statement, the agency could have investigated the veracity of the statement at issue if it considered it important to a determination of the plaintiff's special permit application.

The majority disregards the benefit of this opportunity, I believe in large part, because of its overreliance on what it labels the lack of adequate "due process" safeguards before the commission. I agree that procedural safeguards are necessary to promote the reliability of the result before the commission, but the kind of due process rights contemplated by the majority is not implicated in the present case. The majority appears to contend that, for a planning and zoning commission proceeding to be eligible for quasi-judicial status, when a witness makes a statement before that commission, there must be sufficient procedural safeguards to give the plaintiff an opportunity not only to rebut the statement but for the agency to determine the statement's veracity so as to protect the plaintiff's reputation—in essence, a name-clearing hearing. The plaintiff, however, has no due process right to a determination of the accuracy of the statement of a witness who was not a state actor before a planning and zoning commission.

More is required to establish a due process violation than a simple claim of defamation: "[When] a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . [T]he remedy mandated by the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment is an opportunity to refute

the charge. . . . The purpose of such notice and hearing is to provide the person an opportunity to clear his name . . . .'' (Citation omitted; internal quotation marks omitted.) *Hunt* v. *Prior*, 236 Conn. 421, 441, 673 A.2d 514 (1996). ''However, under *Paul* v. *Davis*, [424 U.S. 693, 710–12, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)], government acts defaming an individual implicate a liberty interest only [when] the individual suffers a related alteration of his legal status or deprivation of a right recognized under state law.'' *Hunt* v. *Prior*, supra, 441; see also *Singhaviroj* v. *Board of Education*, 301 Conn. 1, 6 n.5, 17 A.3d 1013 (2011) (''[s]uch an action is referred to as a stigma-plus claim; it involves an injury to one's reputation (the stigma) coupled with the deprivation of some tangible interest or property right (the plus), without adequate process'' (internal quotation marks omitted)).

In the present case, there is no allegation that the government did anything to the plaintiff to place his ''good name, reputation, honor, or integrity . . . at stake . . . .'' (Internal quotation marks omitted.) *Hunt* v. *Prior*, supra, 236 Conn. 441. The commission is not even a party to the case. Rather, the plaintiff complains that the defendant, a member of the public and not a government actor, referred to his '' 'criminal past' '' at a public meeting. Even putting aside that there is no state action involved, to make out a due process claim, not only would the plaintiff have to demonstrate that he was injured in some way beyond being defamed (i.e., a stigma), but he also would have to demonstrate the deprivation of some tangible interest or property right (i.e., a plus). In the present case, the plaintiff alleges only that the defendant made the allegedly false statement ''intentionally . . . to cause damage to [his] reputation'' and that this statement did in fact ''cause reputational damage . . . in his profession . . . .'' Although it is true that ''a liberty interest is implicated

when a plaintiff can show both harm to his reputation and serious damage to his prospects for future employment in his profession"; (internal quotation marks omitted) *Hunt* v. *Prior*, supra, 441; the plaintiff in the present case merely alleges harm to his professional reputation, not any "serious damage to his prospects for future employment in his profession . . . ." (Internal quotation marks omitted.) Id. Even if these allegations were sufficient to establish a stigma-plus claim, the plaintiff alleges harm to his professional reputation only as part of his damages; he does not assert a due process claim. Thus, although I agree with the majority that we must consider procedural safeguards when determining whether a proceeding is quasi-judicial, the majority's reliance on due process principles erroneously heightens the defendant's burden in establishing immunity from suit because the plaintiff has not alleged harm by a state actor or asserted a stigma-plus claim.

Finally, I also believe that the majority overstates the protections afforded to the defendant by our anti-SLAPP statute. The majority contends that § 52-196a "appl[ies] in precisely this type of situation to ensure speech [is] not chilled." In my view, § 52-196a does little to protect the defendant's first amendment rights, as it does not provide the defendant with any new or additional substantive rights. Compare *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 696, 189 A.3d 79 (2018) ("when the legislature intends to confer immunity from liability or from suit, it does so in distinctive and unmistakable terms"), with General Statutes § 52-196a. Rather, the statute merely creates a procedure by which the defendant may have her first amendment defense considered in an expedited fashion, as early as possible in the litigation, before the defendant is burdened by the cost of discovery. See General Statutes § 52-196a (b). It still requires litigation, albeit expedited, to determine

whether the first amendment protects the defendant's statements. See General Statutes § 52-196a (e) (1). Moreover, the special motion to dismiss permitted under § 52-196a is easily defeated under a probable cause standard. See General Statutes § 52-196a (e) (3). Thus, in my view, the anti-SLAPP statute does little to ameliorate the concern that lawsuits such as this one, brought against defendants for statements made in these proceedings, will discourage public participation before an agency such as the commission.

II

If a public hearing on a special permit application before a town's planning and zoning commission is not quasi-judicial, and I agree with the majority that the defendant has not established that it is, it may nonetheless very well constitute a legislative proceeding. Although Connecticut appellate courts have not addressed this issue, other jurisdictions have held that witnesses in a legislative proceeding are entitled to absolute immunity. These jurisdictions have applied different approaches to arrive at this conclusion.

For example, some state courts have held that, under their common law, the litigation privilege extends to both quasi-judicial and legislative proceedings so that witness comments made in a legislative proceeding are entitled to absolute immunity. See, e.g., *In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1310–11 (8th Cir. 1985) (granting defendant absolute immunity for statements made in letter submitted to congressional subcommittee, explaining that, under common law of New York and Tennessee, "[a] witness actually testifying before a legislative committee, like a witness testifying in court, enjoys absolute immunity from liability for defamation for statements made that are pertinent to the subject of inquiry or responsive to questions asked"); *Fiore* v. *Rogero*, 144 So. 2d 99, 102

(Fla. App. 1962) (one who testifies before legislative body or committee is "generally subject to the same rules of privilege accorded similar testimony in judicial proceedings"); *Erickson* v. *Marsh & McLennan Co.*, 117 N.J. 539, 563, 569 A.2d 793 (1990) ("[a] statement made in the course of judicial, administrative, or legislative proceedings is absolutely privileged and wholly immune from liability").

Other courts have held that the litigation privilege extends to witness statements made in a legislative proceeding because their state follows the Restatement (Second) of Torts. See, e.g., *Beverly Enterprises, Inc.* v. *Trump*, 1 F. Supp. 2d 489, 493 (W.D. Pa. 1998) (The defendant was entitled to absolute immunity for unsworn statements she made at a town hall meeting because "Pennsylvania has adopted section 590A of the Restatement (Second) of Torts as its common law. . . . That section provides, 'A witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding.' . . . This testimonial immunity is absolute and similar in all respects to that afforded a witness in a judicial proceeding." (Citations omitted.)), aff'd, 182 F.3d 183 (3d Cir. 1999), cert. denied, 528 U.S. 1078, 120 S. Ct. 795, 145 L. Ed. 2d 670 (2000); *Burns* v. *Davis*, 196 Ariz. 155, 162, 993 P.2d 1119 (App. 1999) ("the Restatement [(Second) of Torts] extends absolute immunity in limited specified situations to judicial officers, attorneys at law, parties to judicial proceedings, witnesses in judicial proceedings, jurors, legislators, [and] witnesses in legislative proceedings"), review denied, Arizona Supreme Court, Docket No. CV-99-0365-PR (February 8, 2000). The defendant, however, in the present case does not ask this court to extend our litigation privilege to statements made in and relevant to legislative proceedings; nor

does she ask that this court adopt provisions of the Restatement (Second) of Torts.

Finally, another avenue by which state courts have granted absolute immunity to witness statements made in a legislative proceeding is by extending the scope of the legislative privilege. In Connecticut, this privilege applies to certain statements made by legislators in legislative proceedings. See, e.g., *Office of Governor* v. *Select Committee of Inquiry*, 271 Conn. 540, 563, 858 A.2d 709 (2004); *Traylor* v. *Gerratana*, 148 Conn. App. 605, 611–12, 88 A.3d 552, cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied, 312 Conn. 902, 112 A.3d 778, cert. denied, 574 U.S. 978, 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014). Other state courts have held that this privilege extends to witnesses, not just the legislators. See, e.g., *Arlington Heights National Bank* v. *Arlington Heights Federal Savings & Loan Assn.*, 37 Ill. 2d 546, 549, 229 N.E.2d 514 (1967) ("Traditionally, the members of legislative and judicial bodies have been accorded absolute privilege in the performance of their official acts and duties . . . and it is clear that an individual citizen is similarly privileged to some extent in his appearances and actions before these bodies." (Citations omitted.)). If a witness enjoys absolute immunity for statements made before a committee of the legislature, I would have trouble distinguishing the defendant in the present case from any other legislative witness, as she petitioned her local government to consider information that, in her view, was important when acting on the plaintiff's special permit application. See *Beverly Enterprises, Inc.* v. *Trump*, supra, 1 F. Supp. 2d 493 ("[A] legislative proceeding [is not] limited to an official hearing called by a legislative body, or by duly formed committees of that body, where witnesses are compelled to appear and testify under oath. . . . [T]he definition of a legislative proceeding is broad enough to encompass proceedings—including informal

fact-finding, information gathering, or investigative activities—that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation." (Citations omitted.)); *J. D. Construction Corp.* v. *Isaacs*, 51 N.J. 263, 271, 239 A.2d 657 (1968) (absolute immunity may be accorded statements made before municipal governing body hearing zoning appeal depending "on individual circumstances and the . . . pertinency and relevancy of remarks or contentions to the questions legitimately before the governing body"). The defendant, however, has not claimed that the legislative privilege applies in the present case.

Thus, it remains an issue for this court to decide, another day, whether a public hearing on a special permit application before a town's planning and zoning commission constitutes a legislative proceeding and, if so, whether absolute immunity applies to public statements made at such a proceeding.

Accordingly, I concur in part.

STATE OF CONNECTICUT *v.* SHOTA MEKOSHVILI (SC 20442)

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

Syllabus

Convicted of the crime of murder in connection with the stabbing death of the victim, the defendant appealed. The defendant had hailed a taxicab that the victim was driving, and, after the victim drove the defendant to his destination, the defendant stabbed the victim repeatedly, robbed him, and fled the scene. At trial, the defendant admitted that he had stabbed the victim after accepting a ride from him but claimed that he had acted in self-defense. The defendant specifically testified that the victim had made a romantic advance toward him, a fight ensued, and, during the struggle, the victim took out a knife and began to attack the defendant but that the defendant wrestled the knife away and stabbed the victim repeatedly. The state presented abundant evidence from

which the jury reasonably could have concluded either that the defendant had fabricated various aspects of his story or that he had used more force than was necessary to defend himself against the smaller and older victim. At the conclusion of the trial, defense counsel requested that the trial court give a specific unanimity instruction that the jurors must agree unanimously as to which factor of this state's four factor self-defense test the state had disproved. The court denied counsel's request and, instead, instructed the jury on the law of self-defense largely in accordance with this state's model criminal jury instructions. The jury unanimously found the defendant guilty of murder, thereby rejecting his claim of self-defense, and the trial court rendered judgment in accordance with the jury's verdict. The Appellate Court affirmed the trial court's judgment, concluding that, pursuant to this court's prior decisions, although a jury must reject a claim of self-defense unanimously before it may find a defendant guilty, there is generally no requirement that jurors agree on which of the self-defense factors the state has disproven. On the granting of certification, the defendant appealed to this court, claiming that this court should revisit its precedent and conclude that, in order to reject a claim of self-defense, the jurors must unanimously agree as to which factor or factors of that defense the state has disproven beyond a reasonable doubt. The defendant also claimed that a specific unanimity instruction is warranted, even for a factually straightforward self-defense claim, such as his claim, in light of the complexity of the model criminal jury instruction on self-defense. *Held*:

1. This court declined the defendant's invitation to adopt a rule requiring that, even in factually straightforward cases, jurors unanimously agree as to which factor or factors of the claim of self-defense the state has disproven, and the Appellate Court correctly concluded that a specific unanimity instruction on self-defense was not constitutionally required: having reviewed this court's prior decisions concerning the issue presented, which involved factually uncomplicated scenarios and distinct theories of self-defense or distinct statutory exceptions to the defense of self-defense, this court determined that, in the ordinary case, the constitutional requirement that the jury agree unanimously that the state has established each element of the crime charged beyond a reasonable doubt did not apply to the defense of self-defense, and, accordingly, a jury need not be unanimous as to each component of a defendant's claim of self-defense; moreover, the defendant's argument that specific unanimity is constitutionally required rested on a flawed analogy between a crime and a justification for otherwise criminal conduct, such as self-defense, insofar as the defendant asserted that, just as jurors must agree that the state has proven each element of a crime beyond a reasonable doubt, the state also must persuade jurors as to which element of self-defense it has disproven, because a crime is distinct from a defense in ways that make the unanimity requirement inapplicable

to the latter; in the present case, regardless of the specific conclusion drawn by each juror, the state persuaded every juror of the fact that the defendant did not reasonably believe that the degree of force he used was necessary to protect himself from the victim, and there was no reason why the jurors, having rejected one or more aspects of the defendant's account of the events surrounding the stabbing of the victim and having unanimously concluded, beyond a reasonable doubt, that the defendant killed the victim without adequate justification, were required to also reach a further consensus about what components of his claim of self-defense failed.

2. The defendant could not prevail on his claim that a specific unanimity instruction was warranted in his uncomplicated case on the ground that Connecticut's model criminal jury instruction on self-defense was so convoluted that jurors could not readily grasp and apply the law of self-defense: there was no reasonable possibility that the defendant's conviction resulted from the jurors' misunderstanding of the self-defense instructions, as there was more than an adequate basis in the record for the jurors to find that every aspect of the defendant's story that he had acted in self-defense was implausible; moreover, to the extent that the model instructions were unnecessarily confusing, the most reasonable solution was for the Judicial Branch's Criminal Jury Instruction Committee to clarify and simplify those instructions, rather than for this court to impose a novel constitutional requirement, especially insofar as the model instructions arguably provided the defendant with more protection than he was constitutionally entitled to.

(*One justice concurring separately*)

Argued November 15, 2021—officially released September 13, 2022

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *Blawie*, *J.*; verdict and judgment of guilty, from which the defendant appealed; thereafter, the Appellate Court, *Lavine*, *Devlin* and *Beach*, *Js.*, affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Norman A. Pattis, for the appellant (defendant).

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's

attorney, and *James Bernardi*, supervisory assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The question presented by this appeal is whether jurors, in order to reject a criminal defendant's claim of self-defense, must unanimously agree as to which component or factor of that defense the state has disproven beyond a reasonable doubt. The Appellate Court, which affirmed the murder conviction of the defendant, Shota Mekoshvili, answered that question in the negative. *State* v. *Mekoshvili*, 195 Conn. App. 154, 164, 170, 223 A.3d 834 (2020). The Appellate Court read this court's precedents in *State* v. *Bailey*, 209 Conn. 322, 551 A.2d 1206 (1988), and *State* v. *Diggs*, 219 Conn. 295, 592 A.2d 949 (1991), to mean that, although a jury must reject a self-defense claim unanimously before it may find a defendant guilty, there is generally no requirement that jurors agree on which specific factor of Connecticut's four factor test[1] for self-defense the state has disproven. See *State* v. *Mekoshvili*, supra, 167–70. We agree and, accordingly, affirm the judgment of the Appellate Court.

I

The record and the opinion of the Appellate Court set forth the relevant facts that the jury reasonably

[1] For an act of violence to be justified as self-defense, (1) the defendant must actually have believed that the victim was using or was about to use physical force against him, (2) a reasonable person, viewing all the circumstances from the defendant's point of view, would have shared that belief, (3) the defendant must actually have believed that the degree of force he used was necessary for defending himself or herself, and (4) a reasonable person, viewing all the circumstances from the defendant's point of view, also would have shared that belief. See Connecticut Criminal Jury Instructions 2.8-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 7, 2022); see also General Statutes § 53a-19 (a). When the defendant uses deadly force in purported self-defense, then he must actually and reasonably believe that the victim was "using or about to use deadly physical force" or was "inflicting or about to inflict great bodily harm." General Statutes § 53a-19 (a).

could have found. See id., 156–57, 165–66. Only a brief recitation is necessary for our purposes. In 2014, the victim, Mohammed Kamal, and his business partner operated a taxicab business. The victim typically worked the night shift. "On the evening of Tuesday, August 26, 2014, the victim left home for his shift in the taxi between 9 and 10 p.m. At approximately 12:30 a.m. on August 27, the victim briefly returned home and told his wife that he had forgotten to take the money for his share of the [$475 weekly taxi company] fee that he needed to leave in the taxi; he said he also planned to send some money to his family in Bangladesh. The victim's wife observed him take money out of an armoire, after which the victim returned to his shift. At approximately 3 a.m., the defendant hailed the victim's taxi and directed the victim to drive to Doolittle Road in Stamford. While on Doolittle Road, the defendant began to stab the victim repeatedly. At some point, the defendant opened the glove compartment, stole [more than $400] that the victim had set aside for the taxi fee and for his family in Bangladesh, took the victim's credit card, and fled the scene toward the defendant's apartment." Id., 156–57.

Following his confrontation with the victim, the defendant called his friend, Eugene Goldshteyn, and offered Goldshteyn $100 to come pick him up immediately. The defendant later told Goldshteyn that he had been injured and bloodied during an attempted burglary and that he had stabbed the homeowner repeatedly to silence him when the homeowner would not "shut up . . . ." No other local stabbings were reported that evening.

On the morning of August 27, 2014, the Stamford police found the victim's body lying on the lawn at 150 Doolittle Road in Stamford. An autopsy revealed that the victim had been stabbed 127 times. The victim's death resulted from this stabbing, which included deep

stab wounds to his lung and jugular vein, and also numerous cuts to his face. The police also discovered the taxicab in a wooded area across the street. The victim's blood was on the interior of the taxicab. The glove compartment was ajar, and there was no money inside.

The defendant testified in his own defense at trial. He testified that, sometime around 3 a.m. that morning, he accepted a ride home from the victim. He admitted that, after the taxi came to a stop on Doolittle Road, he stabbed the victim repeatedly and then "left [the victim] behind at the crime scene covered in blood . . . ."

The defendant claimed, however, that he had acted in self-defense and without any intent to kill the victim. The Appellate Court summarized the defendant's account of the events that transpired on the night of the killing as follows. "The victim invited [the defendant] to ride along for free while he picked up another fare. The victim then instructed him to move into the front seat to allow the paying fare to ride in the back. At some point, the victim stopped the car and indicated to the defendant that he wanted to 'have some fun.' The victim subsequently grabbed the defendant's genitalia, and the defendant reacted by punching the victim in the face. The victim then grabbed a knife and began attacking the defendant. A struggle between them ensued, and the victim threatened to kill the defendant. The defendant managed to wrestle the knife away from the victim and stabbed him repeatedly." *State* v. *Mekoshvili*, supra, 195 Conn. App. 165–66. For its part, the state presented abundant evidence from which the jurors reasonably could have concluded either that the defendant had fabricated various aspects of his story or that, even if the story were true, he had used more force than was necessary to defend himself from the victim, who was substantially smaller and older than the defendant.

The following procedural history is relevant to the defendant's claim. The state charged the defendant with murder in violation of General Statutes § 53a-54a (a). At the conclusion of the trial, defense counsel filed a request to charge that would have required that the trial court give a specific unanimity instruction, that is, an instruction that the jurors must agree unanimously as to which factor of our state's four factor self-defense test the state had disproved. The trial court held a hearing on the matter and denied the defendant's request. Instead, the court instructed the jury as to the law of self-defense largely in accordance with our state's model jury charge.[2] See Connecticut Criminal Jury Instructions 2.8-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 7, 2022).

After less than three days of deliberations, the jury unanimously found the defendant guilty of murder,

[2] In relevant part, the trial court instructed the jury that "[y]ou must find that the defendant did not act in self-defense if you find any one of the following . . . .

"The state has proved beyond a reasonable doubt that, when the defendant used physical force, he did not actually [believe] that [the victim] was using or about to use physical force against him. If you have found that the force used by the defendant was deadly physical force, then the state must prove that the defendant did not actually believe that [the victim] (a) was using or about to use deadly physical force against him or (b) was inflicting or about to inflict great bodily harm upon him.

"Or the state has proven beyond a reasonable doubt that the defendant's actual belief concerning the degree of force being, or about to be, used against him was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, could not have shared that belief.

"Or the state has proved beyond a reasonable doubt that, when the defendant used physical force to defend himself against [the victim], the defendant did not actually believe that the degree of force he used was necessary for that purpose. Here, again, as with the first requirement, an actual belief is an honest, sincere belief.

"Or the state has proven beyond a reasonable doubt that, if the defendant did actually believe that the degree of force he used to defend himself against [the victim] was necessary for that purpose, that belief was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, would not have shared that belief."

thereby rejecting his claim of self-defense. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of sixty years of incarceration. The Appellate Court affirmed the trial court's judgment, rejecting, among other claims, the defendant's argument that the trial court had committed prejudicial error and violated his constitutional rights by failing to give the requested specific unanimity instruction on self-defense. See *State* v. *Mekoshvili*, supra, 195 Conn. App. 164, 167–70. This certified appeal followed.[3]

II

The defendant invites us to depart from our precedents and adopt a rule whereby, even in a factually straightforward case such as this one, jurors would have to agree unanimously as to which factor of a self-defense claim the state has disproven. He contends that the complexity of Connecticut's self-defense jury instructions warrants such a novel rule. We decline the invitation.

A

The following well established principles frame our analysis. "An improper instruction on a defense, like an improper instruction on an element of an offense,

[3] We granted certification, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court had properly denied the defendant's request for a jury instruction that would require the jury to reach a verdict of not guilty unless it was unanimous in its conclusion that the state disproved *each element* of the defendant's self-defense claim beyond a reasonable doubt?" (Emphasis added.) *State* v. *Mekoshvili*, 334 Conn. 923, 223 A.3d 60 (2020). Both parties agree, and we concur, that the certified question misstates the law of self-defense. The state is not required to disprove each component of self-defense. We therefore restate the question to properly read: "Did the Appellate Court correctly conclude that the jury did not need to be unanimous in its conclusion as to which particular component or components of the defense the state had disproved." See, e.g., *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 174–75 n.3, 243 A.3d 1163 (2020) (this court may restate certified question).

is of constitutional dimension. . . . [T]he standard of review to be applied to the defendant's constitutional claim is whether it is reasonably possible that the jury was misled." (Internal quotation marks omitted.) *State* v. *Clark*, 264 Conn. 723, 729, 826 A.2d 128 (2003). The constitutional requirements that inform those instructions are a matter of law that we review de novo. See, e.g., *State* v. *David N.J.*, 301 Conn. 122, 158, 19 A.3d 646 (2011).

Before a defendant may be found guilty of a criminal offense by a jury, the sixth and fourteenth amendments to the federal constitution require that the jury agree unanimously that the state has established each element of the charged crime beyond a reasonable doubt. See *Ramos* v. *Louisiana*, U.S. , 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020) (unanimity requirement applies to state criminal proceedings); see also *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) (state must establish each element of crime beyond reasonable doubt). However, the United States Supreme Court has never identified a constitutional requirement as to unanimity on the elements or components of a defense.[4] See, e.g., 6 W. LaFave et al., Criminal Procedure (4th Ed. 2015) § 22.1 (e), p. 26.

Although the United States Supreme Court has not spoken on the question, we do not write on a blank slate. In *State* v. *Bailey*, supra, 209 Conn. 322, and *State* v. *Diggs*, supra, 219 Conn. 295, this court considered whether those same constitutional principles require that a jury not only reject a self-defense claim unanimously, but also agree as to which specific component

[4] Although, at times, we have spoken loosely of the "elements" of a self-defense claim; e.g., *State* v. *Singleton*, 292 Conn. 734, 747, 974 A.2d 679 (2009); the different components of a justification defense are not, strictly speaking, essential elements. Rather, they are more properly thought of as "special triggering circumstances . . . ." (Internal quotation marks omitted.) Id., 749.

or circumstance of the defense the state has disproven beyond a reasonable doubt.

In *Bailey*, the defendant claimed, inter alia, that "the trial court [had] erred in . . . failing to instruct the jury that it had to agree unanimously [on] which of the alternative ways the state had disproven the defendant's claim of self-defense . . . ." *State* v. *Bailey*, supra, 209 Conn. 328. Recognizing the "fundamental distinctions between proof of liability and disproof of self-defense"; id., 335; this court expressed "serious reservation[s] about the applicability of the unanimity requirement to [the components of] self-defense . . . ." Id., 336. This court stopped short of holding "that a specific unanimity charge would never be required for claims of self-defense," however, because it was clear that the facts of *Bailey* did not warrant such an instruction.[5] Id.

[5] Specifically, *Bailey* did not involve "separate incidents implicating alternative or *conceptually distinct* bases of liability"; (emphasis added; internal quotation marks omitted) *State* v. *Bailey*, supra, 209 Conn. 336; nor was it a case in which "the complexity of the evidence or other factors create[d] a genuine danger of jur[or] confusion." (Internal quotation marks omitted.) Id., 337.

We note that, at the time that *Bailey* was decided, this court recognized that a count may be impermissibly duplicitous if it charges the defendant with violating more than one provision of a criminal statute (multiple elements), but we had not yet recognized that there is a potential duplicity problem when a single count charges a defendant with multiple instances of violating a single statutory provision (multiple instances). The defendant in *Bailey* asked this court to resolve his challenge to the trial court's self-defense instructions pursuant to the then prevailing federal standard for multiple elements cases, the so-called *Gipson* test; see id., 333; see also *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977); under which a count is not duplicitous if it charges a defendant with violating a statute that provides that the crime may be committed in one of several itemized ways but those ways of committing the crime are not conceptually distinct. See *United States* v. *Gipson*, supra, 456–59. We recognize that the United States Supreme Court has since held that the *Gipson* test, standing alone, is too indeterminate to resolve a multiple elements challenge. See *Schad* v. *Arizona*, 501 U.S. 624, 635, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality opinion). Although, in *Bailey*, this court, at times, used the "conceptually distinct" language drawn from *Gipson*; *State* v. *Bailey*, supra, 209 Conn. 336; we do not believe that the outcome of that case would have been any

Several years after *Bailey*, this court again confronted the question of whether, and when, a trial court should instruct a jury that it must unanimously agree as to the basis for rejecting a claim of self-defense, but again did not definitively resolve this issue. See *State* v. *Diggs*, supra, 219 Conn. 301–302. This court reiterated its "serious reservation[s] about the applicability of the [specific] unanimity requirement to self-defense"; (internal quotation marks omitted) id.; observing that it was unaware of any authority that supported the defendant's claim that a specific unanimity instruction was required under the type of factual scenario presented by that case. Id., 302. In rejecting the defendant's claim, this court emphasized that "the encounter between the victim and the defendant was a single incident, which was brief and took place within a small area. [Although] the testimony bearing on the defendant's claim of self-defense varied somewhat from witness to witness, it certainly was not complicated and the trial was relatively short. [This court thus did] not perceive in the record a complexity of evidence or any other factors creating jury confusion and a consequent need for a specific unanimity charge." Id.

This court followed a similar path in *State* v. *Rivera*, 221 Conn. 58, 602 A.2d 571 (1992), relying on *Bailey* and *Diggs* to reject a specific unanimity instruction with respect to self-defense in a factually uncompli-

different under *Schad*, which held that jurors need not be unanimous as to a single theory of murder, so long as they all agree that first degree murder was committed, whether by premeditation or by felony murder. See *Schad* v. *Arizona*, supra, 630–45. Similarly, as we explain herein, jurors need not be unanimous as to which specific factor of a self-defense justification the state has disproven, so long as they all agree that self-defense was disproven beyond a reasonable doubt. And, in addition, this court ultimately concluded in *Bailey* that *Gipson* did not speak to the question at issue, namely, whether specific unanimity is required in the context of a self-defense justification. See *State* v. *Bailey*, supra, 334–35.

cated case.[6] See id., 76. The Appellate Court also has rejected the need for a specific unanimity instruction with respect to a self-defense claim. See *State* v. *Chace*, 43 Conn. App. 205, 209 n.4, 682 A.2d 143 (1996) (applying *Bailey* and *Diggs*). The handful of sister state courts that have considered the question likewise have held that no specific unanimity instruction is necessary, even when, as in those Connecticut cases, distinct theories of self-defense or distinct statutory exceptions to the self-defense justification were at issue.[7]

Although we are not prepared to say that a specific unanimity instruction could never be required for a self-defense claim; see footnote 12 of this opinion and

[6] For a third time, however, this court declined to rule out the possibility that a specific unanimity charge might be required for more factually complex self-defense claims. See *State* v. *Rivera*, supra, 221 Conn. 76.

[7] See, e.g., *People* v. *Mosely*, 488 P.3d 1074, 1078 (Colo. 2021) ("[d]ue [p]rocess [d]oes [n]ot [r]equire [j]ury [u]nanimity on the [s]pecific [r]eason [s]elf-[d]efense [w]as [d]isproven [b]eyond a [r]easonable [d]oubt"); *Commonwealth* v. *Humphries*, Docket No. 15-P-1018, 2017 WL 118085, *3 (Mass. App. January 12, 2017) (decision without published opinion, 91 Mass. App. 1101, 75 N.E.3d 1148) ("[t]here is no requirement that the jury be unanimous as to how the absence of self-defense was proved"), review denied, 477 Mass. 1104, 88 N.E.3d 1166 (2017); *State* v. *Macchia*, Docket No. A-5473-17, 2021 WL 4515342, *11 (N.J. Super. App. Div. October 4, 2021) ("nothing in our jurisprudence suggests that the jury's findings need be unanimous on how the [s]tate disproves self-defense so long as the jury unanimously agrees that the [s]tate disproved self-defense beyond a reasonable doubt"), cert. granted, 250 N.J. 548, 274 A.3d 1218 (2022); *Rodriguez* v. *State*, 212 S.W.3d 819, 821 (Tex. App. 2006) ("To ensure that the [s]tate's burden of proof is met, the jurors must unanimously agree that the defendant's conduct was not justified by self-defense. It is not necessary, however, that they unanimously agree as to why."); *Harrod* v. *State*, 203 S.W.3d 622, 625 n.2 (Tex. App. 2006) ("[w]e have found no case that has extended the law of unanimity to the negation of at least one element of self-defense"); see also, e.g., *State* v. *Mower*, Docket Nos. 41484-8-II, 41485-6-II, 2012 WL 3679593, *6 (Wn. App. August 28, 2012) (decision without published opinion, 170 Wn. App. 1016) (rejecting need for specific unanimity instruction with respect to medical authorization defense to marijuana growing charge and observing that "[the defendant] fail[ed] to cite any law requiring an instruction that the jury must be unanimous on which element of an affirmative defense has been proved or disproved"), review denied, 176 Wn. 2d 1015, 297 P.3d 707 (2013).

accompanying text; today, we definitively answer the question that *Bailey* and subsequent cases did not have to answer directly and hold that, in the ordinary case, a criminal defendant's constitutional right to unanimity does not apply to the defense of self-defense, and thus the jury was not required to be unanimous as to each component of the defendant's claim of self-defense. The defendant's argument that specific unanimity is required rests on an analogy between a crime, such as murder, and a justification for otherwise criminal conduct, such as self-defense. He contends that, just as jurors must agree that the state has proven each essential element of the crime beyond a reasonable doubt, the state also must persuade jurors as to which of the "elements" of self-defense it has disproven. This analogy fails for at least three reasons, which boil down to the fact that a crime, to which the right of unanimity attaches, is distinct and different from a defense in ways that make the unanimity requirement inapplicable.

First, as our sister state courts have recognized, the fact that criminal conduct was not justified, such as by self-defense, is more analogous, for unanimity purposes, to a finding that a single element of a crime was committed than to the crime itself. See, e.g., *People* v. *Mosely*, 488 P.3d 1074, 1080 (Colo. 2021). All of the statutory factors of the defense of self-defense[8]—that the act be one of defense, that it stem from an objectively and subjectively reasonable belief that the defen-

[8] General Statutes § 53a-19, which codifies our state's common law of self-defense; see, e.g., *State* v. *Havican*, 213 Conn. 593, 598, 569 A.2d 1089 (1990); provides in relevant part that "a person is justified in using reasonable physical force upon another person *to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose*; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." (Emphasis added.) General Statutes § 53a-19 (a).

dant or another is at imminent risk of physical force, that it be proportionate to that risk—simply summarize what it meant under the common law for the otherwise criminal use of force against another person to be deemed "reasonable." See, e.g., *State* v. *Terwilliger*, 314 Conn. 618, 654, 104 A.3d 638 (2014); see also, e.g., *Rodriguez* v. *State*, 212 S.W.3d 819, 821–22 (Tex. App. 2006) ("[e]ach of these reasons for rejecting [the defendant's] self-defense claim results in the same conclusion: [the defendant] was not justified in using deadly force under the circumstances and [was] therefore guilty of murder"). The various statutory components of a self-defense claim thus are not independently essential elements of a self-defense justification defense that must each be disproven. See footnote 4 of this opinion. Rather, those components are more accurately understood as merely "triggering circumstances"; (internal quotation marks omitted) *State* v. *Singleton*, 292 Conn. 734, 749, 974 A.2d 679 (2009); or "factors relevant to a determination [of] whether the defendant acted in self-defense." (Internal quotation marks omitted.) *Commonwealth* v. *Humphries*, Docket No. 15-P-1018, 2017 WL 118085, *3 (Mass. App. January 12, 2017) (decision without published opinion, 91 Mass. App. 1101, 75 N.E.3d 1148), review denied, 477 Mass. 1104, 88 N.E.3d 1166 (2017).

For the same reason, just as jurors need not agree as to the specific details by which the state proves each element of a charged crime, they need not agree as to the specific factors or triggering circumstances by which it disproves a claim of self-defense. For most crimes,[9] the state must persuade every juror that the

[9] As we noted; see footnote 5 of this opinion; a different analysis for specific unanimity, not directly relevant to the present discussion, applies when a statute provides that a crime may be committed in one of several itemized ways. Under those circumstances, whether jurors must specifically agree as to which of the statutory subelements is satisfied is determined by the framework established in *Schad* v. *Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), and its progeny.

core components of the crime—the requisite mens rea, actus reus, and any required results or attendant circumstances—have been established, but there is no specific requirement that jurors unanimously agree on the underlying brute facts or even on the theory of the crime. As United States Supreme Court Justice Antonin Scalia explained in his concurring opinion in *Schad* v. *Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), "[t]hat rule is not only constitutional, it is probably indispensable in a system that requires a unanimous jury verdict to convict. When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her." Id., 650 (Scalia, J., concurring in part and concurring in the judgment). By the same token, once the state has successfully convinced the entire jury that the essence of a self-defense justification is lacking, that is, that the defendant's acts of violence were not a reasonable and justified use of physical force, the constitution does not require jurors to agree on why, specifically, the defendant's choice to engage in otherwise criminal conduct was not reasonable.

Some sister state courts have analogized the components of a self-defense justification to the brute facts that underlie an actus reus element of a crime. See, e.g., *Commonwealth* v. *Humphries*, supra, 2017 WL 118085, *2–3 ("[T]he five propositions [that define self-defense] are evidentiary in nature . . . . [I]t is the absence of self-defense, and not the theory thereof, that is subject to the reasonable doubt standard. . . . Requiring unanimity on the theory of self-defense would effectively require unanimity as to minute factual details within a single episode, a form of unanimity that we

have never required." (Citations omitted; internal quotation marks omitted.)). Other courts suggest that the components are more akin to motives, or the legal theories by which the state proves mens rea. See, e.g., *Harrod* v. *State*, 203 S.W.3d 622, 627 (Tex. App. 2006) ("Self-defense is not a specific actus reus element of the crime, or put another way, it is not which act [the defendant] committed to kill the decedent. Rather, self-defense is 'why' [the defendant] says he committed the actus reus of the crime . . . . As such, it is more analogous to the 'manner and means' by which the specific actus reus element was committed and on which the jury is not required to unanimously agree."). In either event, the state should not be held to a higher burden in disproving a self-defense claim than when establishing that the defendant committed the charged crime. See, e.g., *People* v. *Mosely*, supra, 488 P.3d 1081 ("[b]ecause a jury must unanimously agree only on whether, but not how, each element of a charged offense was established . . . we conclude that the jury need not unanimously agree on the means by which self-defense is disproved so long as the jury unanimously agrees that self-defense was disproven beyond a reasonable doubt" (emphasis omitted)).

The second reason that the defendant's analogy between a crime and a justification, such as self-defense, breaks down is that, whereas the state must prove every essential element of the crime, it need only disprove a single factor or triggering circumstance to overcome a claim of self-defense. In that sense, the state's burden with respect to a justification is the very opposite of its burden with respect to proving a crime. Even if jurors disagree as to the specific reason why the crime was not a justified act of self-defense, "the jury's guilty verdict established that [the jurors] all agreed that the prosecution disproved self-defense, and that is all due process requires." Id.

Indeed, because the lack of any one triggering circumstance causes a self-defense claim to fail, imposing a specific unanimity requirement as to self-defense would lead to absurd results. The same twelve jurors, applying essentially the same law to the same factual findings, could find the defendant not guilty in one jurisdiction but reject his self-defense claim in a different jurisdiction based solely on the arbitrary manner in which those different jurisdictions group and combine the various components or triggering circumstances that define self-defense. Surely, due process does not compel such an outcome.

The third key distinction between a crime and a justification defense that militates against the defendant's analogy is that, as a practical matter, the state has far less control over how the latter is presented to the jury. Whereas the state, in bringing a prosecution, must tell the "story" of the crime; *Old Chief* v. *United States*, 519 U.S. 172, 186–89, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); it is typically "the defendant [who] controls the shape and direction of a self-defense claim. The state must apply its proof to factual circumstances raised or illuminated by the defendant." *State* v. *Bailey*, supra, 209 Conn. 335. The state typically has little or no control over how detailed, how plausible, or how multifaceted a theory of self-defense will be in any particular case. For this reason, as we explained in *Bailey*, it would be particularly unreasonable to require more specific juror unanimity with respect to disproof of self-defense than with respect to proof of liability. "In occupying this inferior tactical position, the state would face a Herculean task if it were required to present for the jury's unanimous agreement a definitive set of facts, neatly synthesized in a unified theory, designed to explain why the defendant's conduct was not justified. . . . [T]he defendant's argument [that the state must disprove one specific factor to the jury's unanimous satisfaction]

. . . would lead to a practical incongruity in the state's role of disproving self-defense." Id., 335–36.

This court also emphasized in *Bailey* that a genuine instance of self-defense often will involve "a whirlwind of physical and emotional turbulence . . . that realistically could not be atomized into discrete, distinct events."[10] Id., 337. Particularly in a case such as this, in which the defendant's testimony provided the only eyewitness account of the events in question, the outcome hinges largely on the jury's resolution of highly subjective and speculative questions. The jury had to make determinations regarding the accuracy and credibility of the defendant's account, what exactly transpired on the night in question, what the defendant might have been thinking and feeling during each moment of the incident, and how a reasonable person would have reacted to the perceived events.

It is quite possible that all twelve jurors in the present case concluded that the defendant's testimony lacked credibility in numerous respects. Some jurors may have concluded that the defendant did not truly believe that the victim's actions warranted a lethal response. Some jurors may have concluded that the defendant's tale was an utter fabrication, concocted to conceal a premeditated robbery and murder. Still others may have concluded that he overreacted to a nonthreatening, romantic advance and then chose to terminate the ensuing struggle with excessive, deadly force. Many (or all) jurors may have reached more than one such conclu-

[10] The same thing could, of course, be said of many violent crimes that are not justified by self-defense. But the jury in such cases merely needs to agree that the defendant committed a crime such as assault or murder against a particular victim while motivated by a sufficiently voluntary mental state. In the context of self-defense, then, it makes little sense to require juror agreement on specific factual questions regarding the defendant's beliefs and internal mental process, such as whether he believed that the victim posed no risk or, rather, that the victim posed a risk but the defendant believed that the risk was insufficient to justify the degree of force used.

sion. In any case, the defendant's justification for the killing is lacking; the state has persuaded every juror of the one thing that is necessary to overcome a self-defense justification, namely, that the defendant did not actually hold a reasonable belief that the degree of force he used was necessary to protect himself from the victim. We see no reason why the jurors, having rejected one or more aspects of the defendant's account and having unanimously concluded, beyond a reasonable doubt, that he killed the victim without adequate justification, must also reach a further consensus on what components of the defense failed.

The unanimity requirement fosters thorough deliberations by forcing the entire jury to consider dissenting viewpoints before concluding that the state has established each essential element of a charged crime beyond a reasonable doubt. See, e.g., *United States* v. *Lopez*, 581 F.2d 1338, 1341 (9th Cir. 1978). The same holds true with respect to the question of whether the defendant's conduct was justified. We fail to see, however, how the purposes behind the unanimity requirement would be served by requiring a properly charged jury—one instructed that it had to be unanimous in its rejection of self-defense—to engage in further deliberations to reach unanimous consensus as to the specific brute facts and legal theories underlying the conclusion that the defendant's use of force was unjustified under the circumstances. To require jurors to agree on such details would result in "hung juries in cases in which the jurors actually agree [on] the defendant's guilt . . . ." (Internal quotation marks omitted.) J. Fayette, " 'If You Knew Him Like I Did, You'd Have Shot Him, Too . . .' A Survey of Alaska's Law of Self-Defense," 23 Alaska L. Rev. 171, 176 n.22 (2006).

We thus agree with the Appellate Court that a specific unanimity instruction was not required.[11] Although *Bai-*

[11] Because we conclude that a specific unanimity charge was unnecessary, we need not consider the state's argument that, in any event, the defendant's

ley, *Diggs*, and *Rivera* left open the possibility that a specific unanimity instruction might be required in exceptional cases involving multiple victims, multiple acts of self-defense, or other unusually complex factual scenarios, this is not such a case.[12]

B

The defendant contends, alternatively, that even factually straightforward self-defense claims, such as his, warrant a specific unanimity instruction because, although the case itself may not be complicated, Connecticut's model jury instructions are so convoluted that jurors cannot readily grasp and apply the law of self-defense. Although the state concedes that the model instructions are unnecessarily complex, it takes the position that adding a specific unanimity instruction would merely add to the complexity and compound juror confusion.

We do not think that there is any reasonable possibility that the defendant's conviction resulted from the

claim fails because the trial court did not sanction a nonunanimous verdict. See, e.g., *State* v. *Rivera*, supra, 221 Conn. 76 (because "the trial court did not sanction a nonunanimous verdict, a unanimity instruction on self-defense is not required").

[12] Although one sister state court has likewise left open the possibility that a specific unanimity self-defense instruction might be required in cases involving multiple victims or other complexities; see, e.g., *State* v. *Martinez*, Docket No. A-0655-09T4, 2013 WL 5989278, *15 (N.J. Super. App. Div. November 13, 2013), cert. denied, 217 N.J. 590, 91 A.3d 25 (2014); we are not aware of any case, and the parties have not cited any, in which such an instruction has been deemed necessary. We note as well that, in each of the cases that left open the possibility that a specific unanimity instruction might be necessary in complex self-defense scenarios, the court cited to cases in which a specific unanimity instruction on the *elements of a crime*, rather than a defense, was at issue. See, e.g., *State* v. *Bailey*, supra, 209 Conn. 337, 338, citing *United States* v. *Schiff*, 801 F.2d 108, 114–15 (2d Cir. 1986), cert. denied, 480 U.S. 945, 107 S. Ct. 1603, 94 L. Ed. 2d 789 (1987). As we explained in part II A of this opinion, however, fundamentally different principles apply to the elements of a crime than to the components of a justification, such as self-defense. Having now considered the question from this standpoint, although we still do not categorically preclude the possibility, we are hard-pressed to imagine any scenario in which juror unanimity as to the particular factors of a self-defense claim would be required.

jurors' misunderstanding of the self-defense instructions, which the trial court reiterated several times and in various ways. Indeed, there was more than an adequate basis in the record for the jurors to find that *every* aspect of the defendant's self-defense story was implausible. If the model jury instructions are unnecessarily confusing, then the most reasonable solution is to clarify and simplify those instructions, rather than to impose a novel constitutional requirement. We invite the Criminal Jury Instruction Committee of the Judicial Branch to adopt a more streamlined test for self-defense, consistent with the approach that many of our sister states and the federal courts have taken.[13]

The state also emphasizes that, as currently written, the model instructions actually provided the defendant with more protection than he was entitled to. Although we repeatedly have indicated that, at least in cases that are neither factually nor legally complex, there is no requirement that jurors agree as to the specific basis for rejecting a claim of self-defense, the model instructions nevertheless could be read to require specific unanimity. They provide in relevant part: "To meet [its] burden, the state need not disprove all four of the elements of . . . self-defense . . . . Instead, it can defeat the defense . . . by disproving *any one of the four elements* of self-defense beyond a reasonable doubt *to your unanimous satisfaction. . . . If you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense* . . . you must reject that defense and find the defendant guilty." (Emphasis added.) Connecticut Criminal Jury Instructions, supra, 2.8-1. The highlighted language could be read to suggest that jurors must agree

[13] See, e.g., United States Court of Appeals for the Fifth Circuit, Pattern Jury Instructions (Criminal Cases) 1.39 (2019) p. 59, available at https://www.lb5.uscourts.gov/juryinstructions/fifth/crim2019.pdf (last visited September 7, 2022).

that the state has disproved one particular element or component[14] of the defense beyond a reasonable doubt.[15] This is not constitutionally required. Accordingly, the Criminal Jury Instruction Committee also may wish to consider whether the instruction can be framed to more accurately characterize the state's burden of proof and the requirement that jurors agree only as to the ultimate conclusion that the state has disproved the defense of self-defense.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and McDONALD, D'AURIA, KAHN and KELLER, Js., concurred.

ECKER, J., concurring in the judgment. I concur in the judgment because I agree that the defendant, Shota Mekoshvili, was not entitled to a specific unanimity instruction materially different from the one used to instruct the jury in the present case. The instruction on self-defense, which spans fifteen pages of trial transcript, repeatedly reminds the jury that its findings must be unanimous, and includes the following directive: "You must remember that the defendant has no burden of proof whatsoever with respect to the defense of self-defense. Instead, it is the state that must prove beyond a reasonable doubt that the defendant did not act in self-defense if it is to prevail on the charge of murder or as to any of the lesser included offenses on which you will be instructed. *To meet this burden, the state need not disprove all four of the elements of self-defense. Instead, the state can defeat the defense of self-defense by disproving any one of the four elements*

[14] See footnote 4 of this opinion.

[15] Indeed, the state contends that, because the trial court gave the jury this instruction, the defendant did, in effect, receive the specific unanimity instruction that he requested.

of self-defense beyond a reasonable doubt to your unanimous satisfaction."[1] (Emphasis added.)

The phrasing of the italicized sentence is not perfect, because it could be construed to mean that the law requires only unanimous agreement that the state has disproved any one (but not necessarily the same one) element of the defense. In my view, however, the far more natural reading of the language is that, although the state need not disprove all four elements of the defense, the defense is not defeated unless the jury unanimously agrees that the state has disproved at least one of the four elements (any one of them, but the same one) beyond a reasonable doubt. This latter understanding provides the defendant with the substance of the specific unanimity charge he requested. See, e.g., *State* v. *Ledbetter*, 263 Conn. 1, 22, 818 A.2d 1 (2003) ("[The] refusal to charge in the exact words of a request . . . will not constitute error if the requested charge is given in substance. . . . Thus, when the substance of the requested instructions is fairly and substantially included in the trial court's jury charge, the trial court may properly refuse to give such instructions." (Internal quotation marks omitted.)).

Because the jury charge fairly and substantially informed the jury that it must unanimously agree that the state had disproved the same element of self-defense in conformance with the specific unanimity

[1] The requirement of jury unanimity was a consistent theme throughout the entire jury charge, and the jury was told by the trial court more than twenty times that it must reach a unanimous verdict with respect to the crimes charged and the defense of self-defense. In addition to the passage quoted in the text of this opinion, the trial court concluded its self-defense charge by again reminding the jury that it must reject the defense of self-defense "[i]f you unanimously find that the state has disproved beyond a reasonable doubt at least one of the elements of the defense . . . . If, on the other hand, you unanimously find that the state has not disproved beyond a reasonable doubt at least one of the elements of the defense . . . then . . . you must find the defendant not guilty . . . ."

instruction requested by the defendant,[2] I see no need to address whether such a unanimity instruction constitutionally was required. I therefore express no opinion on the constitutional analysis set forth in the majority opinion.

I respectfully concur in the judgment for these reasons.

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[2] The defendant requested the following specific unanimity instruction: "The state has the burden of disproving self-defenses, as I have instructed. To meet its burden as to this disproof, the state must persuade you unanimously as to any of the four elements on which I have instructed you. Thus, it is not enough for some of you to find the first element disproved while others find a different element disproved. Unless you unanimously agree that the state has disproven the same element, the state has failed to disprove self-defense." (Internal quotation marks omitted.) *State* v. *Mekoshvili*, 195 Conn. App. 154, 166 n.3, 223 A.3d 834 (2020).

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Murder; certification from Appellate Court; whether Appellate Court correctly concluded that trial court properly declined request for specific unanimity instruction on self-defense; whether, in ordinary case, constitutional requirement that jury agree unanimously that state has proven each element of charged crime beyond reasonable doubt applied to defendant's claim of self-defense; whether jury was required to be unanimous as to each component of defendant's claim of self-defense; claim that uncomplicated criminal case, such as defendant's case, warranted specific unanimity instruction on ground that Connecticut's model criminal jury instruction on self-defense was so convoluted that jurors could not readily grasp and apply law of self-defense.

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State *v.* Schimanski 435
Operating motor vehicle with suspended license; conditional plea of nolo contendere; certification from Appellate Court; whether Appellate Court improperly upheld trial court's denial of defendant's motion to dismiss charge of operating motor vehicle with suspended license; claim that Appellate Court incorrectly interpreted relevant statute (§ 14-227b (i) (1)) as extending suspension of person's license under statute beyond specified forty-five day period until motor vehicle operator subject to suspension has installed ignition interlock device; whether Appellate Court incorrectly determined that analysis and rationale of State *v.* Jacobson *(31 Conn. App. 797), and* State *v.* Cook *(36 Conn. App. 710), were inapplicable to present case; whether defendant's interpretation of § 14-227b (i) (1) would yield absurd result.*

State *v.* Smith 229
Robbery first degree; conspiracy to commit robbery first degree; assault first degree; arson second degree; conspiracy to commit arson second degree; attempt to commit murder; conspiracy to commit murder; larceny third degree; interfering with officer; claim that trial court improperly denied defendant's motion to suppress evidence discovered during search of his cell phone and evidence obtained from his cell phone provider; whether warrants authorizing searches were supported

by probable cause; whether warrants were sufficiently particular to comport with fourth amendment to United States constitution; whether any error in denial of defendant's motion to suppress was harmless beyond reasonable doubt.

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Tax appeal; appeal from assessment of real property taxes on basis that property was overvalued and overassessed; claim that assessor of defendant town improperly classified plaintiff's wind turbines and associated equipment as real property pursuant to statute (§ 12-64 (a)) rather than as personal property pursuant to statute (§ 12-41 (c)); whether trial court correctly concluded that wind turbines constitute "buildings" or "structures" pursuant to § 12-64 (a); whether wind turbines and their associated equipment were taxable under "fixtures of . . . electric . . . companies" provision of § 12-41 (c); whether trial court correctly concluded that plaintiff did not establish its allegations of overvaluation and overassessment.

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CONNECTICUT APPELLATE REPORTS

Vol. 215

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE LILLYANNE D. ET AL.*
(AC 45124)
(AC 45156)

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

Syllabus

The respondent parents filed separate appeals with this court from the judgment of the trial court terminating their parental rights with respect to their minor child, R, who had been in foster care since his discharge from a hospital after his birth. The Department of Children and Families became involved with the respondents when the respondent mother threatened to harm their daughter, L. The mother had a previous history

* 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.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

with the department in connection with incidents involving her older children. After L had been adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families, the respondents' second child, R, was born, and the petitioner filed a motion for an order of temporary custody and a neglect petition on the basis of predictive neglect. That same day, the court granted the order of temporary custody and ordered specific steps with which the respondents were required to comply. R thereafter was adjudicated neglected and committed to the custody of the petitioner. The trial court found that the department had made reasonable efforts to reunify R with the respondents but that the respondents were unwilling or unable to benefit from the services the department offered. The court found that the mother had resisted the department's efforts to address the key issues underlying her history of threats or acts of violence against R and her other children and that the father had demonstrated an inability to accurately evaluate the risk she posed to R. The court thus concluded, inter alia, that, pursuant to statute (§ 17a-112 (j) (3) (B) (i)), the respondents had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, they could assume responsible positions in R's life. *Held*:

1. The respondent mother could not prevail on her claim that the trial court committed harmful error when it admitted into evidence under the residual exception to the hearsay rule certain summary reports by a department service provider that it relied on to terminate her parental rights: this court, without deciding whether the summaries constituted inadmissible hearsay, concluded that the admission of the summaries was harmless, as the information in them was cumulative of that contained in the department's social study and the report of a court-appointed psychologist, both of which had been admitted into evidence without objection; moreover, despite the mother's claim that the court relied on the summaries to bolster and credit the conclusions in the psychologist's report, the court was entitled to rely on the report to support its findings, as it was within the court's sole province to assess the reliability and trustworthiness of the psychologist's conclusions and the weight to accord to his report; furthermore, even if the court had sustained the mother's objection to the summaries, she could not demonstrate that the outcome of the trial would have been different, as the record was replete with references to the challenged information, and she failed to articulate any manner in which the information in the summaries was materially different from that contained in the department's social study and the psychologist's report.
2. The respondent father could not prevail on his claims that the trial court made erroneous evidentiary findings in terminating his parental rights as to R:

   a. The trial court reasonably determined that the cumulative effect of the evidence was sufficient to justify its conclusion that the respondent

father was unable or unwilling to benefit from the department's efforts to reunify him with R: the court did not rely on outdated information in making its determination, as the father claimed, but limited its analysis to events that preceded the filing of the termination petition, as required by the applicable rule of practice (§ 35a-7 (a)); moreover, the record adequately supported the court's conclusion that, in the event of reunification, the respondent mother would be R's primary caregiver when the father was at work, as the respondents were unified in their intentions to parent R as a couple; furthermore, the record reflected that the father, who declined to pursue reunification on his own, was defensive about and overprotective of the mother and appeared to minimize the threat of harm she posed to R, as the mother resisted efforts to address the issues that led to R's removal from her care, rebuffed recommendations for treatment to address her past trauma and refused to take accountability for the events at issue.

b. The evidence was sufficient to support the trial court's conclusion that the respondent father had failed to achieve the requisite degree of personal rehabilitation so as to encourage the belief that, within a reasonable time, he could assume a responsible position in R's life: contrary to the father's claim, the court's consideration of evidence that predated the filing of the petition to terminate his parental rights was proper under § 35a-7 (a), the father failed to point to any specific postpetition evidence the court declined to consider that was probative of his rehabilitation, and the postpetition evidence that the respondents did introduce did not offer any additional perspective that was determinative of the issue of the father's rehabilitation; moreover, the father's contention that, with proper support services in place, he could assume a responsible position in R's life was unavailing, as there was no indication that he sought the department's help in obtaining additional support services or that he intended to rely on support services if reunification were to be granted, even though he was apprised of the department's concerns with respect to the respondents' intention to have the respondent mother care for R when he was at work; furthermore, regardless of the father's progress toward addressing the factors that led to R's commitment, and given his failure to appreciate the risk that the mother posed to the children's safety and his commitment to parent R with her, the court, in making its determination, was entitled to rely on his continued involvement with the mother, whom the court also determined had failed to achieve sufficient rehabilitation.

c. The trial court's determination that it was in R's best interest to terminate the respondent father's parental rights was factually supported by the court's findings and conclusions with respect to the factors set forth in § 17a-112 (k): the court found that the department had timely made referrals to address the respondents' needs and reasonable efforts to reunify them with R but that, despite having made significant progress toward improving his marital relationship and complying with nearly

every one of the specific steps, the father remained unable to appropriately assess the threat that the mother posed to R; moreover, although the court weighed the evidence that was more favorable to the father, it found that R had bonded with his foster family, with whom he had spent his entire life, and noted that R could not afford to wait for the respondents to make the necessary adjustments to ensure his safety and well-being.

Argued May 18—officially released September 1, 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 Windham, Juvenile Matters at Willimantic, and tried to the court, *Chaplin*, *J.*; judgments granting the petitions, from which the respondents filed separate appeals with this court; thereafter, the respondents withdrew their appeals in part. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant in Docket No. AC 45124 (respondent mother).

David B. Rozwaski, assigned counsel, for the appellant in Docket No. AC 45156 (respondent father).

Michael J. Besso, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Claire Kindall*, solicitor general, and *Evan O'Roark*, *Jennifer C. Leavitt* and *Nisa Kahn*, assistant attorneys general, for the appellee (petitioner in both appeals).

Kelly L. Babbitt, for the minor child in both appeals.

Opinion

CLARK, J. In these two appeals, the respondent mother, Chrystal P., and the respondent father, William D., appeal from the judgment of the trial court rendered

** September 1, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

in favor of the petitioner, the Commissioner of Children and Families, terminating their parental rights as to their minor child, Richard D.[1] In Docket No. AC 45124, the respondent mother claims that the trial court improperly admitted into evidence two documents under the residual exception to the rule against hearsay. In Docket No. AC 45156, the respondent father claims that the court improperly concluded that (1) the Department of Children and Families (department) had made reasonable efforts to reunify him with Richard or, alternatively, that he was unwilling and unable to benefit from those reunification efforts, (2) he had failed to achieve the requisite degree of rehabilitation required by General Statutes § 17a-112 (j), and (3) it would be in Richard's best interest to terminate his parental rights. We affirm the judgment of the trial court.[2]

The following facts and procedural history are relevant to both appeals. The department became involved with the respondents in June, 2017, when the respondent mother threatened to harm the respondents' daughter, Lillyanne D., who, at that time, was less than one year old.[3] In July, 2017, the department received another referral after the respondent father called 911 to report that the respondent mother had threatened to harm Lillyanne[4] and had held Lillyanne tightly across

[1] In both appeals, the attorney for Richard filed a statement pursuant to Practice Book §§ 67-13 and 79a-6 (c) adopting the brief of the petitioner.

[2] The respondents also appealed from the trial court's judgment terminating their parental rights as to their minor child, Lillyanne D. Prior to oral argument before this court, the respondents withdrew their claims on appeal with respect to Lillyanne. Throughout this opinion, we refer to Lillyanne and Richard individually by name and collectively as the children.

[3] The record reflects that the respondent mother made a comment during an argument that the respondent father had understood to be a veiled threat against Lillyanne. The respondent mother had stated, in essence, that the respondent father did not want to get a call someday that something had happened to Lillyanne.

[4] The respondent father reported to the department that the respondent mother essentially had stated that, if he went to work, she was going to call him and tell him news that he was not going to like about Lillyanne.

her chest, causing her to cry, during an argument between the respondents. In both instances, the respondent mother had threatened harm to Lillyanne as retribution against the respondent father. As a result of the July, 2017 incident, criminal charges were filed against the respondent mother, and the criminal court issued a full protective order, which prohibited her from having any contact with the respondent father and Lillyanne.[5] Lillyanne remained in the care of the respondent father, who signed a safety plan with the department in which he agreed to abide by the protective order and to prohibit the respondent mother from having any unsupervised visits with Lillyanne in the event that the protective order was modified.

During its investigation, the department learned that the respondent mother had a history with the department dating to 1997, when her eldest child, Margaret T., was removed from her care following a domestic dispute with Margaret's father, James T. During that incident, the respondent mother reportedly had attacked James with a pen and picked up Margaret, who was five weeks old, by one arm and dangled her in the air twice, stating: "Look what I can do."[6] The department's files also indicated that the respondent mother had subsequently been involved with Michael T., with whom she had two children. In 2015, the department had received a referral alleging that the respondent mother and Michael had been arrested after getting

The respondent father understood the respondent mother's statement to imply that she was threatening to harm Lillyanne.

[5] The respondent mother was charged with disorderly conduct, interfering with a 911 call, and risk of injury to a child. On October 2, 2017, she pleaded guilty to interfering with a 911 call and was sentenced to one year of incarceration, execution suspended, and one year of probation.

[6] The department substantiated the allegations of emotional neglect and physical abuse against the respondent mother, and a maternal relative of the respondent mother obtained temporary guardianship over Margaret. Margaret was returned to the respondent mother's care in 1998.

into a domestic dispute that was witnessed by their children.[7] When interviewed during the department's investigation into the allegations concerning Lillyanne, Michael indicated that the respondent mother had a history of attempting or threatening to harm one of their children when they were in a relationship.[8]

On October 2, 2017, the criminal protective order was vacated, and the respondent mother moved back into the respondents' home shortly thereafter. On October 5, 2017, the department learned that the respondent mother was residing in the home and attempted to create a safety plan with the respondents. The respondents declined to implement a safety plan and were informed by the department that the respondent mother's presence in the home placed Lillyanne at risk of removal from their care. The next day, the petitioner filed a motion for an order of temporary custody and a neglect petition on behalf of Lillyanne. The court granted the ex parte order of temporary custody and ordered specific steps for the respondents to take to facilitate their reunification with Lillyanne. The order of temporary custody was sustained by agreement of the parties on October 10, 2017. Lillyanne was adjudicated neglected and committed to the care and custody of the petitioner on July 9, 2018.

In June, 2019, the respondents' second child together, Richard, was born. On June 7, 2019, the petitioner filed a motion for an order of temporary custody and a neglect petition as to Richard on the basis of predictive neglect.

[7] The department filed neglect petitions following this incident based on substantiated physical and emotional neglect, but the petitions were withdrawn due to evidentiary insufficiency.

[8] Although, due to the department's investigation protocol, Michael did not know about the nature of the allegations concerning Lillyanne, he stated to a department social worker: "[L]et me guess, she either tried to harm [Lillyanne] or threatened to harm [Lillyanne] because that is what she did with me over [one of our children] when we were together." (Internal quotation marks omitted.)

That same day, the court granted the order of temporary custody, ordered specific steps with which the respondents were required to comply, and scheduled a contested hearing. Richard was adjudicated neglected and committed to the care and custody of the petitioner on June 21, 2019. On October 8, 2019, the petitioner filed termination of parental rights petitions as to both Lillyanne and Richard, which alleged that the respondents had failed to rehabilitate pursuant to § 17a-112 (j).[9] The termination of parental rights trial was held on July 12, 13, 15 and 16, 2021.

In a memorandum of decision dated September 17, 2021, the court granted the termination petitions. In the adjudicatory phase of the proceedings, it initially found, by clear and convincing evidence, that the children had been adjudicated neglected in prior proceedings, that the department had made reasonable efforts to locate and reunify the children with the respondents, and that the respondents remained unwilling or unable to benefit from the services the department offered. The court further found that the respondents had failed to achieve an appropriate degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the children, they could assume responsible positions in the children's lives. The court's conclusion that the respondents had failed to rehabilitate was predicated on its finding that the respondent mother had resisted efforts to address the key issues underlying her history of threats or acts of violence against her children and had minimized the nature of the events that led to Lillyanne's removal from her care. With respect to the respondent father, the court found that the respondents were unified in their intentions to parent as a couple and that

[9] During the pendency of the underlying proceedings, the respondents had two more children, Daniel D. and James D. Both children were removed from the respondents' care on the basis of predictive neglect.

the respondent father had demonstrated an inability to accurately evaluate the risk the respondent mother poses to the children.

In the dispositional phase of the proceedings, the court made findings as to each of the criteria set forth in § 17a-112 (k) and concluded that the termination of the respondents' parental rights would be in the best interests of Lillyanne and Richard. Accordingly, the court appointed the petitioner as the statutory parent of the children. These appeals followed. Additional facts will be set forth as necessary.

I

AC 45124

The respondent mother claims that the court improperly admitted into evidence two documents under the residual exception to the rule against hearsay and that the admission of those documents constituted harmful error because the court could not have reached the decision to terminate her parental rights as to Richard in the absence of the information contained within those documents. Without deciding whether the challenged documents fall within any of the exceptions to the rule against hearsay, we conclude that the admission of the documents, even if improper, was harmless.[10]

[10] On January 5, 2022, the petitioner filed a motion for articulation, seeking clarification as to whether the trial court also had determined that the challenged documents were admissible pursuant to the business records exception to the rule against hearsay. See Conn. Code Evid. § 8-4. The trial court denied the motion for articulation. On January 21, 2022, the petitioner filed with this court a motion for review of the trial court's denial of her motion for articulation. This court granted the petitioner's motion for review but denied the relief requested therein.

On February 3, 2022, the petitioner filed a preliminary statement pursuant to Practice Book § 63-4 (a) (1), asserting as an alternative ground for affirming the trial court's judgment as to the respondent mother that the documents were admissible under the business records exception. The respondent mother claims on appeal that the challenged documents do not satisfy the requirements of § 8-4 of the Connecticut Code of Evidence. Our conclusion that any error in admitting the documents under the residual

The following additional facts and procedural history are relevant to the disposition of the respondent mother's claim.[11] At the termination trial, the petitioner offered testimony from two witnesses and presented ten exhibits, all of which the court admitted into evidence in full. Relevant to this appeal, the court admitted a social study and an addendum to the social study (addendum), which were authored by Jennifer L. Andrews, a department social worker assigned to the respondents' case, who testified at trial. Both the social study, dated September 10, 2019, and the addendum, dated June 24, 2021, were admitted into evidence without objection.

The social study outlines, among other things, the observations and assessments of United Services, Inc. (USI), staff members, who worked with the respondents in 2018 when they participated in two reunification programs, Therapeutic Family Time and Reunification and Therapeutic Family Time (reunification program(s)).[12] Following each reunification program that the respondents participated in, USI staff members authored a summary report (summaries), both of which are the subjects of the respondent mother's claim on appeal.

In the social study, Andrews noted that the USI staff members had reported the following concerns with respect to the respondent mother: her inappropriate tone in regard to her interactions with Lillyanne; her poor reception of feedback and suggestions made by

exception to the hearsay rule was harmless makes it unnecessary to address this claim.

[11] We note that, because Richard was adjudicated neglected on the basis of predictive neglect, the factual record concerning Lillyanne is necessarily relevant to the court's termination of the respondents' parental rights as to Richard.

[12] The department contracts with and provides referrals to USI, which provides reunification and other support services for families involved with the department.

staff members; a continued lack of insight into the circumstances that led to Lillyanne's removal from her care; and her statements indicating that, after the department was no longer involved with the family, she would parent her children in the manner she saw fit. It was also noted that the USI staff members had concluded that the respondent mother was unwilling to implement the parenting strategies taught during the reunification programs and did not recommend reunification between the respondent mother and Lillyanne.

The petitioner also offered the testimony of and a report prepared by David M. Mantell, a clinical and forensic psychologist, who had been appointed by the court to evaluate the respondents and provide recommendations with respect to reunification. Although counsel for both respondents initially objected to the introduction of Mantell's report, those objections were later withdrawn, and the court admitted his report in full. In evaluating the respondents, Mantell reviewed the records of and spoke with other service providers who had worked with the respondents since the June, 2017 incident concerning Lillyanne that led to the initial referral to the department. In his report, Mantell thoroughly described the contents of both of the challenged summaries, often citing the observations and conclusions of the USI staff members verbatim. Additionally, he indicated that he did not recommend reunification as of the date of his report, June 1, 2019.

The petitioner did not call the USI staff members who had authored or approved the summaries as witnesses at trial but, instead, sought to admit the summaries into evidence during Andrews' direct examination. Counsel for the respondent mother objected on the ground that the summaries constituted inadmissible hearsay. The petitioner responded that the summaries fell within the business records exception to the rule against hearsay. See Conn. Code Evid. § 8-4. The court

concluded that the petitioner had not established a proper foundation to satisfy the business records exception but that the summaries were nonetheless admissible under the residual exception to the hearsay rule and admitted them in full.

On appeal, the respondent mother claims that the trial court improperly admitted the summaries under the residual exception to the hearsay rule and that the court's reliance on the observations and conclusions of the USI staff members described within the summaries to terminate her parental rights demonstrates that the court's error was prejudicial. Specifically, the respondent mother argues that the court's factual findings and conclusion that she had failed to achieve an appropriate degree of rehabilitation substantially were based on the following information contained within the summaries: the respondent mother's continued lack of insight into the circumstances that led to Lillyanne's removal from her care; her persistent remarks that she would parent her children as she deemed appropriate; her resistance to implement the parenting strategies taught during the reunification programs; the USI staff members' lack of confidence with regard to the respondent mother's ability to keep Lillyanne safe from harm; and the respondent mother's unwillingness to modify her parenting strategies. With respect to the court's conclusion that termination of her parental rights was in the children's best interests, the respondent mother argues that the court improperly relied on the summaries to find that she had failed to appreciate the gravity of her threats of violence toward her children and that, despite the efforts of the USI staff members, the respondent mother remained steadfast in her determination to raise her children " 'as she sees fit.' "

Notwithstanding the respondent mother's argument, the record discloses that all of the foregoing contested information was restated in Mantell's report *and* the

department's social study—either in substance or quoted nearly word for word from the summaries—both of which were admitted into evidence as full exhibits without objection. The social study, for example, outlines the concerns of the USI staff members that the respondent mother now alleges on appeal were improperly admitted into evidence through the summaries and relied on by the court to terminate her parental rights. Mantell's report likewise comprehensively details that same information. Moreover, the court could have predicated its findings and conclusions on other evidence presented at trial. Andrews, for example, testified that Jessica Janczyk, a licensed counselor with whom the respondent mother had engaged with for counseling services, also assessed the respondent mother as lacking an understanding regarding the seriousness of the incident that led to the department's involvement and resistant to implementing recommendations made by service providers.

When challenging a court's evidentiary ruling, a party "must show that the court abused its discretion in admitting the challenged evidence and that any improper admission caused [the party] substantial prejudice or injustice." *In re Tayler F.*, 111 Conn. App. 28, 36, 958 A.2d 170 (2008), aff'd, 296 Conn. 524, 995 A.2d 611 (2010). In order to demonstrate that she was harmed, the respondent mother must establish that, but for the evidentiary error, the outcome of the trial likely would have been different. See, e.g., *In re Alizabeth L.-T.*, 213 Conn. App. 541, 602, 278 A.3d 547 (2022). This she cannot do. Even if we were to conclude that the court improperly admitted the summaries into evidence under the residual exception to the hearsay rule, the information contained therein was available elsewhere in the record. The respondent mother fails to articulate any manner in which the information within the allegedly inadmissible summaries that the trial court relied

on to terminate her parental rights was materially different from the information that was provided through the department's social study and Mantell's report. Thus, the contested information was entirely cumulative. "It is well recognized that any error in the admission of evidence does not require reversal of the resulting judgment if the improperly admitted evidence is merely cumulative of other validly admitted [evidence]." (Internal quotation marks omitted.) *In re Anna B.*, 50 Conn. App. 298, 305–306, 717 A.2d 289 (1998); see also *Duncan* v. *Mill Management Co. of Greenwich, Inc.*, 308 Conn. 1, 23, 60 A.3d 222 (2013) ("[i]n determining whether evidence is merely cumulative, we consider the nature of the evidence and whether any other evidence was admitted that was probative of the same issue as the evidence in controversy").

Additionally, although the respondent mother acknowledges that the court relied on additional evidence, such as Mantell's report, to terminate her parental rights, she argues that the court's admission of the summaries was nevertheless harmful because the court relied on the improperly admitted hearsay evidence, i.e., the summaries, to bolster and credit Mantell's conclusions and his recommendation against reunification. This argument misses the mark. Insofar as the respondent mother is challenging the reliability and trustworthiness of Mantell's conclusions, it is well established that the weight accorded to evidence presented at trial is within the sole province of the fact finder. See *In re Leo L.*, 191 Conn. App. 134, 142, 214 A.3d 430 (2019) ("it is the trial court's role to weigh the evidence presented and determine relative credibility when it sits as a fact finder"). Because Mantell's report was admitted as a full exhibit, without objection, the court was entitled to rely on it to support its findings. See *In re Leilah W.*, 166 Conn. App. 48, 71, 141 A.3d 1000 (2016). More importantly, as we have explained, even if the court

had sustained the respondent mother's objection to the summaries, the record is replete with references to the information she now challenges on appeal.

We conclude that, because the evidence contained within the summaries was merely cumulative of other validly admitted evidence contained in Mantell's report and the department's social study, and the respondent mother has failed to establish that the result of the trial would have been different had the summaries not been admitted into evidence, their admission was harmless.

II

AC 45156

The respondent father claims that the trial court erroneously found that (1) the department had made reasonable efforts toward reunification and that he was unwilling or unable to benefit from the department's reunification efforts,[13] (2) he had failed to achieve a degree of rehabilitation sufficient to encourage the belief that, within a reasonable time, he could assume a responsible position in Richard's life, and (3) termination of his parental rights was in Richard's best interest. We address each of these claims in turn.

Initially, we briefly set forth the relevant legal principles that govern termination of parental rights proceedings. Pursuant to § 17a-112 (j), "[t]he Superior Court,

[13] In his appellate brief, the respondent father frames his first claim as follows: "The trial court erred in its findings that the respondent father was unable or unwilling to benefit from reunification services for his children." On the basis of certain arguments presented in his brief and at oral argument before this court, however, we interpret the respondent father's claim to be challenging both the court's finding that the department made reasonable efforts toward reunification and its finding that he was unable or unwilling to benefit from such efforts. Because we conclude that there was sufficient evidence in the record to support the court's finding that he was unable to benefit from reunification services, we need not address whether the court properly found that the department made reasonable efforts to reunite him with Richard. See *In re Gabriella A.*, 319 Conn. 775, 777 n.4, 127 A.3d 948 (2015).

upon notice and hearing . . . may grant a petition [to terminate parental rights] . . . if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .'' (Internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 807, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

''[A] hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. . . . If the trial court determines that a statutory ground for termination exists, then it proceeds to the dispositional phase. During the dispositional phase, the trial court must determine whether termination is in the best interests of the child. . . . The best interest determination also must be supported by clear and convincing evidence.'' (Citation omitted; internal quotation marks omitted.) *In re Ja'La L.*, 201 Conn. App. 586,

595, 243 A.3d 358 (2020), cert. denied, 336 Conn. 909, 244 A.3d 148 (2021). "Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 527, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

The following additional facts provide the necessary context for our discussion of the respondent father's claims.[14] The respondent mother experienced a turbulent childhood and has a history of untreated mental health issues. As a result of the incidents precipitating Lillyanne's removal from the respondents' care, the department made referrals for individual counseling and a substance abuse evaluation to assist the respondent mother in addressing her mental health concerns. In August, 2017, the respondent mother engaged in treatment with Janczyk, who diagnosed the respondent mother with an anxiety based disorder. During the nearly two years that the respondent mother met with Janczyk, the respondent mother continued to insist that she never posed a threat to Lillyanne and refused to acknowledge the concerning nature of her actions that led to the department's involvement in this case. Additionally, the respondent mother continually rejected Janczyk's recommendation to engage in trauma focused therapy because the respondent mother believed that her childhood trauma was not impacting her and that trauma focused therapy was therefore unnecessary.

In January, 2018, the respondents began a twelve week reunification program with USI. The USI staff members reported that the respondent mother lacked

[14] See footnote 11 of this opinion.

insight into the reason for Lillyanne's removal from her care and was difficult to engage with during the program, resistant to implementing new parenting strategies, and unaware of developmentally appropriate expectations. It was recommended that the respondent mother continue to engage in individual therapy to address her past trauma.

In March, 2018, the respondent mother participated in a neuropsychological evaluation with Sarah E. Bullard, a clinical neuropsychologist. In a report dated June 9, 2018, Bullard opined that the respondent mother's test results indicated a deficit in executive function and impaired intellectual abilities. The respondent mother was assessed as having unreliable problem solving skills and a processing impairment, which could cause her to become overwhelmed, frustrated, and unable to manage stressful situations. Additionally, Bullard noted that the respondent mother was reluctant to admit to shortcomings and presented as detached and unemotional at times.

In June, 2018, the respondents participated in another twelve week reunification program with USI staff members, who reported that the respondent mother remained obstinate in her resistance to implementing new parenting strategies and continued to "lack insight into the circumstances that led to [Lillyanne's] removal." Although the USI staff members felt confident about the respondent father's parenting abilities and observed that he shared a strong bond with Lillyanne, they expressed concern that his work schedule would leave the respondent mother as the primary caregiver. They additionally noted that they were not confident with respect to the respondent mother's ability to recognize and meet Lillyanne's needs or to keep Lillyanne safe, and recommended that the respondent mother continue to engage in therapy to address her past trauma.

The respondents also engaged in couples counseling with Richard Hisman, a clinical counselor, for approximately six months beginning in September, 2018, to address intimate partner violence concerns and communication issues. Hisman opined that the respondents had made significant progress in developing effective communication skills during the course of their counseling sessions.

In May, 2019, the respondents participated in a court-ordered psychological evaluation with Mantell. In addition to reviewing the USI summaries, Bullard's report, and other records related to the respondents' case, Mantell interviewed the respondents, spoke with service providers who had worked with them, conducted psychological evaluations of both respondents, and observed a parent-child visit between the respondents and Lillyanne. With respect to the respondent mother, Mantell opined that she presented as a "very weak and often unreliable personal historian who is denying her own responsibilities for the loss of custody of [Lillyanne]." He noted that she was reluctant to address and was in avoidance of "major issues of personal violence and threat[s] that have been a part of her life since childhood" and that "[t]hreatening to harm a child is a rare protection issue . . . [that] cannot be considered resolved by not talking about it and by rejecting accountability for its occurrence." Accordingly, Mantell concluded that the respondent mother needed further focused treatment to address her past "exposures to family violence, both physical and verbal, as well as her thoughts about violence and her use of violent threats with at least [two] marital partners and with at least [two] children." With respect to the respondent father, Mantell noted that the respondent father "speaks for his wife in multiple settings in ways that are considered overprotective and defensive" and that the respondent father had stated that he was not at all concerned

with the respondent mother being home alone with a toddler and a newborn. Additionally, Mantell reported that he had spoken with Kimberly Applewhite, who provided individual counseling to the respondent father for about one and one-half years after Lillyanne was placed in the custody of the petitioner. When asked about her understanding of the respondent father's views regarding the respondent mother's judgment, Applewhite informed Mantell that the respondent father appeared comfortable with the respondent mother's being alone with Lillyanne while he was at work. Mantell consequently did not recommend reunification as of the date of his report, June 1, 2019, because "[t]here are too many issues in this case involving parent-and-child violence and threat[s] of violence which remain unresolved."

In support of the termination of parental rights petitions, the petitioner filed with the court the September 10, 2019 social study authored by Andrews, which was admitted into evidence at trial.[15] Relevant to this appeal, Andrews reported that the department previously had discussed with the respondent father its concerns regarding the respondent mother and that reunification would be appropriate as to him if he pursued reunification on his own. The respondent father told the department that he would not pursue reunification without the respondent mother, however. Notwithstanding the department's repeated concerns that the respondent mother would be the primary caregiver for the children while the respondent father was at work, the respondent father did not suggest an alternative caregiving

[15] As previously noted, the social study was admitted into evidence as a full exhibit without objection. See part I of this opinion. Although the petitioner must submit a social study to the court for purposes of the dispositional hearing in contested cases; see General Statutes § 45a-717 (e) (1); Practice Book § 35a-9; the court may rely on the social study in both the adjudicatory and dispositional phases of a termination of parental rights proceeding. See *In re Anna Lee M.*, 104 Conn. App. 121, 128, 931 A.2d 949, cert. denied, 284 Conn. 939, 937 A.2d 696 (2007).

plan until the department informed him that it did not recommend reunification.[16] Andrews also noted that the respondent father continually minimized the respondent mother's statements and behaviors that led to the department's involvement in this case.

A

We first consider the respondent father's claim that the trial court improperly found that he was unable or unwilling to benefit from reunification efforts.

"As part of a termination of parental rights proceeding, § 17a-112 (j) (1) requires the department to prove by clear and convincing evidence that it has made reasonable efforts to locate the parent and to reunify the child with the parent, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . . Accordingly, the department must prove either that it has made reasonable efforts to reunify or, alternatively, that the parent is unwilling or unable to benefit from reunification efforts."[17] (Emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 552, 979 A.2d 469 (2009).

"[I]n determining whether the department has made reasonable efforts to reunify a parent and a child or whether there is sufficient evidence that a parent is unable or unwilling to benefit from reunification efforts, the court is required in the adjudicatory phase to make its assessment on the basis of events preceding the date on which the termination petition was filed. . . . This

[16] The record does not indicate what alternative caregiving plan the respondent father had proposed.

[17] The department also may meet its burden concerning reunification efforts under § 17a-112 (j) (1) based on "a previous judicial determination that such efforts were not appropriate." (Internal quotation marks omitted.) *In re Ryder M.*, supra, 211 Conn. App. 808.

court has consistently held that the court, [w]hen making its reasonable efforts determination . . . is limited to considering only those facts preceding the filing of the termination petition or the most recent amendment to the petition . . . . Practice Book § 35a-7 (a) codifies this procedural rule by providing: In the adjudicatory phase, the judicial authority is limited to evidence of events preceding the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Cameron W.*, 194 Conn. App. 633, 660–61, 221 A.3d 885 (2019), cert. denied, 334 Conn. 918, 222 A.3d 103 (2020).

Finally, in reviewing whether a trial court properly determined that a parent is unwilling or unable to benefit from the department's reunification efforts, "the trial court's subordinate factual findings are reviewable only for clear error, [but] the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts 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." (Internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 87, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020).

In the present appeals, the court found that the department had made reasonable efforts to locate the respondents and to reunify them with the children. It noted that, since Lillyanne entered into the petitioner's custody in 2017, the petitioner had maintained contact with the respondents and offered each respondent appropriate services to facilitate reunification in accordance with the court-ordered specific steps,[18] which, among other things, required the respondent father to engage in parenting and individual counseling and to make progress toward ensuring Richard's safety and well-being.

Notwithstanding its finding that the department had satisfied its obligations under § 17a-112 (j) (1), the trial court also concluded that the respondent father was unable or unwilling to benefit from the department's efforts to reunify him with Richard. In so concluding, the court observed that the respondent mother had "resisted all efforts to address the central issue of parent-child threats of violence and parent-child violence. She has repeatedly refused to engage in treatment necessary for her to make progress regarding her parent-child violence issues and, thereby, demonstrated her inability and/or unwillingness to benefit from the petitioner's efforts to reunify the respondent parents with Lillyanne and Richard. [The] respondent parents are unified in their positions in this matter and plan to parent as a unit, with [the] respondent mother serving as the primary caretaker. [The] respondent father has demonstrated a continued inability to properly evaluate the threat of harm [the] respondent mother poses to the children while her parent-child violence issues remain unaddressed and untreated and, thereby, demonstrated his inability and/or unwillingness to benefit from the

[18] After Richard was born in June, 2019, the court ordered specific steps that encompassed the same steps that previously had been ordered with respect to facilitating the respondents' reunification with Lillyanne.

petitioner's efforts to reunify the respondent parents with Lillyanne and Richard."

The respondent father raises two primary arguments in support of his claim that the trial court improperly found that he was unwilling or unable to benefit from reunification services. First, he asserts that the court's findings are premised on outdated information and failed to account for the respondents' continuing progress and engagement with services after the petitioner filed the termination of parental rights petitions. Second, he argues that the court's determination that he was unable or unwilling to benefit from the department's efforts to reunify him with Richard is predicated on its erroneous finding that the respondent mother would be the primary caregiver for the children while he is at work. We are not persuaded.

We first consider the respondent father's assertion that the court relied on outdated information to reach its conclusion that he was unwilling or unable to benefit from reunification services. In support of this claim, the respondent father argues that the court's findings were based entirely on information predating the filing of the termination petitions in October, 2019, and that the court failed to consider the observations and testimony of service providers who worked with the respondents after the filing of the petitions. The respondent father's contention that the court improperly had relied on reports and information predating the petition to terminate his parental rights, however, directly contravenes our rules of practice, which provide that trial courts are, generally, "limited to evidence of events preceding the filing of the petition or the latest amendment" during the adjudicatory phase of termination proceedings. Practice Book § 35a-7 (a); see also *In re Cameron W.*, supra, 194 Conn. App. 660. Consequently, we conclude that this argument fails.

Having concluded that the court properly limited its analysis to events preceding the filing of the termination petitions, we next review the court's subordinate factual findings and consider whether clear and convincing evidence supports the trial court's ultimate conclusion that the respondent father was unwilling or unable to benefit from the department's reasonable efforts toward reunification.

Initially, we note that the respondent father does not challenge the court's finding that he and the respondent mother were unified in their intentions to parent the children together. Nor does the respondent father challenge the court's findings with respect to the respondent mother's resistance to addressing her history of parent-child violence and threats prior to the filing of the termination petitions. Rather, he contends that the court's conclusion that he was unwilling or unable to benefit from the department's efforts toward reunification is based on a finding that lacks evidentiary support, namely, that the respondent mother would be the primary caregiver for the children when he was at work. The court's finding that the respondent mother would serve as the primary caregiver, however, is adequately supported by the record, which indicates that the USI staff members expressed concerns that the children would be left in her care while the respondent father was at work. In the department's social study, Andrews also noted that the respondent father's work schedule would result in the respondent mother's assuming the primary caregiving role in the event that the respondents were reunified with the children.[19] Although the department repeatedly raised concerns about this plan, the respondent father did not suggest an alternative care plan until the department indicated that it would

[19] At trial, Andrews testified that this information was gleaned from her review of the department's records and that she did not recall personally having discussed the respondents' childcare plans with them.

not recommend reunification. Additionally, multiple service providers had observed that the respondent father appeared comfortable with the respondent mother's remaining home alone with the children. Thus, contrary to the respondent father's claim, the court's finding that the respondent mother would be the primary caregiver for the children is not clearly erroneous.

The record establishes that, as of the date of the petition to terminate her parental rights, the respondent mother continued to resist efforts to address the key issues that had led to the children's removal from the respondents' care. The respondent mother rebuffed recommendations to engage in treatment to address her past trauma and refused to take accountability for the events that led to the department's involvement in this case. As a result, multiple service providers lacked confidence in the respondent mother's ability to recognize the children's needs or to keep them safe from harm. The record also reflects that the respondent father presented as defensive about and overprotective of the respondent mother and appeared to minimize the threat of harm she poses to the children. Additionally, although the department had expressed that reunification would be appropriate as to the respondent father alone, he declined to pursue reunification on his own and remained steadfastly committed to coparenting the children with the respondent mother. On the basis of the foregoing, the trial court reasonably determined that the cumulative effect of the evidence was sufficient to justify its ultimate conclusion that the respondent father was unable or unwilling to benefit from the department's efforts to reunify him with Richard.

B

The respondent father also challenges the court's finding that he had failed to achieve a sufficient degree of rehabilitation pursuant to § 17a-112 (j) (3) (B) (i).

For the reasons that follow, we conclude that this claim is unavailing.

"Failure of a parent to achieve sufficient personal rehabilitation is one of six statutory grounds on which a court may terminate parental rights pursuant to § 17a-112. [See General Statutes § 17a-112 (j) (3) (B) (i).] That ground exists when a parent of a child whom the court has found to be neglected fails to achieve such a degree of rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, the parent could assume a responsible position in the life of that child." (Internal quotation marks omitted.) *In re Leilah W.*, supra, 166 Conn. App. 67.

"Personal rehabilitation as used in [§ 17a-112 (j) (3) (B) (i)] refers to the restoration of a parent to his or her former constructive and useful role as a parent. . . . The statute does not require [a parent] to prove precisely when [he] will be able to assume a responsible position in [his] child's life. Nor does it require [him] to prove that [he] will be able to assume full responsibility for [his] child, unaided by available support systems. . . . Rather, [§ 17a-112] requires the trial court to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further, that such rehabilitation must be foreseeable within a reasonable time. . . . [The statute] requires the court to find, by clear and convincing evidence, that the level of rehabilitation [the parent] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [he or she] can assume a responsible position in [his or her] child's life." (Internal quotation marks omitted.) *In re Lilyana P.*, 169 Conn. App. 708, 717–18, 152 A.3d 99 (2016), cert. denied, 324 Conn. 916, 153 A.3d 1290 (2017). "[I]n assessing rehabilitation, the critical issue is not whether the parent has improved [his or her] ability to manage [his or her] own life, but

rather whether [he or she] has gained the ability to care for the particular needs of the child at issue." (Internal quotation marks omitted.) *In re Phoenix A.*, 202 Conn. App. 827, 845, 246 A.3d 1096, cert. denied, 336 Conn. 932, 248 A.3d 1 (2021).

With respect to a claim that a trial court improperly concluded that a parent failed to achieve sufficient rehabilitation, we review the court's subordinate factual findings for clear error. See, e.g., *In re Anaishaly C.*, 190 Conn. App. 667, 681, 213 A.3d 12 (2019). The court's determination that a parent has failed to rehabilitate, however, is subject to the evidentiary sufficiency standard of review. Id.; see also part II A of this opinion. Finally, we note that "the mere existence in the record of evidence that would support a different conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is enough evidence in the record to support the finding that the trial court made." (Emphasis omitted.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

In determining that the respondent father had failed to rehabilitate sufficiently, the court set forth the following relevant findings in its memorandum of decision, emphasizing that the "primary issues in this matter are the threat of physical harm that the respondent mother poses to the children and the respondent father's ability to accurately assess the threat of harm that the respondent mother poses to the children." Although the court acknowledged that the respondent father had made a concerted effort to comply with many of the court-ordered specific steps to address the department's main concerns, it noted that compliance with specific steps does not necessarily demonstrate that a parent has achieved sufficient rehabilitation. See *In re Brian P.*,

195 Conn. App. 558, 569, 226 A.3d 159 ("[The] completion or noncompletion [of the specific steps] . . . does not guarantee any outcome . . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation." (Internal quotation marks omitted.)), cert. denied, 335 Conn. 907, 226 A.3d 151 (2020). Thus, notwithstanding the respondents' progress in certain respects, the court underscored that its main concern was not the number of steps the respondents had complied with but, rather, that the "respondent parents have failed to comply in a substantive manner with the specific steps that raise the most concern."

With respect to the respondent mother, the court found that she "has a history of untreated mental health issues" and noted that she initially became acquainted with the petitioner nearly twenty years prior to the present case. The court then summarized the observations of the various service providers who had worked with the respondent mother to assist her in rehabilitating. Specifically, the court highlighted the observations of the USI staff members, Mantell, and Janczyk concerning the respondent mother's resistance to engaging in treatment to address her history of family violence, her reluctance to modify her parenting strategies, and her lack of accountability for the events that had precipitated the department's involvement in this case. For those reasons, among others, the court found that the respondent mother had demonstrated a "consistent resistance to address her pattern of parental violence toward her own children, to address the impact of her past trauma on the threat she poses to the children, and to take accountability for her attitudes, behaviors and actions that led to Lillyanne's removal from her care." The court further found that the "respondent mother's refusal to discuss her behaviors and the cause

thereof is the single most important issue in this case and the foremost barrier to her deriving any rehabilitative benefit from the services provided by the petitioner." As a result of its findings, the court determined that the respondent mother had failed to rehabilitate, noting that it agreed with Mantell's assessment that "[t]here are too many issues in this case involving parent-and-child violence and threat[s] of violence which remain unresolved."

With respect to the respondent father, the court remarked that his barriers to reunification with the children, although fewer, were nonetheless "highly disconcerting." The court noted that the respondent father had been observed to be "sensible, attentive, [and] reasonable" during Mantell's evaluation, and someone who appears to understand appropriate parenting techniques and demonstrated compassion and patience for both Lillyanne and the respondent mother. The court also found that the respondent father had been described as "enmeshed" with the respondent mother and was overprotective and defensive of her, which impeded her progress in holding herself accountable for her actions and addressing the issues that underlie her behaviors. Consequently, the court found that the respondent father enabled the respondent mother and "consistently demonstrated a blind spot for appropriately assessing the risk that the respondent mother poses to the children's welfare and safety." The court also found that the parents consistently had presented as united in their intentions to parent the children together, with the respondent mother assuming the primary caregiving role should reunification be granted. On the basis of the respondent mother's unwillingness to address her unresolved mental health issues and the respondent father's unwavering commitment to coparent with the respondent mother, the court concluded that the respondent father had failed to achieve an

appropriate degree of rehabilitation sufficient to encourage the belief that he could assume a responsible role in the children's lives within a reasonable time.

In challenging the court's determination that he had failed to rehabilitate, the respondent father again argues that the court improperly relied on outdated information that preceded the filing of the termination petitions to support its findings and failed to consider evidence of rehabilitation that occurred subsequent to the filing of the petitions. This contention lacks merit. First, as noted, Practice Book § 35a-7 (a) makes clear that, "[i]n the adjudicatory phase, the judicial authority is limited to evidence of events *preceding* the filing of the petition or the latest amendment, except where the judicial authority must consider subsequent events as part of its determination as to the existence of a ground for termination of parental rights." (Emphasis added.) Thus, it was appropriate and proper for the court to consider the evidence before it that predated the filing of the petition.

With respect to postpetition evidence, our courts have held that a "court *may* rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis added.) *In re Keyashia C.*, 120 Conn. App. 452, 457 n.12, 991 A.2d 1113, cert. denied, 297 Conn. 909, 995 A.2d 637 (2010). In this case, however, the respondent father has failed to point to any specific postpetition evidence that was probative of his rehabilitation that the court declined to consider. And, upon our independent review of the record, we have found none.

There is no dispute that the respondent parents introduced some postpetition evidence, including, among

other things, a competence based parenting assessment of the respondent mother completed by Kathleen M. Brown, dated April 30, 2020, and a psychotherapy intake note regarding the respondent mother, which was completed by Nicole M. Hayes, a licensed professional counselor. The court considered this evidence in the context of the dispositional phase of the termination proceedings. This postpetition evidence, however, did not offer any additional perspective determinative of the issue of the respondent father's rehabilitation. Specifically, this evidence did not demonstrate that the respondent mother no longer posed a threat to the children or that the respondent father intended to parent the children without her.[20]

The respondent father also argues that the evidence is insufficient to support the court's conclusion that he had failed to rehabilitate because the record demonstrates that he is willing and capable of benefiting from continued efforts toward reunification and that he could assume a responsible position in Richard's life, within a reasonable time, with proper support services in place. There is no indication in the record, however, that the respondent father sought the department's help in obtaining additional support services. Nor is there any evidence that the respondent father intended to rely on

[20] For example, the parenting assessment focused on ways in which to eliminate barriers impacting the respondent mother's ability to function, but it did not undertake to diagnose her mental health issues or to contradict Mantell's report. With respect to Hayes' psychotherapy intake note and assessment, it consisted of only a sixty minute session with the respondent mother, which included a thirty minute interview that focused on whether she needed trauma therapy. Other than an interview with the respondent mother and the administration of two testing instruments, which took place three days prior to the start of trial, Hayes' assessment did not take into consideration other sources of information, such as Mantell's report, which concluded that the respondent mother needed further focused treatment to address her violent threats to her children. Hayes clarified her assessment, testifying that she was not recommending that the children be returned to the respondent mother's care.

support services if reunification were to be granted, even though the respondent father was apprised of the department's concerns with respect to, inter alia, the respondents' intention to have the respondent mother care for the children while the respondent father was at work. See *In re Gabriel C.*, supra, 196 Conn. App. 358 ("[t]he purpose of the social study is to put parents on notice of allegations that need to be explained or denied" (internal quotation marks omitted)). To the extent the respondent father is maintaining that he should have been afforded more time to rehabilitate, "we recently have noted that such an argument is inconsistent with our Supreme Court's repeated recognition of the importance of permanency in children's lives." (Internal quotation marks omitted.) *In re Phoenix A.*, supra, 202 Conn. App. 847 n.4.

Construing the evidence in the manner most favorable to sustaining the court's judgment, as we must, we conclude that the evidence was sufficient to support the court's conclusion that the respondent father had failed to rehabilitate. Because the court determined that the respondent mother had failed to achieve a sufficient degree of rehabilitation and continued to pose a risk to Richard, it was entitled to rely on those findings and the respondent father's continued involvement with the respondent mother to conclude that the respondent father also had failed to rehabilitate. As our Supreme Court has observed, in considering whether a parent has failed to rehabilitate, trial courts have relied on evidence that a parent has continued to associate with a party who poses a danger to a child. See *In re Jorden R.*, supra, 293 Conn. 562 n.20; see also *In re Corey C.*, 198 Conn. App. 41, 76, 232 A.3d 1237 (court's determination that father failed to rehabilitate was not improper even though court's conclusion relied, in part, on factual findings related to risk mother posed to child), cert. denied, 335 Conn. 930, 236 A.3d 217 (2020); *In re Albert*

M., 124 Conn. App. 561, 565, 6 A.3d 815 (trial court's finding that father failed to rehabilitate was not clearly erroneous because record supported finding that father had "knowledge of the necessity of changing his relationship with the mother," yet failed to appreciate risk mother posed to child), cert. denied, 299 Conn. 920, 10 A.3d 1050 (2010); *In re Ellis V.*, 120 Conn. App. 523, 531–32, 992 A.2d 362 (2010) (record supported trial court's finding that father failed to achieve sufficient rehabilitation because he remained loyal to child's mother and entrusted child to mother's care while he was away for work, despite knowledge of mother's psychological and substance abuse issues).

In the present case, the respondent father was given an opportunity to pursue reunification on his own, but he declined to do so. Regardless of the respondent father's progress toward addressing the factors that led to Richard's commitment, given his failure to appreciate the risk posed by the respondent mother and his commitment to parent with her as a unit, we cannot find fault with the trial court's determination that he had failed to achieve the requisite personal rehabilitation so as to encourage the belief that, within a reasonable time, he could assume a responsible position in Richard's life.

C

Last, the respondent father claims the court improperly found that termination of his parental rights was in Richard's best interest. He contends that the trial court too narrowly focused on the respondents' actions prior to the filing of the termination petitions and failed to accord appropriate weight to evidence demonstrating that he consistently attended visitation and engaged in services, in addition to progress made by the respondent mother after the adjudicatory date. We do not

agree that the court's best interest determination was clearly erroneous.

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interest in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . [T]he trial court must determine whether it is established by clear and convincing evidence that the continuation of the [respondent father's] parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding the seven statutory factors delineated in [§ 17a-112 (k)].[21] . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination

[21] General Statutes § 17a-112 (k) provides in relevant part: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family . . . (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future . . . and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child . . . ."

can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote added; internal quotation marks omitted.) *In re Brian P.*, supra, 195 Conn. App. 579.

"[T]he fact that the legislature [had interpolated] objective guidelines into the open-ended fact-oriented statutes which govern [parental termination] disputes . . . should not be construed as a predetermined weighing of evidence . . . by the legislature. [If] . . . the record reveals that the trial court's ultimate conclusions [regarding termination of parental rights] are supported by clear and convincing evidence, we will not reach an opposite conclusion on the basis of any one segment of the many factors considered in a termination proceeding . . . . Indeed . . . [t]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference." (Internal quotation marks omitted.) *In re Jacob M.*, 204 Conn. App. 763, 789, 255 A.3d 918, cert. denied, 337 Conn. 909, 253 A.3d 43 (2021), and cert. denied sub nom. *In re Natasha T.*, 337 Conn. 909, 253 A.3d 44 (2021).

In the dispositional phase of the termination proceedings, the court made the following relevant findings. With respect to the criteria set forth in § 17a-112, the court found that (1) the department had timely made referrals to address the most important concerns that had been identified by the petitioner and service providers who had worked with the respondents to facilitate reunification; (2) the department had made reasonable efforts to reunify the respondents and the children, including providing substantial supervised visitation and multiple referrals for services; (3) the respondent father had made determined and significant progress toward improving his marital relationship and complied

with nearly every specific step but, nonetheless, remained unable to appropriately assess the threat to the children's safety and well-being insofar as the respondent mother is concerned; (4) Richard had bonded to his foster family and seeks their comfort and support; (5) Richard was twenty-seven months old and had been with his foster family since his discharge from the hospital after his birth; (6) the respondent father had failed to appreciate that the respondent mother poses a substantial risk to the children; and (7) there was no unreasonable conduct or economic circumstances that prevented the respondents from maintaining a meaningful relationship with the children.

In addition to the foregoing findings, the court found that the "respondent mother's resistance to meaningfully address the impact of her past trauma on her parenting history and her continuation of the cycle of parent-child violence causes serious concern for the children's welfare." Notwithstanding that the respondents had made demonstrable strides to address their intimate partner violence and communication issues, which the court applauded, the court found that those efforts had failed to address the primary areas of concern that were noted by the petitioner at the outset of this case when seeking custody of Lillyanne. On the basis of all of the evidence presented, the court ultimately found that there was no basis in the record to conclude that the respondent parents would be willing to adjust their circumstances such that the court could form a belief that they could safely and appropriately parent the children in the foreseeable future. Accordingly, the court concluded that terminating the respondents' parental rights was in Richard's best interest.

Importantly, the respondent father does not challenge the accuracy of any of the facts underlying the court's findings with respect to the criteria enumerated in § 17a-112 (k). Instead, in his appellate brief, he

appears to ask this court to reweigh the evidence that was presented to the trial court so that we might reach a conclusion that differs from the one reached by the trial court. That is not our role or function. See, e.g., *In re Janazia S.*, 112 Conn. App. 69, 99, 961 A.2d 1036 (2009) ("Our function as an appellate court is to review and not retry the proceedings of the trial court. . . . The probative force of conflicting evidence is for the trier to determine." (Internal quotation marks omitted.)). "[A] trial court's factual findings are accorded great deference" and will not be disturbed unless those findings are clearly erroneous. See, e.g., *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008).

Although the court discussed at length the evidence concerning the respondent mother's failure to address the root causes underlying her history of threatening or attempting to harm her children and the respondent father's inability to recognize the threat she posed to Richard's safety and well-being, it was not improper for the court to consider evidence relevant to its adjudicatory findings. As this court previously has observed, even though "the emphasis shifts from the parent to the child in the dispositional phase . . . a trial court is not required to blind itself to any parental deficiencies that also were considered during the adjudicatory phase. Our precedents establish that the consideration of the parent's circumstances, including the parent's degree of rehabilitation, is proper during the dispositional phase." (Citation omitted.) *In re Malachi E.*, 188 Conn. App. 426, 437, 204 A.3d 810 (2019). Additionally, the trial court's memorandum of decision makes clear that it did weigh the evidence that was more favorable to the respondent father in considering whether termination of his parental rights was in Richard's best interest. Nevertheless, the court noted that Richard had been in the care of his foster parents for more than two years at the time of the termination trial and could not afford

to wait for the respondents to make the necessary adjustments to ensure his safety and well-being. Aside from the time he spent in the hospital following his birth, Richard has spent his entire life residing in the home of his foster parents, where two of his biological siblings also were placed. See footnote 9 of this opinion. The record indicates that he is flourishing in his placement and shares a strong bond with his foster parents, who have expressed a commitment to adopt him. He requires permanency, stability, and a safe environment to continue to thrive. In light of the court's factual findings concerning the respondent mother's unwillingness to rehabilitate in a substantive manner, the respondent father's inability to perceive the risk she poses to the children, and the likelihood that the respondents will not substantially adjust their circumstances within the foreseeable future so as to ameliorate these concerns, we conclude that the court's determination that it was in Richard's best interest to terminate the respondent father's parental rights is not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

PAUL CONEY *v.* COMMISSIONER OF CORRECTION (AC 41747)

Alvord, Elgo and Albis, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder and criminal possession of a pistol or revolver, filed a fourth petition for a writ of habeas corpus. The habeas court, upon the request of the respondent Commissioner of Correction, issued an order to show cause why the petition should not be dismissed as untimely given that it had been filed beyond the time limit for successive petitions set forth in the applicable statute (§ 52-470 (d)). The court held an evidentiary hearing, during which the petitioner testified that he had filed a timely third habeas petition but withdrew it prior to trial because his prior habeas counsel

had advised him that withdrawing the petition and refiling it would be in the petitioner's best interest because counsel had lost contact with a key witness. The petitioner further testified that counsel did not discuss § 52-470 (d) or its effect on the petitioner's ability to file another petition challenging his conviction nor did he take any other action to address the witness' unavailability and that, if the petitioner had known that withdrawing the petition and refiling would result in an untimely petition, he would not have done so. The habeas court dismissed the fourth habeas petition as untimely, concluding that the petitioner failed to demonstrate good cause for the delay in filing the petition. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court did not abuse its discretion in determining that the petitioner failed to demonstrate good cause for the delay in filing his fourth habeas petition: contrary to the petitioner's claim that his prior habeas counsel's deficient advice to withdraw his third habeas petition constituted good cause, there were no external factors outside of the petitioner's control that caused or contributed to the withdrawal of that petition and the delay in filing the fourth habeas petition, and the petitioner and his counsel together exclusively bore responsibility for the delay in filing the fourth petition; moreover, insofar as the petitioner contended that the witness' unavailability for trial on the third habeas petition constituted an external factor that warranted the withdrawal of that petition and the subsequent untimely filing of the fourth habeas petition, it was clear that the petitioner and his counsel both bore personal responsibility for this proffered excuse, as neither took steps to address the witness issue by filing a motion for a continuance or requesting a status conference, but, rather, the petitioner addressed the issue by taking the drastic step of withdrawing the petition; furthermore, this court rejected the petitioner's assertion that the habeas court's decision was inconsistent with our Supreme Court's holding in *Kelsey* v. *Commissioner of Correction* (343 Conn. 424) that a petitioner's lack of knowledge of a change in the law is potentially sufficient to establish good cause, as the court in *Kelsey* did not hold that ignorance of the law is typically sufficient, and the habeas court in this case specifically considered both the petitioner's and his counsel's lack of knowledge of the time limit in § 52-470 (d) but, nevertheless, determined that there was no good cause for the delay in filing the petition.

Argued February 3, 2021—officially released September 13, 2022

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed*.

Judie Marshall, assigned counsel, with whom, on the brief, was *Stephanie L. Evans*, assigned counsel, for the appellant (petitioner).

Sarah Hanna, senior assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva B. Lenczewski*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Paul Coney,[1] appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus as untimely pursuant to General Statutes § 52-470 (d) and (e).[2] On appeal, the

[1] In the underlying criminal trial, the petitioner was convicted under the name Stephen Coney. See *State* v. *Coney*, 266 Conn. 787, 835 A.2d 977 (2003). In the present case, and in his previous habeas cases, however, the petitioner has used the name Paul Coney. The petitioner's full name is Stephen Paul Coney.

[2] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive pursuant to a decision of the Supreme Court or Appellate Court of this state or the Supreme Court of the United States or by the enactment of any public or special act. For the purposes of this section, the withdrawal of a prior petition challenging the same conviction shall not constitute a judgment. The time periods set forth in this subsection shall not be tolled during the pendency of any other petition challenging the same conviction. Nothing in this subsection shall create or enlarge the right of the petitioner to file a subsequent petition under applicable law.

"(e) In a case in which the rebuttable presumption of delay . . . applies, the court, upon the request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. For the purposes of this subsection, good cause includes, but is not limited to, the discovery

petitioner claims that the habeas court erred in determining that he failed to demonstrate good cause to overcome the statutory presumption of unreasonable delay. We disagree and, accordingly, affirm the judgment of dismissal.

The following facts and procedural history are relevant to this appeal. After a jury trial, the petitioner was convicted of one count of murder in violation of General Statutes § 53a-54a (a) and one count of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217c (a). *State* v. *Coney*, 266 Conn. 787, 790, 835 A.2d 977 (2003). The trial court sentenced the petitioner to a total effective term of sixty years of imprisonment, and our Supreme Court affirmed the judgment of conviction on direct appeal. Id., 790–91.

On February 20, 2004, the petitioner filed his first petition for a writ of habeas corpus (first petition), challenging the validity of his criminal conviction. The habeas court denied this petition. This court affirmed that judgment, and our Supreme Court thereafter denied certification to appeal. *Coney* v. *Commissioner of Correction*, 117 Conn. App. 860, 982 A.2d 220 (2009), cert. denied, 294 Conn. 924, 985 A.2d 1061 (2010). On March 18, 2010, the petitioner filed a second petition for a writ of habeas corpus (second petition), which also challenged his criminal conviction. He subsequently withdrew that petition prior to trial.

On June 1, 2012, the petitioner filed a third petition for a writ of habeas corpus (third petition), again challenging his criminal conviction, and a trial was scheduled for January 12, 2015. Shortly before the start of that trial, the petitioner's counsel advised the petitioner to withdraw the third petition because counsel had

of new evidence which materially affects the merits of the case and which could not have been discovered by the exercise of due diligence in time to meet the requirements of subsection . . . (d) of this section. . . ."

lost contact with a witness whose testimony counsel believed was essential to establish one of the claims set forth in the petition. Relying on that advice, the petitioner withdrew the third petition on January 6, 2015.[3]

On January 20, 2015, the petitioner filed a fourth petition for a writ of habeas corpus (fourth petition), which also challenged his criminal conviction and is the subject of this appeal. At the request of the respondent, the Commissioner of Correction, the court, *Sferrazza*, *J.*, issued an order, pursuant to § 52-470 (e), requiring the petitioner to show cause as to why the petition should not be dismissed as untimely, given that it was filed outside of the time periods prescribed in § 52-470 (d), and scheduled a hearing for May 1, 2018 (show cause hearing).

Prior to the show cause hearing, the petitioner submitted a "motion to find good cause and allow the case to proceed to trial." Therein, the petitioner asserted that his counsel for the third habeas action had advised him that "an important witness may not attend the trial," that "without his testimony the petitioner was unlikely to prevail," and that "he could withdraw his habeas petition and then refile, providing him with additional time to locate the witness." The petitioner further noted that his counsel had not sought a continuance or any other means of addressing the issue of the witness' unavailability prior to suggesting withdrawal. Finally, the petitioner asserted that his counsel never explained § 52-470 (d) or its impact on his ability to file future habeas petitions.

[3] The petitioner asserts that the habeas court should have canvassed him in person or via live video from the correctional facility before accepting his withdrawal of his third petition. The petitioner does not, however, explain how this alleged failure impacts the good cause analysis. Because the petitioner withdrew his third petition prior to trial and the rendering of a final judgment on its merits, that issue is not properly before us.

The petitioner testified at the show cause hearing, and no other evidence was presented. When asked, the petitioner agreed that his prior habeas counsel advised him to withdraw his third petition because a particular witness, who the petitioner's counsel described as "a key witness to one of [the habeas] claims," might not have been able to attend the trial on the third petition. The petitioner testified that his counsel informed him that he had lost contact with the witness and felt that withdrawing the petition and refiling would be in the petitioner's best interest.[4] The petitioner further testified that this discussion occurred during a meeting that lasted approximately five to ten minutes and that his counsel never discussed § 52-470 (d) or its effect on the petitioner's ability to file another petition attacking his conviction. The petitioner also testified that his counsel took no other action to address the witness' unavailability. Finally, he testified that, if he had known that withdrawing the third petition and refiling would result in an untimely petition, he would not have withdrawn his third petition.

Thereafter, each side presented arguments on the issue of good cause for the delay. The petitioner's counsel argued that the delay resulted from prior habeas counsel's "ineffectiveness"[5] and that such ineffective assistance satisfied § 52-470 (e), specifically citing the witness' alleged unavailability as the basis for the suggestion that the petitioner withdraw the third petition. Counsel for the respondent argued that the claim

[4] Although the witness' testimony would be presented in support of only one of the claims set forth in the third petition, the petitioner's counsel recommended withdrawal of the whole petition because he considered that claim to be the strongest one.

[5] Specifically, the petitioner's counsel cited prior counsel's failure to inform the petitioner of the time limit in § 52-470 (d), to pursue less "dramatic" steps such as requesting a continuance to find the witness, and to notify the petitioner of other options of addressing the issue regarding the witness.

regarding the "missing" witness was meritless and that attorney error could not be the basis of good cause.

The day after the show cause hearing, the court issued a memorandum of decision dismissing the petitioner's fourth petition. The court first determined that the fourth petition was presumptively untimely pursuant to § 52-470 (d).[6] The court then set forth the relevant facts as follows: "The trial [on the third petition] was scheduled to begin on January 12, 2015. Unfortunately, a highly desirable witness, in the view of the petitioner and his habeas counsel . . . went missing shortly before trial.

"[The petitioner's counsel] discussed this development with the petitioner and advised him that the best course would be to withdraw the [third petition] before trial and refile the claims in a new habeas [petition] to gain more time to locate the witness for use at a future trial. The petitioner accepted this advice and withdrew the third [petition] on January 6, 2015, around one week before the first day of trial. The sole purpose of that withdrawal was to avoid trial in the hope that, if a new habeas case was initiated, the witness could be found and his testimony presented at some later date. . . .

[6] Specifically, the court determined: "[T]he unfavorable decision [in the first habeas action] became final, at the latest, by January 25, 2010 . . . . The petitioner filed the present habeas action on January 20, 2015, nearly five years later. . . . Thus, the presumption of delay without good cause in § 52-470 (d) is activated." Although the petitioner does not challenge this determination, we note for the sake of clarity that the proper date by which to measure the timeliness of subsequent petitions challenging the petitioner's criminal conviction was October 1, 2014. See General Statutes § 52-470 (d) ("there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the *later* of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; (2) October 1, 2014; or (3) two years after the date on which the constitutional or statutory right asserted in the petition was initially recognized and made retroactive" (emphasis added)).

"Neither [the petitioner's counsel] nor the petitioner considered the effect the passage of § 52-470 (d) . . . had on the filing of a new habeas [petition] . . . that is, the petitioner could not file a new habeas [petition], directed at his criminal conviction, without invoking the presumption of undue delay, which, if unrebutted, mandated dismissal."

The court then determined that the petitioner had failed to establish good cause for the delay in filing, "reject[ing] poor legal advice as a basis for rebutting the presumption of undue delay."[7] In so doing, the court specifically cited the principle that "[g]ood cause must be external to the defense . . . ." See *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 137, 629 A.2d 413 (1993). Thereafter, the petitioner filed a petition for certification to appeal, which the court granted, and this appeal followed.[8]

Following oral argument, this court ordered, sua sponte, that this appeal be stayed pending the release

[7] The petitioner asserts that the habeas court "relied on an analysis that ignorance of the law is not a basis for good cause . . . ." The petitioner misinterprets the court's decision, however, as the court looked to "similar areas of the law" to determine whether "poor legal advice" could be sufficient to rebut the presumption of undue delay.

[8] Following the submission of the petitioner's appellate brief but prior to the submission of the respondent's brief, the respondent filed a motion to stay the appellate proceedings pending the release of our Supreme Court's decision in *Langston* v. *Commissioner of Correction*, 335 Conn. 1, 225 A.3d 282 (2020). This court granted the motion and entered an order staying the appeal. Follow the release of *Langston*, the respondent submitted its appellate brief.

Thereafter, the petitioner, represented by new appellate counsel, filed a motion for substitute briefing, requesting that the briefing process be restarted and arguing that his prior appellate counsel was deficient and that the petitioner "was not at fault for prior counsel's failure" and "should not suffer a deprivation based on prior counsel's errors." This court denied the motion but ordered, sua sponte, that the petitioner could file a supplemental brief to which the respondent would have the opportunity to respond. Both parties filed supplemental briefs.

of our Supreme Court's decision in *Kelsey* v. *Commissioner of Correction*, 343 Conn. 424, 274 A.3d 85 (2022).[9] Following the release of our Supreme Court's decision in *Kelsey*, the parties were ordered to file supplemental briefs addressing *Kelsey*'s impact on this appeal.

We begin our analysis by setting forth the applicable standard of review. "[A] habeas court's determination regarding good cause under § 52-470 (e) is reviewed on appeal only for abuse of discretion. Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did."[10] (Internal quotation marks omitted.) Id., 440.

Section 52-470 (d) provides in relevant part: "In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after . . . October 1, 2014 . . . ." Section 52-470 (e) provides in relevant part that, "[i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

"[T]o rebut successfully the presumption of unreasonable delay in § 52-470, a petitioner generally will be

[9] Initially, this court ordered the parties to provide their positions on whether the appeal should be stayed pending *Kelsey*. The respondent objected to a stay of proceedings, and the petitioner requested a stay. Thereafter, this court determined that no stay was necessary. Upon further consideration, however, this court determined that a stay was necessary and, accordingly, entered an order of stay.

[10] In his initial appellate brief, the petitioner asserted that, because his claim concerns the legal meaning of "good cause," it is subject to plenary review. In light of our Supreme Court's decision in *Kelsey*, the petitioner concedes that his claim is reviewed pursuant to the abuse of discretion standard. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 440.

required to demonstrate that something outside of the control of the petitioner or habeas counsel caused or contributed to the delay."[11] (Internal quotation marks omitted.) *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 441–42. The following nonexhaustive list of factors aid in determining whether a petitioner has satisfied the definition of good cause: "(1) whether external forces outside the control of the petitioner had any bearing on the delay; (2) whether and to what extent the petitioner or his counsel bears any personal responsibility for any excuse proffered for the untimely filing; (3) whether the reasons proffered by the petitioner in support of a finding of good cause are credible and are supported by evidence in the record; and (4) how long after the expiration of the filing deadline did the petitioner file the petition."[12] (Internal quotation marks omitted.) Id., 442.

"[A]lthough . . . the legislature certainly contemplated a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing, the legislature did not intend for a petitioner's lack of knowledge of the law, standing alone, to establish that a petitioner has met his evidentiary burden of establishing good cause. As with any

[11] Initially, the petitioner asserted that this court must engage in statutory interpretation and look to other areas of the law addressing "good cause" as well as sixth amendment jurisprudence in order to establish whether the facts of the case establish good cause for delay pursuant to § 52-470 (e). Following the release of *Kelsey*, however, the petitioner does not challenge the definition of good cause or the relevant factors for consideration set forth in that decision, which is binding on this court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent").

[12] In addition to these factors, "the habeas court may also include in its good cause analysis whether a petition is wholly frivolous on its face. . . . [T]he good cause determination can be, in part, guided by the merits of the petition." *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444 n.9.

excuse for a delay in filing, the ultimate determination is subject to the same factors previously discussed, relevant to the petitioner's lack of knowledge: whether external forces outside the control of the petitioner had any bearing on his lack of knowledge, and whether and to what extent the petitioner or his counsel bears any personal responsibility for that lack of knowledge." (Footnote omitted.) Id., 444–45. Furthermore, this court has recently considered whether an attorney's advice to withdraw a timely petition and to file another petition, without considering the effect of the time limit in § 52-470 (d), can establish good cause for delay and concluded that, without more, an attorney's erroneous advice does not constitute good cause within the meaning of § 52-470. See *Michael G.* v. *Commissioner of Correction*, 214 Conn. App. 358, 364–72, A.3d (2022).

In *Kelsey*, the petitioner filed a second petition for a writ of habeas corpus approximately five years after our Supreme Court denied his petition for certification to appeal from this court's judgment affirming the habeas court's denial of the petitioner's first petition for a writ of habeas corpus. *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 429. The habeas court determined that the petitioner did not demonstrate good cause for the delay in filing his second petition and, therefore, dismissed the petition. Id., 431. On appeal before our Supreme Court, the petitioner argued that, "in addition to his prior habeas counsel's failure to inform him of any statutory filing deadlines, his status as a self-represented party when he filed this petition caused the delay in filing insofar as his conditions of confinement had caused him to be unaware of the deadline set by the 2012 amendments to § 52-470." Id., 441. The court rejected this argument, noting that "the petitioner had access to a resource center that included the General Statutes" and that "the petitioner stated

[as an explanation for the delay] that he was housed in and out of administrative segregation due to a disciplinary problem." Id., 446.

Similarly, in *Michael G.* v. *Commissioner of Correction*, supra, 214 Conn. App. 358, the petitioner filed a subsequent petition for a writ of habeas corpus challenging his conviction approximately ten months after the passing of the statutory deadline and the withdrawal of a previous habeas petition challenging the conviction. Id., 362. The petitioner argued that his prior counsel, who had advised him to withdraw his petition, provided deficient advice, which constituted good cause for his delay in filing his subsequent petition. Id., 364. This court disagreed and, on the basis of the factors set forth in *Kelsey*, determined that "there [were] no external factors at play and the petitioner and his habeas counsel together exclusively [bore] responsibility for the delay in filing the petition." Id., 370. In addition, this court concluded that "the habeas court . . . reasonably concluded that the petitioner's [withdrawal of the previous petition was] an attempt to 'manipulate or delay proceeding to trial.' " Id., 371–72.

In the present case, the petitioner does not dispute that his fourth petition was presumptively untimely. Rather, he argues that the court erred when it determined that the petitioner had not established good cause for the delay in filing his fourth petition. Specifically, the petitioner argues that his prior habeas counsel's advice to withdraw his third petition, despite the fact that the statutory deadline had passed, constituted good cause for the delay in filing. In addition, the petitioner points to his ignorance of the law, his counsel's ignorance of the law, and the unavailability of the important witness as being beyond his control and excusing his untimely fourth petition. We disagree.

The first two *Kelsey* factors are particularly instructive: on the basis of the evidence presented at the show

cause hearing, there are no external factors at play and the petitioner and his prior habeas counsel together exclusively bear responsibility for the delay in filing. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 445. As the respondent notes, "the petitioner and his counsel were solely responsible for the withdrawal of the petitioner's [third] petition. Therefore, the 'cause' of the delay was not 'something outside of the control of the petitioner or habeas counsel' as required under [*Kelsey*'s] definition of good cause . . . ." The habeas court expressly credited the petitioner's testimony that the reason he failed to timely file the fourth petition was because of his prior habeas counsel's advice. As a result, the court determined that the petitioner's prior counsel bore personal responsibility for the untimely filing. In light of its determination that the poor advice of counsel does not constitute good cause, the court concluded that the petitioner had not overcome the statutory presumption that his fourth petition was untimely and must be dismissed. On the basis of the evidence presented at the show cause hearing, there are no external factors at play, and the petitioner and his prior habeas counsel together exclusively bear responsibility for the delay in filing the fourth petition. See *Kelsey* v. *Commissioner of Correction*, supra, 442; see also *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 591–92, 284 A.2d 1191 (1996) (neglect by party or party's attorney does not meet traditional definition of good cause), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997).

Although it is arguable that the witness' unavailability for trial on the third petition constituted an external factor outside the control of the petitioner and his counsel that warranted the withdrawal of the third petition and subsequent untimely filing of the fourth petition, under the present facts, it is clear that the petitioner and his counsel both bear personal responsibility for

this proffered excuse. See *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 442. As discussed previously in this opinion, the petitioner and his counsel took no other steps to address the issue regarding the witness, as no motion for a continuance was filed and no request for a status conference was made. The petitioner addressed the issue only by taking the rather drastic step of withdrawing his entire third petition. Counsel's error in failing to consider the effect of § 52-470 on future petitions is not tempered by the reason for his advice to withdraw the petition.

Finally, although our Supreme Court specifically recognized "a petitioner's lack of knowledge of a change in the law as potentially sufficient to establish good cause for an untimely filing"; *Kelsey* v. *Commissioner of Correction*, supra, 343 Conn. 444; the court did not hold that ignorance of the law is typically sufficient. We therefore reject the petitioner's position that the habeas court's decision "is inconsistent with the holding in *Kelsey*, since the *Kelsey* court acknowledged the legislative intent to consider knowledge of the law as part of the good cause analysis." Furthermore, the habeas court in this case specifically considered both the petitioner's and his counsel's lack of knowledge of the time limit in § 52-470 (d) but determined that there was no good cause for delay—this conclusion does not run afoul of *Kelsey*. Thus, we conclude that the habeas court did not abuse its discretion in determining that the petitioner had failed to demonstrate good cause for the delay in filing his fourth petition for a writ of habeas corpus.[13]

The judgment is affirmed.

In this opinion the other judges concurred.

[13] In his supplemental brief addressing *Kelsey*'s effect on this case, the petitioner suggests that, because the habeas court did not have the guidance of *Kelsey* when considering whether there was good cause for the delay, "this matter should be remanded for further proceedings." We conclude that this argument has no merit.

LUIS SOTO *v.* COMMISSIONER OF CORRECTION (AC 43289)

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

Syllabus

The petitioner, who had been convicted of the crimes of criminal possession of a pistol and risk of injury to a child, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, C, had provided ineffective assistance. The police obtained a search warrant for the home of P, the petitioner's cousin, on the basis of a tip from a confidential informant indicating that P was in possession of a semiautomatic handgun. The petitioner was in the home when the police executed the warrant. The police discovered a semiautomatic pistol, which they later determined had been stolen, inside of a backpack that was in the closet of one of the bedrooms. After the petitioner became aware that the police had located the pistol, one of the police officers overheard him ask P in Spanish, "quién va a tomar," meaning, "who's going to take it." Thereafter, both the petitioner and P denied possession and knowledge of the pistol. The petitioner, however, admitted that he was staying in the bedroom in which the pistol was located, that his clothes were hanging in the closet, and that he had been in and out of the closet multiple times. Prior to trial, the petitioner rejected two offers to enter into a plea agreement, the first of which would have required him to serve three years of incarceration and the second of which would have required him to serve two years. Following trial, he was sentenced to a term of twelve years of incarceration. The petitioner filed a writ of habeas corpus alleging, inter alia, that C had rendered ineffective assistance by failing to meaningfully convey the plea offers and by failing to investigate and call the confidential informant as a witness. The habeas court denied the writ of habeas corpus, and, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The habeas court's conclusion that the petitioner failed to prove that he was prejudiced by C's allegedly deficient pretrial advice was not improper: although C rendered professional assistance that may have been deficient in certain respects, the petitioner could not prevail on his claim of ineffective assistance with respect to the pretrial proceedings because he failed to establish, pursuant to *Strickland* v. *Washington* (466 U.S. 668), that he was prejudiced by C's actions, as the habeas court, crediting C's testimony that the petitioner insisted that he was innocent of the crimes charged and thought that the second offer was unfair when compared to the offer received by P and discrediting the petitioner's testimony that, but for C's advice, he would have accepted a plea offer, found that there was no credible evidence that the petitioner was ever willing to accept a pretrial offer, regardless of C's advice;

moreover, the petitioner's alternative argument that the habeas court, in analyzing the claim under *Strickland*, applied an improper legal standard failed because, contrary to the petitioner's claim, C's conduct was not presumptively prejudicial under *United States* v. *Cronic* (466 U.S. 648), as the record demonstrated that the petitioner was provided legal counsel throughout his criminal trial, the petitioner did not claim that his criminal trial presented a situation in which no competent attorney could render effective assistance, and C did not entirely fail to subject the prosecution's case to meaningful adversarial testing.

2. The petitioner could not prevail on his ineffective assistance of counsel claim with respect to C's failure to investigate and call the confidential informant as a witness because he failed, under *Strickland*, to establish that he was prejudiced by such failure: the habeas court's conclusion that the informant's testimony would have been cumulative to other evidence elicited at the criminal trial was supported by the evidence, including the warrant to search the apartment, which was obtained on the basis of the informant's tip that P was in possession of a gun; moreover, the state's theory at trial was that the petitioner constructively possessed the gun, and the fact that P had been, at one time, in actual possession of the gun did not by itself negate that theory; furthermore, the informant did not and could not offer any testimony regarding the petitioner's knowledge, dominion or control of the backpack or the gun that was sufficient to undermine confidence in the verdict, which was supported by the petitioner's admissions and by his incriminating statement in Spanish to P, which supported an inference that he knew of the gun's presence and its incriminating nature; accordingly, this court was not convinced that there was a reasonable probability that, but for C's alleged errors, the result of the proceeding would have been different.

Argued February 8, 2021—officially released September 13, 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.*

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Joseph T. Corradino*,

state's attorney, and *Cornelius Kelly*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ELGO, J. The petitioner, Luis Soto, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. On appeal, the petitioner claims that the court improperly rejected his claim that trial counsel rendered ineffective assistance (1) during pretrial proceedings and (2) by failing to investigate and present the testimony of a confidential informant at trial. We affirm the judgment of the habeas court.

The following facts are relevant to our resolution of the petitioner's claims. "On June 11, 2014, at approximately 5 a.m., police officers with the Statewide Urban Violence Cooperative Crime Control Task Force (task force) executed a search warrant on the second floor apartment at 217 Hough Avenue in Bridgeport. The task force had obtained the warrant on the basis of a confidential informant's tip that Francisco Pineiro, the [petitioner's] cousin, was in possession of a black semiautomatic handgun. When the task force officers applied for the warrant, they believed that, in addition to Pineiro, Christina Jimenez and her two children resided at the apartment.

"Upon entering the apartment, task force officers encountered Pineiro, Jimenez, two children aged ten and five, and the [petitioner]. Some of the task force officers detained the apartment's occupants in the kitchen while other officers searched the apartment. The apartment had three bedrooms, one of which eventually was determined to be the [petitioner's]. In the closet of that bedroom, Detective David Edwards found a leather backpack containing a bag of cocaine, three loose .40 caliber rounds, and a semiautomatic pistol that was fully loaded with twelve rounds. The task force

officers eventually determined that the pistol had been stolen several years earlier. Edwards also found the [petitioner's] state identification card on a television stand in that bedroom and some clothes hanging in the bedroom closet.

"While being detained in the kitchen, the [petitioner] became aware that task force officers [had] found a pistol in the bedroom. At that point, Officer Ilidio Pereira, who was detaining the apartment's occupants in the kitchen, overheard the [petitioner] ask Pineiro in Spanish, 'quién va a tomar,' which means 'who's going to take it.'

"After recovering the pistol, Edwards questioned Pineiro, Jimenez, and the [petitioner] about the pistol. Both Pineiro and Jimenez denied possession and knowledge of the pistol. Additionally, Jimenez was 'genuinely concerned and shocked' about the pistol's presence in the apartment and 'placed the blame' on the [petitioner] for the pistol. The [petitioner], who was a convicted felon, stated that the pistol was not his, that he had never seen it before, and that he did not know to whom it belonged. The [petitioner] did indicate, however, that he was staying in that bedroom, that the clothes hanging in the closet belonged to him, and that he had been 'in and out of the closet multiple times.'

"As a result of the search and questioning of the apartment's occupants, task force officers arrested the [petitioner] on several gun and drug offenses. The state charged the [petitioner] with stealing a firearm in violation of General Statutes § 53a-212 (a), criminal possession of a pistol in violation of [General Statutes] § 53a-217c (a) (1), possession of a controlled substance within 1500 feet of a school in violation of General Statutes § 21a-279 (b), and risk of injury to a child in violation of [General Statutes] § 53-21 (a) (1). The [petitioner] elected a jury trial.

"At trial, the state sought to establish that the [petitioner] constructively possessed the pistol, ammunition, and cocaine seized from Pineiro's apartment. Specifically, it sought to link the [petitioner] to those items with statements he had made to Pineiro and to task force officers at Pineiro's apartment. The [petitioner's] statements were introduced through the testimony of several task force officers who had participated in executing the warrant at Pineiro's apartment. In particular, those officers testified that the [petitioner] asked Pineiro 'who's going to take it' in reference to the pistol, that he indicated that he was staying in the bedroom in which the items were found, that he stated that the clothes hanging in the closet belonged to him, and that he admitted that he had been 'in and out of the closet multiple times.'

"In an effort to refute the officers' testimony with his own version of the events as to what had transpired at Pineiro's apartment, the [petitioner] testified on his own behalf. The [petitioner's] decision to do so rendered this case, in large part, a credibility contest between the [petitioner] and the task force officers. The thrust of the [petitioner's] testimony was a blanket denial of the inculpatory statements the task force officers alleged he had made, including his asking Pineiro 'who's going to take it' with respect to the pistol that the officers had discovered.

"Furthermore, the [petitioner] denied that the officers asked him whether he had been staying in the bedroom in which the pistol was found, whether the backpack in which the pistol was stored belonged to him, whether the cocaine stored in the backpack belonged to him, and whether the clothes in the bedroom belonged to him. According to the [petitioner], the only question the officers asked him was if the gun belonged to him. The [petitioner] testified that, in

response to that question, he stated 'that's not my gun, I never saw it.'

"The jury found the [petitioner] guilty of criminal possession of a pistol and risk of injury to a child, but not guilty of stealing a firearm and possession of a controlled substance within 1500 feet of a school." *State* v. *Soto*, 175 Conn. App. 739, 741–43, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). The trial court rendered judgment accordingly and sentenced the petitioner to a term of twelve years of incarceration. Id., 744. This court affirmed that judgment of conviction on direct appeal. Id., 757.

On June 9, 2016, the petitioner filed a petition for a writ of habeas corpus, alleging that his trial counsel, Attorney Andre Cayo, rendered ineffective assistance,[1] inter alia, because he failed (1) "to meaningfully convey one or more plea offers to the petitioner" and (2) "to adequately investigate, identify and compel the attendance of the state's confidential informant . . . ."[2] A habeas trial was held on March 6 and 11, 2019. On June 19, 2019, the court issued a memorandum of decision

[1] In his petition, the petitioner also raised a claim of actual innocence, which the court rejected. On appeal, the petitioner does not challenge the propriety of that determination.

[2] The petitioner also alleged that Cayo was ineffective because he failed (1) "to provide the petitioner with affirmative advice as to what plea [he] should enter," (2) "to properly and adequately investigate witnesses," (3) "to properly and adequately present the testimony of witnesses," (4) "to investigate and present witnesses to identify the firearm as belonging to [Pineiro]," (5) "to seek correction of the [trial] court's statement that the petitioner had a room in the home of [Pineiro and Jimenez]," (6) "to adequately seek to compel the testimony of [Jimenez]," (7) "to adequately exclude evidence of the petitioner's prior conviction for possession of a weapon," (8) "to adequately advise the petitioner of the undesirability of exercising his right to testify," and (9) to act reasonably when he "argued to the jury about his own criminal matter(s) . . . ." The habeas court concluded that those claims lacked merit, and the petitioner does not contest those rulings on appeal.

denying the petitioner's writ of habeas corpus. Thereafter, the habeas court granted the petition for certification to appeal, and this appeal followed.

Before considering the petitioner's specific claims, we first note the well established precepts that govern our review. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. 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. . . .

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong of the *Strickland* test, 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. . . . [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. . . .

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Wargo* v. *Commissioner of Correction*, 144 Conn. App. 695, 700–702, 73 A.3d 821 (2013), appeal dismissed, 316 Conn. 180, 112 A.3d 777 (2015).

"It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 278, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). "[T]he petitioner's failure to prove either [the performance prong or the prejudice prong] is fatal to a habeas petition." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." (Internal quotation marks omitted.) *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 72, 174 A.3d 206 (2017). With those principles in mind, we turn to the

petitioner's specific claims of ineffective assistance of counsel.

I

The petitioner first claims that the court improperly concluded that he failed to prove that he was prejudiced by Cayo's allegedly deficient pretrial advice. We do not agree.

The following additional facts and procedural history are relevant to the petitioner's claim. During the habeas trial, Nicholas Bove, the prosecutor from his criminal trial, testified that, although he was not personally involved in any plea negotiations with the petitioner, his review of the file reflected that two offers were made to the petitioner. On October 14, 2014, the state offered the petitioner a sentence of ten years of incarceration, execution suspended after three years, with five years of probation and a $5000 fine (first offer). That offer was withdrawn by the state on November 13, 2014. According to Bove, the trial court proposed a second offer of ten years of incarceration, execution suspended after two years, with five years of probation and a $5000 fine on November 19, 2014 (second offer), which the petitioner rejected.[3] The state was unwilling to offer a term of less than two years of imprisonment. On December 9, 2014, Bove and Cayo appeared before the court, at which time the state represented that there had been no progress on the offer proposed by the court on November 19, 2014. As a result, the court

[3] The record indicates that Attorney Thomas Paoletta filed an appearance for the petitioner on June 12, 2014. Although Cayo filed his appearance in lieu of the public defender's office on November 13, 2014, Attorney Joanna Carloni from the Office of the Public Defender appeared with the petitioner in court on November 19, 2014, and reported that he was eligible for its services. The transcript of the hearing on November 19, 2014, does not reflect the substance of any off the record discussions regarding an offer by the court.

scheduled the matter for a jury trial, which commenced on February 5, 2015.

At the habeas trial, Cayo gave conflicting and confusing testimony regarding whether he had advised the petitioner to consider a plea agreement. Cayo testified that he first appeared on behalf of the petitioner right before trial and had not participated in any pretrial proceedings. As to why he never discussed with the petitioner the mandatory minimum sentences that he faced if convicted, Cayo explained that he was not the petitioner's attorney at the time that the plea offers were made and rejected, which is when such discussions ordinarily would occur with his client. Cayo also stated that, after filing his appearance on behalf of the petitioner, he never approached the state about resolving the case through a plea agreement because he knew the state would not offer less than two years. Cayo also did not recall whether the state made another offer following the petitioner's rejection of the first two offers, stating only, as a matter of practice, rejected offers may or may not be on the table.

When asked if he had "a recollection of there being a firm offer on the table in this case prior to trial when [he] represented the petitioner," Cayo testified that he recalled "talking to one of the state attorneys who made a final offer before trial of two years, no money, or two years and less money." Asked whether he had conveyed only one offer to the petitioner during the course of his representation, Cayo testified: "Yes, just one offer. Actually . . . there might have been a second offer with or without money. So, there was—I think the two years was the same. I think there was an offer with money and another offer without money. So, the [offer] without money may have come second." Cayo testified that he told the petitioner about the second offer, which—contrary to the state's testimony and documentary evidence—he stated was for "two years, no money,

or two years and less money." Cayo further testified that the petitioner at that time had claimed that he was innocent and that two years of imprisonment was "too much" because Pineiro had been offered only three months of incarceration.

At the habeas trial, the petitioner testified that, had he not been misadvised by Cayo on a variety of legal and evidentiary issues during his criminal trial, he "would have just took the three years." In particular, the petitioner and Cayo both testified that Cayo never explained the theory of constructive possession to the petitioner. The petitioner also insisted that he had no knowledge of the handgun found by the police.

In its memorandum of decision, the court first concluded that the petitioner's ineffective assistance claim could not succeed because "the evidence fails to establish that [Cayo] was actually the attorney who represented and advised the petitioner at the time he formally rejected the offers." The court also concluded that, even if the evidence sufficiently had established that Cayo represented the petitioner at the time the offer was formally extended, "or that the [second offer] was recommunicated to [Cayo] in a way that obligated him to discuss the matter with [him]," the petitioner had failed to establish prejudice because "Cayo was clear and unequivocal that the petitioner [at that time] . . . insisted [that] he had no knowledge of the drugs or guns with which he was charged, that he firmly protested his innocence, and that he was wholly unwilling to accept a resolution that required him to serve two years in prison. The petitioner also admitted that he always denied knowledge of the gun or the [backpack] when speaking to counsel. . . . [T]he petitioner protested the unfairness of an offer that would require him to serve two years while his codefendant was supposedly only being offered three months." The court thus concluded that, "despite the petitioner's testimony *now*,

[there was no] credible evidence that he was ever willing to accept the [second offer], regardless of counsel's advice." (Emphasis in original.)

A

On appeal, we need not address both prongs of the *Strickland* test if either is dispositive of the petitioner's ineffective assistance of counsel claim. See *Quint* v. *Commissioner of Correction*, 211 Conn. App. 27, 32, 271 A.3d 681, cert. denied, 343 Conn. 922, 275 A.3d 211 (2022). Because we conclude that the petitioner has failed to establish that the habeas court erred in its prejudice determination, we limit our analysis to that prong.

We begin our analysis by noting that, to establish prejudice in the context of plea negotiations, a petitioner must show that "(1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013). Moreover, "[i]t is well established that an appellate court cannot evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Georges* v. *Commissioner of Correction*, 203 Conn. App. 639, 646, 249 A.3d 355, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

A review of cases in which habeas courts have made credibility determinations regarding a petitioner's willingness to accept plea offers is instructive. In *Watts* v.

Commissioner of Correction, 194 Conn. App. 558, 562, 221 A.3d 829 (2019), cert. denied, 334 Conn. 919, 222 A.3d 514 (2020), the petitioner was charged with, inter alia, murder in violation of General Statutes §§ 53a-8 (a) and 53a-54 (a), conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and three counts of assault in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-59 (a) (5) in relation to a shooting in Hartford. The petitioner also was charged with assault in the first degree in violation of § 53a-59 (a) (1) in connection with an altercation in East Hartford. Id. Shortly thereafter, the court offered the petitioner a plea deal of thirty-eight years of incarceration to resolve both cases. Id. The petitioner rejected that offer, and, before jury selection began in the Hartford case, he accepted a separate plea offer of nine years to resolve the East Hartford case. Id. After a jury found the petitioner guilty in the Hartford case of manslaughter in the first degree in violation of General Statutes §§ 53a-8 (a) and 53a-55a (a) and three counts of assault in the first degree, the court sentenced the petitioner to a term of ninety-five years of incarceration. Id., 562–63.

Subsequently, the petitioner brought a habeas action alleging, inter alia, ineffective assistance of counsel. Id., 563. At the habeas trial, the petitioner testified that, if he had received accurate advice from his trial counsel, he would have accepted the plea offer given by the court to resolve both cases. Id., 564. Later in his testimony, however, the petitioner stated that, at the time he was offered a plea deal of thirty-eight years, it was his impression that it was a " 'large sentence.' " Id., 566. The habeas court concluded that "the petitioner did not prove that there was a reasonable probability that he would have accepted the offer of thirty-eight years, even if [his trial counsel] had recommended it, and

implicitly discredited the petitioner's testimony." (Internal quotation marks omitted.) Id.

On appeal, this court affirmed the propriety of that determination "[b]ecause the habeas court discredited the petitioner's testimony, and there was no other evidence from which the court could have found that the petitioner would have accepted the plea deal offered . . . ." Id., 566–67. Accordingly, this court concluded that the petitioner "failed to meet his burden of demonstrating prejudice. Ultimately, the habeas court concluded, after choosing not to credit the petitioner's testimony, that he would not have accepted the plea offer if his lawyer had performed competently and that the petitioner failed to sustain his burden of persuasion of showing that he was prejudiced by his trial counsel's alleged deficient performance. Given our well established deference to the habeas court's credibility determinations, the petitioner cannot prevail on this claim." Id., 567.

In *Fields* v. *Commissioner of Correction*, 179 Conn. App. 567, 180 A.3d 638 (2018), the petitioner challenged his thirty year sentence for felony murder, claiming that his trial counsel rendered ineffective assistance by failing to advise him of a plea offer made by the state before trial. Id., 568–69. Although the habeas court concluded that the petitioner's trial counsel had rendered constitutionally deficient performance by failing to advise the petitioner of the state's twenty-five year plea offer, the court nonetheless determined that the petitioner had not been prejudiced by that deficient performance. Id., 569. Specifically, the court concluded that the petitioner had failed to demonstrate, by a fair preponderance of the evidence, that he would have accepted the offer had his trial counsel conveyed it to him. Id. At the habeas trial, the petitioner testified that he would have accepted responsibility in exchange for the plea offer of twenty-five years. Id., 571–72. In its

memorandum of decision, however, the court refused to credit the petitioner's testimony in that regard, noting that "(1) it was self-serving; (2) it was the only evidence in the record that the petitioner would have accepted the offer; and (3) because what the petitioner would do at the time of the hearing, knowing the outcome of his trial, was different from what he would have done at the time of his sentencing." Id., 576.

On appeal, the petitioner in *Fields* claimed that the habeas court erred in concluding he was not prejudiced by his trial counsel's constitutionally deficient performance "because there was no evidence in the record tending to show that he would not have accepted the offer, and, thus, the court's finding to that effect was entirely speculative." Id., 569. This court rejected that claim, stating: "Although we are troubled by the facts of this case concerning [trial counsel's] deficient performance, we must keep in mind that, in assessing the habeas court's finding as to prejudice, [i]t is simply not the role of this court on appeal to second-guess credibility determinations made by the habeas court." (Internal quotation marks omitted.) Id.

Both cases compel a similar conclusion here. In the present case, the habeas court credited Cayo's "clear and unequivocal" testimony that the petitioner insisted that he was innocent of the crimes charged and thought the second offer was unfair when compared to his codefendant's offer.[4] As in *Watts*, the habeas court here

[4] We note that the petitioner has asserted that this determination by the habeas court was "predicated on clearly erroneous factual findings . . . ." We do not agree. "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 a definite and firm conviction that a mistake has been committed. . . . It is not enough to merely point to evidence in the record that contradicts the court's findings." (Citation omitted; internal quotation marks omitted.) *Rosa* v. *Commissioner of Correction*, 171 Conn. App. 428, 434, 157 A.3d 654, cert. denied, 326 Conn. 905, 164 A.3d 680 (2017).

The petitioner first contends that, although the habeas court concluded that the petitioner "protested the unfairness of an offer that would require

discredited the petitioner's habeas trial testimony that,

him to serve two years while his codefendant was supposedly only being offered three months," Cayo had testified that *he advised* the petitioner that "[t]wo years was too much time especially when [Pineiro] was getting three months." Earlier in Cayo's testimony, however, he stated that "my client did not want to do two years because . . . based on my advice *and based on what he felt*, he should not have to do two years if it's [Pineiro] who . . . was getting three months." (Emphasis added.) More importantly, the habeas court had before it the following colloquy between counsel for the respondent and Cayo:

"Q. [D]id [the petitioner] at any point in time during those situations that you met with him on the court dates indicate that 'I want to plead guilty to these charges?'

"A. No.

"Q. He never indicated that?

"A. No.

"Q. And he wanted this trial?

"A. Well, not necessarily. He was willing to do less than two years.

"Q. Okay.

"A. But he didn't want to do two years.

"Q. Right.

"A. He thought two years was too much.

"Q. All right.

"A. And—

"Q. And I believe the state wasn't willing to come off that two year offer?

"A. Correct.

"Q. Thus, creating a situation where the case was destined for a trial which you did have?

"A. Yes."

As a result, the court had before it testimony that the petitioner independently believed two years was "too much" time under the circumstances. In addition, there was a plethora of evidence on which the court could have relied in concluding that the petitioner was not credible, including his testimony that Cayo conveyed both pretrial offers to him. Therefore, the court's finding that there was no credible evidence that the petitioner was ever willing to accept a pretrial offer, regardless of counsel's advice, is not clearly erroneous.

The petitioner also argues that, when the habeas court concluded that he was "wholly unwilling to accept a resolution that required him to serve two years in prison," it failed to consider Cayo's testimony that the petitioner "probably was willing to take the two years without the fine." A review of the record nonetheless indicates that there was conflicting evidence as to whether there was an offer for two years of imprisonment without a fine. According to Bove, the first offer and the second offer both included a $5000 fine. Cayo, however, testified: "I think there was an offer with money and another offer without money. So the [offer] without money may have

but for Cayo's advice, he would have accepted a plea offer. The court found that there was no "credible evidence that [the petitioner] was ever willing to accept the [second offer], regardless of counsel's advice." As in *Fields*, we are troubled by certain facts concerning Cayo's pretrial conduct. Nonetheless, "[a]ppellate courts do not second-guess the trier of fact with respect to [determinations of] credibility"; (internal quotation marks omitted) *Perez* v. *Commissioner of Correction*, 194 Conn. App. 239, 242, 220 A.3d 901, cert. denied, 334 Conn. 910, 221 A.3d 43 (2019); and "[t]his court does not retry the case or evaluate the credibility of the witnesses." (Internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 141 Conn. App. 626, 632, 62 A.3d 554, cert. denied, 308 Conn. 947, 67 A.3d 290 (2013). In light of the foregoing, we conclude that the petitioner has not established that he was prejudiced by the actions of his trial counsel, and, therefore, he cannot prevail on his first claim of ineffective assistance of counsel.

B

The petitioner argues in the alternative that, irrespective of the habeas court's credibility determination,

come second." Additionally, Cayo testified the petitioner was unwilling to accept an offer for two years of imprisonment because Pineiro was offered significantly less time in prison. In the face of such conflicting evidence, we are mindful of our long-standing precedent that, "[w]hen there is conflicting evidence . . . it is the exclusive province of the . . . trier of fact, to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude . . . ." (Internal quotation marks omitted.) *State* v. *Williams*, 200 Conn. App. 427, 448, 238 A.3d 797, 811–12, cert. denied, 335 Conn. 974, 240 A.3d 676 (2020). The petitioner's arguments merely point to evidence in the record that contradicts the court's factual findings, which is insufficient to support a determination that those findings are clearly erroneous. See *Rosa* v. *Commissioner of Correction*, supra, 171 Conn. App. 434.

Cayo's conduct was presumptively prejudicial under *United States* v. *Cronic*, 466 U.S. 648, 659–60, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), and that the court erred in not analyzing his ineffective assistance claim under that authority. On our plenary review of that question of law; see *Hartford Courant Co.* v. *Freedom of Information Commission*, 261 Conn. 86, 96–97, 801 A.2d 759 (2002); we disagree.

The United States Supreme Court recognized in *Strickland* that "[i]n certain [s]ixth [a]mendment contexts, prejudice is presumed." *Strickland* v. *Washington*, supra, 466 U.S. 692. In *Cronic*, which was decided on the same day as *Strickland*, the court "elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a defendant at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 555, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, 578 U.S. 941, 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). The court subsequently has emphasized "how seldom circumstances arise that justify a court in presuming prejudice . . . ." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 644, 153 A.3d 1264 (2017); see also *Ellis* v. *United States*, 313 F.3d 636, 643 (1st Cir. 2002) ("[t]he only [s]ixth [a]mendment violations that fit within this narrowly circumscribed class are those that are pervasive in nature, permeating the entire proceeding"), cert. denied, 540 U.S. 839, 124 S. Ct. 99, 157 L. Ed. 2d 72 (2003).

None of the three prongs of *Cronic* is implicated in the present case. The record demonstrates that the petitioner was provided legal counsel throughout his

criminal trial, and he does not argue otherwise on appeal. The petitioner also does not contend that this case presented a situation in which no competent attorney could render effective assistance. Moreover, when viewed in its entirety, the present case is not one in which counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Although the petitioner claims that Cayo's representation was deficient in multiple respects, such as misadvising him on the state's plea offers, the likelihood of prevailing at trial, and the probability of a much greater sentence after trial, those claims all concern the adequacy of the representation provided and properly are analyzed under *Strickland*. See, e.g., *Boria* v. *Keane*, 99 F.3d 492, 495–96 (2d Cir. 1996) (in case where trial counsel failed to advise petitioner of slim chance of success at trial, claim of prejudice was reviewed pursuant to *Strickland*), cert. denied, 521 U.S. 1118, 117 S. Ct. 2508, 138 L. Ed. 2d 1012 (1997); *Fields* v. *Commissioner of Correction*, supra, 179 Conn. App. 577 (in case where trial counsel failed to inform petitioner of state's plea offer, claim was reviewed pursuant to *Strickland*); *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 794, 802, 93 A.3d 165 (2014) (in case where trial counsel failed to offer petitioner "her professional advice and assistance concerning, and her evaluation of, the . . . plea offer," claim was reviewed pursuant to *Strickland*).

Contrary to the petitioner's contention, the record before us does not reveal that Cayo " 'wasn't really acting as a lawyer at all.' " In this regard, we are mindful that Cayo helped the petitioner obtain an acquittal on the charges of stealing a firearm and possession of a controlled substance within 1500 feet of a school. See *State* v. *Soto*, supra, 175 Conn. App. 743. Although Cayo rendered professional assistance that may have been deficient in certain respects, we cannot conclude that this case falls into the narrow class for which review

under *Strickland* is obviated and prejudice must be presumed. The habeas court, therefore, did not apply an improper legal standard to the petitioner's claim of ineffective assistance.

II

The petitioner next claims that Cayo rendered ineffective assistance by failing to investigate and present the testimony of the state's confidential informant (informant). The respondent contends that, because the informant's testimony was cumulative to other evidence presented at the petitioner's criminal trial, Cayo's failure to discover his identity and call him as a defense witness did not constitute constitutionally deficient performance. We conclude that the materiality of the informant's testimony is more appropriately considered under the prejudice prong of *Strickland*. See *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 278 (reviewing court may decide against petitioner on either prong of *Strickland* test).

The following additional facts are relevant to the petitioner's claim. In order to obtain a search warrant for the apartment, the police relied on statements from the informant, an associate of Pineiro who previously had observed a .40 caliber handgun and drugs at Pineiro's apartment. The informant told the police that Pineiro showed him the gun twice in the summer of 2014. During one such occasion, Pineiro showed the informant the gun, cocked it back, and said that "this is for whoever, you know, for whatever I need it for" and that "this is my new toy . . . ." After the informant provided that information to the police, no one contacted him about the case until years later when, approximately two weeks before the petitioner's habeas trial, he was contacted by a private investigator working with the petitioner's habeas counsel. When asked by the private investigator about the petitioner, the informant

stated that he "didn't really know who [the petitioner] was," except that Pineiro and the petitioner were cousins. The informant testified that, on those occasions when Pineiro showed him the gun, he had "never seen [the petitioner]" at Pineiro's apartment. He also testified that, if someone had contacted him at the time of the petitioner's criminal trial, he would have provided the same information and would have been willing to testify.

At the habeas trial, Cayo testified that he did not know the informant's identity at the time of the petitioner's trial[5] and did not seek to investigate him because "[h]ow [the police] got the information—at the end of the day, they had information to know there was a gun and who owned the gun and which address the gun was at. And I know my client does not live there. [The petitioner] does not live there. So, I'm thinking, okay, he lives somewhere else. The gun is at his cousin's house. You know, I had evidence of where he lives, and he just happened to be at his cousin's house when the search was executed. So, I thought because of that I didn't need to talk to the confidential informant."

In its memorandum of decision, the habeas court did not make a determination as to whether Cayo's failure to investigate or call the informant constituted deficient performance. Instead, the court concluded that the informant's testimony was "cumulative to the evidence elicited at trial," reasoning that it was uncontroverted at trial that (1) the search warrant was based on a claim that Pineiro had been seen in possession of a handgun and (2) the petitioner had never been seen in physical

[5] We note that Cayo's testimony at the habeas trial was inconsistent as to whether he knew the identity of the confidential informant. At one point, Cayo testified that "someone told [him]" the identity of the informant, yet, earlier in his testimony, Cayo stated: "I don't even know who [the confidential informant was]" and that "I don't even think I asked for the information about the confidential informant . . . ."

possession of the handgun or backpack in question. The court also stated that the informant's testimony did not "exclude the petitioner from knowledge and actual or constructive possession of the weapon inside of the apartment, which was allegedly wrapped in a T-shirt belonging to him,[6] inside the black [backpack], within a closet in the bedroom he slept in at Pineiro's residence." (Footnote added.) Accordingly, the court determined that the petitioner had failed to establish that he was prejudiced by the absence of the informant's testimony.

We reiterate that, "[w]ith respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (Internal quotation marks omitted.) *Madagoski* v. *Commissioner of Correction*, 104 Conn. App. 768, 774, 936 A.2d 247 (2007), cert. denied, 286 Conn. 905, 944 A.2d 979 (2008). This court also has stated that "[t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the

[6] We note that the petitioner claims that the court's factual finding that the shirt belonged to him was clearly erroneous. Even if we were to accept that claim, we nonetheless would not conclude that Cayo's allegedly deficient performance was prejudicial to the petitioner in light of the other evidence of his constructive possession of the handgun found inside the apartment.

testimony would have been helpful in establishing the asserted defense." (Internal quotation marks omitted.) *Donald G.* v. *Commissioner of Correction*, 203 Conn. App. 58, 68, 247 A.3d 182, cert. denied, 337 Conn. 907, 253 A.3d 45 (2021); see also *Nieves* v. *Commissioner of Correction*, 51 Conn. App. 615, 624, 724 A.2d 508 ("[i]n the absence of that showing by the petitioner, we are unable to conclude that he was prejudiced by counsel's failure to interview the witnesses"), cert. denied, 248 Conn. 905, 731 A.2d 309 (1999).

A review of other cases dealing with the failure of trial counsel to call potential witnesses to testify is instructive. In *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 504–505, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009), a jury convicted the petitioner of manslaughter in the first degree after crediting the state's evidence that he had dragged two men from their car and beat them, one of them fatally, because the men had failed to pay him in connection with a drug deal. In his subsequent habeas petition, the petitioner alleged that his trial counsel was ineffective for failing to present a third-party culpability defense predicated on the testimony of several witnesses, namely (1) the driver of the car that struck the victim's car, (2) two emergency medical technicians who arrived shortly thereafter, and (3) the girlfriend of the surviving victim, with whom she had spoken shortly after the incident. Id., 505–506. After hearing testimony from those witnesses, the habeas court found their credibility to be " 'considerable and compelling' " because all four were neutral witnesses who were not meaningfully impeached at the habeas trial. Id., 510–11. The court thus granted the petition for a writ of habeas corpus, concluding that " 'it was harmful to the petitioner and constituted inadequate representation to avoid introducing available and credible evidence of a clearly

exculpatory nature . . . .' " Id., 511. In affirming that judgment, our Supreme Court observed that, if the four witnesses had been called to testify, their testimony "likely would have permeated to some degree every aspect of the trial and raised a reasonable doubt in the minds of the jury as to the petitioner's guilt." Id., 523. Moreover, our Supreme Court concluded that the testimony "would have called into question the most basic elements of the state's case: (1) that the petitioner was the individual who killed [the victim]; and (2) that [the victim] died as a result of a beating." Id., 520.

By contrast, in *Meletrich* v. *Commissioner of Correction*, 178 Conn. App. 266, 272–73, 174 A.3d 824 (2017), aff'd, 332 Conn. 615, 212 A.3d 678 (2019), the petitioner alleged that his trial counsel, Claud Chong, was ineffective because he failed to call Guillermina Meletrich, the petitioner's aunt, as an alibi witness. Although Chong did not call Meletrich, he did call the petitioner's girlfriend, Christina Diaz, who testified as an alibi witness at trial. Id., 276 n.3. This court determined that Meletrich's testimony "would have been cumulative of that of Diaz. Diaz testified at the criminal trial that she had been with the petitioner every moment from the time she arrived until after the robbery. . . . Meletrich stated that Diaz was with the petitioner when she came to see him. Finally, Chong, who did not remember every detail, testified nonetheless that he or his investigator interviewed several friends and family members and thought Diaz could provide the best alibi because she could cover the petitioner's whereabouts at the time of the robbery." Id., 283–84. Because of the cumulative nature of Meletrich's testimony, this court concluded that the addition of Meletrich's testimony "would [not] have reasonably affected the jury's verdict." Id., 286.

In the present case, the petitioner argues that he was prejudiced by Cayo's failure to call the informant as a witness at his criminal trial because the informant's

testimony "clearly indicates" Pineiro's ownership of the handgun. As this court noted in the petitioner's direct appeal, the evidence adduced at his criminal trial demonstrated that the warrant to search the apartment was obtained on the basis of a tip "that [Pineiro] . . . was in possession of a black semiautomatic handgun." *State* v. *Soto*, supra, 175 Conn. App. 741. Moreover, there was no evidence before the jury that the petitioner owned or ever was seen in possession of the handgun. For that reason, Cayo argued to the jury during closing argument that the handgun belonged to Pineiro. That evidence supports the habeas court's conclusion that the confidential informant's testimony would have been cumulative to other evidence elicited at trial.

Furthermore, the state's theory at trial was that the petitioner *constructively* possessed the handgun seized from Pineiro's apartment; see id., 742; and not that he had *actual* possession of it. "There are two types of possession, actual possession and constructive possession. . . . Actual possession requires the defendant to have had direct physical contact with the [gun]. . . . Where . . . the [gun is] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the premises where the [gun is] found, it may not be inferred that [the defendant] knew of the presence of the [gun] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Citation omitted; internal quotation marks omitted.) *State* v. *Dawson*, 188 Conn. App. 532, 541–42, 205 A.3d 662 (2019), rev'd in part on other grounds, 340 Conn. 136, 263 A.3d 779 (2021). "Under the doctrine of nonexclusive possession, more than one person can possess contraband." *State* v. *Rhodes*, 335 Conn. 226, 234, 249 A.3d 683 (2020). "Although ownership may be evidence

of constructive possession . . . ownership is not necessary for constructive possession to be established." (Citation omitted.) *State* v. *Bowens*, 118 Conn. App. 112, 124 n.4, 982 A.2d 1089 (2009), cert. denied, 295 Conn. 902, 988 A.2d 878 (2010).

Here, the fact that Pineiro was, at one point in time, in actual possession of the firearm does not by itself negate the state's theory that the petitioner constructively possessed the handgun. As we have noted, when the police searched Pineiro's apartment, they located the handgun in a backpack in a bedroom closet. *State* v. *Soto*, supra, 175 Conn. App. 741. The petitioner's state identification card was on a television stand in the bedroom and some clothes were hanging in the bedroom closet. Id. When questioned by the police, the petitioner admitted that he was staying in the bedroom where the handgun was located, that the clothes hanging in the bedroom belonged to him, and that he had been " 'in and out of the closet multiple times.' " Id., 742. Most important to the state's case was the statement overheard by the police in which the petitioner asked Pineiro in Spanish, "quién va a tomar," meaning "who's going to take it." (Internal quotation marks omitted.) Id., 741–42. At trial, the state argued that this remark was an incriminating statement tending to buttress an inference that the petitioner knew about the handgun's presence and incriminating nature. Id., 744. As the habeas court correctly noted in its memorandum of decision, other than testimony of Pineiro's potential ownership of the firearm, the informant "did not, and could not . . . offer any testimony regarding the *petitioner's* knowledge, dominion or control of the [backpack] and gun, or lack thereof, sufficient to undermine confidence in the verdict." (Emphasis added.)

Because we are not persuaded that the informant's testimony would have "called into question the most

basic elements of the state's case"; *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 520; or that it would have "been helpful in establishing the asserted defense"; (internal quotation marks omitted) *Donald G.* v. *Commissioner of Correction*, supra, 203 Conn. App. 68; we are not convinced that "there is a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Madagoski* v. *Commissioner of Correction*, supra, 104 Conn. App. 774. We therefore conclude that the petitioner has not established that he was prejudiced by Cayo's failure to investigate and call the informant as a witness and, accordingly, cannot prevail on his claim of ineffective assistance of counsel.

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS OCASIO *v.* VERDURA CONSTRUCTION, LLC, ET AL.
(AC 44100)

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

Syllabus

The plaintiff sought to recover damages from the defendant landlord for injuries he allegedly sustained as a result of the defendant's negligence in failing to maintain a porch railing on the premises leased by the plaintiff. One winter morning, the plaintiff fell and broke his leg when he exited his apartment building while sleet and/or freezing rain were falling. The plaintiff claimed that his fall was due to a defective railing that ran along the stairs leading up to the building. He alleged that the railing gave way when he grabbed onto it, which caused him to lose his balance and fall down the stairs. The defendant asserted the ongoing storm doctrine as a special defense, claiming that it did not have a duty to remove any ice from the property during a storm. The plaintiff argued that the doctrine was not applicable because the theory of his case, as presented to the jury, was that his fall was due to the defective railing, not to the presence of ice on the porch. Over the plaintiff's objection,

the trial court instructed the jury that if it determined that the ice on the porch and stairs was the proximate cause of the plaintiff's fall and subsequent injuries, it had to apply the ongoing storm doctrine. The trial court also provided the jury with a set of interrogatories. The first two questions asked the jury whether it found that there was an ongoing storm at the time of the incident and, if so, whether the defendant had proved that the icy condition from such storm was the proximate cause of the fall and damages sustained by the plaintiff. In the event that its responses to those questions were in the affirmative, the interrogatories instructed the jury to skip the remaining questions and to return a verdict in favor of the defendant. The jury answered the first two questions in the affirmative and, in accordance with the instructions, returned a defendant's verdict. Thereafter, the trial court denied the plaintiff's motion to set aside the verdict, and the plaintiff appealed to this court. *Held*:

1. The trial court's inclusion of the ongoing storm doctrine in the jury instructions and interrogatories was in error because the doctrine was inapplicable and irrelevant to the plaintiff's claims: the plaintiff alleged that his fall was due to the defective railing, not to the presence of snow and ice on the porch; moreover, the plaintiff never claimed that the defendant breached its duty of care by failing to remove ice and snow from the porch and stairs, and, therefore, the liability issue that the jury had to resolve was whether the plaintiff's fall was caused by the defective railing, the accumulated snow and ice, or the plaintiff's own carelessness; furthermore, even though the defendant had asserted the ongoing storm doctrine as a special defense, an instruction on it could not reasonably have been supported by the evidence.
2. The trial court's erroneous instruction and interrogatories regarding the ongoing storm doctrine were harmful: the trial court likely misled and confused the jury by instructing it on a doctrine that was irrelevant to the case, and such confusion was compounded by the court's decision to have the jury answer questions about the ongoing storm doctrine first and by its instruction to the jury that it was not to answer any additional interrogatories and was to return a defendant's verdict if it determined that the ongoing storm was the proximate cause of the plaintiff's injuries; moreover, the trial court's actual instruction on the ongoing storm doctrine likely further confused and misled the jury because it was an incorrect statement of the law, as it told the jury that the existence of an ongoing storm impacted its causation analysis instead of properly stating that the doctrine relates solely to duty, which was not at issue in this case; furthermore, the trial court's repeated reference in the charge to "the" proximate cause and its suggestion that the jury had to find either the railing or the ongoing storm to be the proximate cause of the plaintiff's injury was incorrect, as it ignored the fact that the injury could have had more than one proximate cause; additionally, the instruction also was likely misleading, as it suggested to the jury

that it had to return a verdict for the defendant if it concluded that the plaintiff's fall was caused by the ongoing storm even if it also concluded that the defective railing contributed to the fall.

3. The defendant could not prevail on its alternative grounds for affirmance as they did not undermine this court's conclusion that the instructional error was harmful or that reversal was required: contrary to the defendant's claim, the plaintiff clearly introduced evidence that the railing was defective; moreover, the plaintiff was not required to introduce expert testimony as to the standard of care for the railing because that issue was a matter of common knowledge; furthermore, the plaintiff introduced sufficient evidence for the jury to conclude that the defendant had constructive notice of the defective railing.

(*One judge concurring in part and dissenting in part*)

Argued January 31—officially released September 13, 2022

Procedural History

Action to recover damages for the defendants' alleged negligence, brought to the Superior Court in the judicial district of Waterbury, where the plaintiff withdrew the action as to the defendant Verdura Building, LLC; thereafter, the matter was tried to the jury before *Brazzel-Massaro*, *J.*; verdict for the named defendant; subsequently, the court, *Brazzel-Massaro*, *J.*, denied the plaintiff's motion to set aside the verdict and rendered judgment in favor of the named defendant, and the plaintiff appealed to this court. *Reversed*; *new trial.*

James J. Healy, with whom, on the brief, was *Brian M. Flood*, for the appellant (plaintiff).

Miles N. Esty, for the appellee (named defendant).

Opinion

BRIGHT, C. J. The plaintiff, Luis Ocasio, appeals from the judgment of the trial court rendered after a jury verdict in favor of the defendant Verdura Construction, LLC.[1] On appeal, the plaintiff claims that (1) the court

[1] The plaintiff's complaint also originally named Verdura Building, LLC, as a defendant to the underlying action. On July 29, 2019, the complaint was withdrawn as to that party. Accordingly, Verdura Building, LLC, did not participate in this appeal, and, in this opinion we refer to Verdura Construction, LLC, as the defendant.

erred when it instructed the jury and provided it with interrogatories to answer regarding the ongoing storm doctrine and (2) such error was harmful because it likely confused and misled the jury as to the relevant law. We agree and, accordingly, reverse the judgment of the trial court.[2]

The following facts, as to which the plaintiff presented evidence to the jury, and procedural history are relevant to our resolution of this appeal. The plaintiff is a tenant in an apartment building in Waterbury that is owned and controlled by the defendant. At the time of the events underlying this case, railings ran along both sides of the stairs that led up to the building. According to the plaintiff, one of those railings was missing two screws and was rotted where it attached to the building.

On the morning of February 7, 2017, the plaintiff left his apartment to take out the garbage. At the time, sleet and/or freezing rain was falling, which caused ice and snow to accumulate on the building's porch and stairs. Despite the weather, the plaintiff walked over to the stairs while carrying the garbage bag and, once at the top of the stairs, grabbed the allegedly defective railing. According to the plaintiff, the railing then moved and gave way, causing him to lose his balance and fall down the stairs. The fall broke the plaintiff's leg.

On September 28, 2017, the plaintiff filed a complaint against the defendant alleging negligence. He specifically alleged that "[his] fall was caused by the negli-

[2] The plaintiff also claims that the court erred when it (1) gave the jury an incorrect instruction on proximate cause and (2) refused to grant the plaintiff leave to amend his complaint. We address the court's proximate cause instruction not as a separate claim but as part of our analysis as to why the court's ongoing storm instruction and jury interrogatories were harmful. Because we conclude that the judgment must be reversed because of the court's instructional error, we need not consider the plaintiff's claim regarding his motion to amend his complaint.

gence of the defendant . . . its agents, servants and/or other employees in one or more of the following ways:

"a) they failed to properly maintain the porch and its railings;

"b) they failed to properly inspect the porch and its railings;

"c) they knew or should have known of the unstable and defective condition of the railing, yet took no steps to fix the condition;

"d) they allowed the unstable and defective condition of the railing to exist for an unreasonable period of time;

"e) they failed to adequately train their agents to inspect and maintain the porch and its railings;

"f) they failed to warn the plaintiff that the railing was unstable and defective;

"g) they failed to enact and/or follow adequate procedures to ensure the porch and its railings were properly inspected and maintained;

"h) they knew or should have known that people would be using the porch and its railings, yet failed to inspect and maintain the porch and its railings; and/or

"i) they failed to erect signs, barriers or otherwise isolate the icy area of the porch and its railings."

On February 23, 2018, the defendant filed an answer denying the plaintiff's allegations and asserting as a special defense that the "[p]laintiff's injuries and damages, if any, were caused by his own contributory negligence . . . ." Prior to trial, the defendant notified the plaintiff that it also intended to assert the ongoing storm doctrine[3] as a special defense and would request that

[3] Under the ongoing storm doctrine, plaintiffs cannot recover damages for injuries that resulted from ice and snow and that occurred during or a reasonable time after a winter storm because property owners are allowed to wait until the end of such a storm before removing snow and ice. See *Kraus* v. *Newton*, 211 Conn. 191, 197–98, 558 A.2d 240 (1989). The nuances of this doctrine will be discussed subsequently in this opinion.

the court take judicial notice of the doctrine. The plaintiff filed an objection to that request, arguing that the ongoing storm doctrine was inapplicable to the case because the plaintiff had alleged that a defective railing, and not "the accumulation of freezing rain, water and ice," caused his fall.

A jury trial was held on July 30, July 31 and August 1, 2019. During opening statements, the plaintiff's counsel set forth the plaintiff's theory of the case. Specifically, the plaintiff's counsel contended that the plaintiff's fall was caused by the defective railing and not by the ice and snow. The plaintiff's counsel further stated that, in the moments preceding the plaintiff's fall, he "realized that it was freezing rain" and "saw water and ice on the porch" but that he had "no problem walking on the porch," despite those wintery conditions. The defendant's counsel, on the other hand, contended that the evidence would show that the plaintiff's fall had been caused by the ice and snow on the porch and not by the defective railing.

At trial, the plaintiff testified about his fall: "It was going to be 10:30 in the morning. I was going out to take the garbage out. I went down the steps from my apartment. I opened the outside door. Then I started to see that there was frozen water—sleet coming down. I took a look at the porch and the porch is full of sleet—frozen water. I walked to the handle. I had no problem. I had the bag of garbage. I held on to the rail. When I leaned on the railing, the railing moved towards the outside. I dropped the garbage bag. I grabbed on—I was holding on to the rail. I wanted to pull the railing and I lost my balance. That's when I fell." The plaintiff adamantly denied that any slippery conditions on the porch and/or stairs had caused his fall.

After the plaintiff's direct examination, the court granted the defendant's request to use the ongoing

storm doctrine as a special defense and informed the parties that it would charge the jury on the doctrine. According to the court, the plaintiff's testimony about ice and snow sufficiently implicated the ongoing storm doctrine and, thus, it was relevant to the case.

The defendant's counsel then began his cross-examination of the plaintiff. During that cross-examination, the plaintiff admitted that freezing rain was falling on the morning of his accident but continued to profess that the defective railing, not the weather, had caused his fall.

After the first day of trial concluded, the plaintiff filed a request for leave to file an amended complaint in order to conform his complaint to the evidence introduced at trial. The plaintiff specifically sought to remove paragraph 7 (i) from the complaint, which alleged that the defendant had been negligent in "fail[ing] to erect signs, barriers or otherwise isolate the icy area of the porch and its railings."

The court addressed the plaintiff's request to amend his complaint at the start of the second day of trial. Initially, the defendant had no objection to removing paragraph 7 (i) from the complaint. The court then asked the parties if so amending the complaint would eliminate the ongoing storm doctrine from the case, to which the plaintiff's counsel responded, "I believe it does." The defendant's counsel agreed that removing paragraph 7 (i) would eliminate the ongoing storm doctrine as a special defense but stated that the defendant would still request a jury charge on the doctrine because it believed that the jury needed such an instruction to help it determine the cause of the plaintiff's fall. The plaintiff's counsel then reiterated his argument that the ongoing storm doctrine was irrelevant because "[t]he bottom line is this is a defective railing case. There is

no allegation about the issue of snow and ice being the cause of the fall."

Thereafter, the defendant's counsel argued that the ongoing storm doctrine was relevant because evidence of ice and snow had been introduced by the parties. The plaintiff's counsel renewed his objection to the jury being instructed on the ongoing storm doctrine, again arguing that the doctrine was inapplicable and that instructing the jury on it would prejudice the plaintiff's case. The defendant's counsel then informed the court that if it did not allow the defendant to rely on the ongoing storm doctrine, either by way of judicial notice or a jury instruction, the defendant would withdraw its nonobjection to the plaintiff's request to amend. At that point, the plaintiff's counsel argued that amending the complaint to remove the reference to the defendant's failure "to erect signs, barriers or otherwise isolate" the icy area was proper because there was no evidence, and there would be no evidence, on that issue. The court decided to hear the rest of the testimony before ruling on the plaintiff's request to amend.

The defendant's counsel then resumed his cross-examination of the plaintiff. The plaintiff continued to testify that the defective railing, not the ice or sleet, had caused his fall. In response, the defendant's counsel introduced into evidence several medical records that showed that, in the days and weeks after his fall, the plaintiff repeatedly had told his medical providers that he fell after slipping on ice. The plaintiff claimed those records were incorrect. The defendant's counsel then introduced into evidence an excerpt from the plaintiff's deposition, wherein the plaintiff described the fall as follows: "So when I was going to throw out the garbage, I realized there was freezing rain falling. So that's when I was holding on to the [railing] and had the bag in my hands. So when I was holding on to the [railing] I slipped. When I slipped, I dropped the garbage." The

plaintiff also claimed that he had not said that at his deposition. Shortly after that exchange, the cross-examination concluded and the parties rested.

Thereafter, the court held a charging conference, which began with a conversation about whether questions regarding the ongoing storm doctrine should be included in the jury interrogatories. The plaintiff's counsel objected to including any such questions in the interrogatories, but the court overruled the objection. The court then proposed that the ongoing storm doctrine be the first topic the jury addressed in the interrogatories, to which the plaintiff's counsel again objected, arguing that "[t]he ongoing storm [doctrine] has nothing to do with [the case]. The case is whether the rail . . . was defective and caused the injury. . . . [G]oing into . . . [the] ongoing storm [doctrine] is inappropriate and . . . it's going to confuse the jury." The plaintiff's counsel also argued that the evidence in the case about ice and snow could go to the cause of the plaintiff's fall but that instructing the jury about the ongoing storm doctrine on the basis of that evidence alone was prejudicial. The court overruled the plaintiff's objection and ruled that the first two interrogatories the jury would answer would be about the ongoing storm doctrine.

Thereafter, the court denied the plaintiff's request to amend his complaint, concluding that sufficient evidence had been introduced regarding paragraph 7 (i). The court then went over each of the proposed jury instructions individually and asked the parties whether they had any concerns with or objections to the instructions. When the court reached instruction number five, the following colloquy occurred:

"The Court: Instruction number five, burden of proof special defense.

"[The Defendant's Counsel]: No objection, Your Honor.

"[The Plaintiff's Counsel]: No objection, *except for the continuing storm doctrine*.

"The Court: That is correct. I'll just note that for the record. You don't have to even say that.

"[The Plaintiff's Counsel]: Okay.

"The Court: I'll note that you're going [to] have, anywhere we mention continuing storm . . . or ongoing storm, you're going to have an objection.

"[The Plaintiff's Counsel]: Correct." (Emphasis added.)

Before discussing instruction fifteen, which charged the jury on comparative negligence, the court, sua sponte, recognized the plaintiff's standing objection to the ongoing storm doctrine, stating, "And I know that you have an objection to anything dealing with the ongoing storm, [plaintiff]." Then, on instruction seventeen, which charged the jury on the ongoing storm doctrine, the court again, sua sponte, stated, "Other than the objection as [a] whole on ongoing storm, any other objections to [instruction 17]?" The plaintiff's counsel responded, "I'll just clarify what you just said, that [the ongoing storm doctrine] shouldn't be part of the case."

After the charging conference, both parties gave their closing arguments. In the plaintiff's closing argument, the plaintiff's counsel again argued that the present case was a "[d]efective premises case" that was the "result of a defective rail," which caused the plaintiff to fall. The plaintiff's counsel further argued that the ice and snow was unrelated to the plaintiff's fall, stating: "He saw that there was an ice storm downstairs and he assumed he would have no problem negotiating . . . going down to the garbage can. . . . He saw that there was water and ice on the porch. But that didn't—he had no issues with that. He actually walked safely on the porch and went to the rail. And he's been very

consistent throughout his testimony today, yesterday and today, that as he went to the rail, the rail gave way causing him to lose his balance." Finally, with respect to the ice on the stairs and the porch, the plaintiff's counsel stated: "Now there's no question that there was ice on the staircase. . . . There's no question [that the plaintiff] slipped on the ice [but] that was after he was caused to fall. That is our claim. So he slipped on the ice after he was caused to fall from the defective rail." The defendant's counsel, however, argued in his closing argument that the plaintiff's testimony that it was the defective railing that caused his fall was not credible, given the plaintiff's many statements to medical personnel that he fell because of the ice and snow. The defendant's counsel further argued that the statements in the plaintiff's medical records, wherein the plaintiff said that the ice and snow caused his fall, showed that the plaintiff's fall was caused by the ongoing storm and not by the allegedly defective railing. Accordingly, the defendant's counsel asserted that the ongoing storm doctrine barred the plaintiff's recovery in the present case.

Thereafter, the court instructed the jury on the law of the case. With respect to the ongoing storm doctrine, the court instructed the jury, in relevant part, as follows: "If you find that it was the ice that was *the proximate cause of the fall and not the alleged claims of a defective railing as alleged by the plaintiff*, you must consider whether the defense of ongoing storm is applicable. The defendant contends that at the time of the incident in question there was an ongoing storm or weather conditions which left some precipitation on the porch and *that this precipitation was the proximate cause of the plaintiff's fall and injuries or damages*. The plaintiff has specifically alleged . . . that the defendant was negligent in a number of ways, including the

condition of the railing and the failure to isolate the icy area of the porch and stair.

"The defendant has alleged as a special defense that the plaintiff's recovery is barred by the ongoing storm doctrine. Therefore, *if you determine based upon the testimony and evidence that there was an ongoing storm and that the plaintiff's fall and subsequent injuries and damages were proximately caused . . . as a result of the storm, which placed ice on the porch and stairs that were the proximate cause of the injuries, you are to apply this doctrine.*" (Emphasis added.)

The court also provided the jury with a series of interrogatories, which stated in relevant part:

"We the jury find the following:

"1) Do you find the defendant proved by a preponderance of the evidence that at the time of the incident there was [a]n ongoing storm? . . .

"2) Do you find by a preponderance of the evidence that the defendant proved the icy condition from the ongoing storm was *the* proximate cause . . . of the fall and damages sustained by the plaintiff?" (Emphasis added.) The interrogatory form instructed the jury: "If the answer to number 2 is yes, sign this form and go to the defendant's verdict form."

The jury answered "[y]es" to both interrogatories about the ongoing storm doctrine. Consistent with the instructions on the interrogatory form, the jury answered no other interrogatories and the foreperson signed and dated the defendant's verdict form, returning a defendant's verdict, which the court accepted. Thereafter, the plaintiff filed a motion to set aside the verdict, alleging that the court (1) provided the jury with an incorrect interrogatory, (2) improperly charged the jury on causation, and (3) inappropriately instructed the jury on the ongoing storm doctrine. On February 24, 2020,

the court held a hearing on the plaintiff's motion to set aside the verdict. On April 27, 2020, the court, by way of a memorandum of decision, denied the plaintiff's motion. This appeal followed.

On appeal, the plaintiff claims that the court erred when it instructed the jury on the ongoing storm doctrine because he clearly alleged that his fall was caused by the defective railing, not by the defendant's failure to remove ice or snow, thus rendering the ongoing storm doctrine irrelevant. The plaintiff further argues that the court's error was harmful because the court's instruction and the interrogatories regarding the ongoing storm doctrine instructed the jury that it must return a verdict for the defendant if the storm was *the* proximate cause of the plaintiff's fall. The plaintiff argues that the court's instruction precluded the jury from considering whether the allegedly defective railing also was *a* proximate cause of the plaintiff's fall.

In response, the defendant argues that the court properly gave the ongoing storm doctrine instruction and properly submitted the corresponding interrogatories to the jury, the plaintiff expressly waived any objection to the court's proximate charge instruction, and the court's instruction on proximate cause was proper. In the alternative, the defendant argues that any error by the court was harmless because the judgment of the court can be affirmed on the grounds that the plaintiff failed to present sufficient evidence of a defect in the railing or that the defendant had notice of any defect.

I

We first address whether the court erred in including the ongoing storm doctrine in its jury instructions and interrogatories. We begin with the standards of review and principles of law that guide our analysis. "A challenge to the validity of jury instructions presents a question of law. Our review of this claim, therefore, is plenary. . . . We must decide whether the instructions,

read as a whole, properly adapt the law to the case in question and provide the jury with sufficient guidance in reaching a correct verdict. . . . [T]he test of a court's charge is . . . whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . It is established law that it is error for a court to submit to the jury an issue which is wholly unsupported by the evidence." (Citation omitted; internal quotation marks omitted.) *Iino* v. *Spalter*, 192 Conn. App. 421, 458, 218 A.3d 152 (2019).

"The power of the trial court to submit proper interrogatories to the jury, to be answered when returning [its] verdict, does not depend upon the consent of the parties or the authority of statute law. In the absence of any mandatory enactment, it is within the reasonable discretion of the presiding judge to require or to refuse to require the jury to answer pertinent interrogatories, as the proper administration of justice may require. . . . The trial court has broad discretion to regulate the manner in which interrogatories are presented to the jury, as well as their form and content. . . . Moreover, [i]n order to establish reversible error, the [plaintiff] must prove both an abuse of discretion and a harm that resulted from such abuse." (Internal quotation marks omitted.) *Champeau* v. *Blitzer*, 157 Conn. App. 201, 210, 115 A.3d 1126, cert. denied, 317 Conn. 909, 115 A.3d 1105 (2015).

In *Kraus* v. *Newton*, 211 Conn. 191, 197–98, 558 A.2d 240 (1989), our Supreme Court adopted the ongoing storm doctrine. The doctrine pertains "to the duty to protect invitees upon one's property when a snowstorm is in progress at the time of [a] plaintiff's alleged injury." *Belevich* v. *Renaissance I, LLC*, 207 Conn. App. 119, 125, 261 A.3d 1 (2021); see also *Sinert* v. *Olympia & York Development Co.*, 38 Conn. App. 844, 849, 664 A.2d 791 (ongoing storm doctrine pertains to landowner or

other inviter's "duty of care with respect to others"), cert. denied, 235 Conn. 927, 667 A.2d 553 (1995). The court in *Kraus* defined the ongoing storm doctrine as follows: "[I]n the absence of unusual circumstances, a property owner, in fulfilling the duty owed to invitees upon his property to exercise reasonable diligence in removing dangerous accumulations of snow and ice, may await the end of a storm and a reasonable time thereafter before removing ice and snow from outside walks and steps." *Kraus* v. *Newton*, supra, 197–98.

The ongoing storm doctrine, however, "does not foreclose submission to the jury, on a proper evidentiary foundation, of the factual determinations of whether a storm has ended or whether a plaintiff's injury has resulted from new ice or old ice when the effects of separate storms begin to converge." Id., 198. The doctrine also does not apply when there is evidence that a preexisting dangerous condition on the defendant's property, unrelated to the ongoing storm, caused the plaintiff's injury. Id. (ongoing storm doctrine applied because no evidence of preexisting dangerous condition on premises); see also *Seitz* v. *J. C. Penney Properties, Inc.*, United States District Court, Docket No. 3:15-CV-01131 (VAB) (D. Conn. September 28, 2017) ("[t]he ongoing storm doctrine is inapplicable when an invitee's injury stems from a 'preexisting dangerous condition upon the defendant's premises' . . . rather than the ongoing storm"); *Berlinger* v. *Kudej*, 120 Conn. App. 432, 436–37, 991 A.2d 716 (2010) (finding trial court's rendering of summary judgment in case involving ongoing storm doctrine improper when there was genuine issue of fact as to whether ice on driveway had accumulated before ongoing storm); *Mejias* v. *New York*, 183 App. Div. 3d 886, 887–88, 125 N.Y.S.3d 112 (2020) (denying motion for summary judgment with respect to negligence claim in case involving ongoing storm doctrine because defendants "failed to eliminate triable issues

of fact as to whether an allegedly defective condition with the step caused or contributed to the plaintiff's injuries").

In the present case, the ongoing storm doctrine was inapplicable and irrelevant because the plaintiff was not claiming that his fall was due to snow and ice that the defendant had failed to remove or treat. The record is clear that the theory of the plaintiff's case as presented to the jury was that his fall was due to the defective railing and not due to the presence of snow and ice on the porch.

The plaintiff repeatedly testified at trial that he lost his balance and fell after the defective railing moved when he grabbed it and that he did not slip on any ice or snow that the defendant had neglected to remove. Furthermore, his counsel argued to the jury in both his opening statement and closing argument that the plaintiff's fall was caused by the defective railing. The plaintiff's counsel also made clear to the court both when objecting to the defendant's request to add a special defense based on the ongoing storm doctrine and when arguing against the defendant's proposed ongoing storm charge that the plaintiff's case was premised solely on the defective railing. When the defendant's counsel argued that the allegation in the complaint that the defendant "failed to erect signs, barriers or otherwise isolate the icy area of the porch and its railings" implicated the ongoing storm doctrine, the plaintiff moved to amend the complaint to remove that allegation and his counsel correctly noted that the plaintiff had presented no evidence in support of that allegation so there was no basis to submit it to the jury. The defendant's counsel even acknowledged that if that allegation was removed from the case there would be no need to plead a special defense based on the ongoing storm doctrine.

Because the plaintiff never claimed that the defendant breached its duty of care by failing to remove ice and snow from the porch and/or stairs and, instead, claimed solely that the defective railing (and the defendant's failure to maintain and repair the railing) caused his fall, the ongoing storm doctrine, which is about duty, not causation, was inapplicable. See *Kraus* v. *Newton*, supra, 211 Conn. 197–98; *Belevich* v. *Renaissance I, LLC*, supra, 207 Conn. App. 125. Specifically, the liability issue the jury had to resolve was whether the plaintiff's fall was caused by the defective railing, the accumulated snow or ice, or the plaintiff's own carelessness. Whether the snow and ice was caused by an ongoing storm or a previous storm simply was irrelevant to the resolution of this issue.

This is not to say that the evidence of ice and snow, including the evidence introduced by the defendant that the plaintiff initially blamed his fall on the ice, was irrelevant. To the contrary, such evidence was highly relevant, but it was relevant only as to what *caused* the plaintiff's fall, not as to whether the defendant had a duty to clear or treat the snow and ice in light of an ongoing storm. Thus, although the defendant was free to argue to the jury that the plaintiff could not prevail because his injuries were caused by the ice and snow, not the defective railing, that causation argument does not implicate the ongoing storm doctrine.

The fact that the defendant pleaded the ongoing storm doctrine as a special defense makes no difference to our analysis. Just because the defendant pleaded the special defense of an ongoing storm does not mean that the court should have instructed the jury on the doctrine. Courts are permitted to instruct juries only when the proposed instructions are supported by the evidence. See *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 139, 757 A.2d 516 (2000) ("trial court should instruct the jury in accordance with

a party's request to charge if the proposed instructions are reasonably supported by the evidence"). Here, as explained in the preceding paragraph, the ongoing storm doctrine was irrelevant to the plaintiff's case or the issue of causation, and, therefore, an instruction on the doctrine could not reasonably have been supported by the evidence. Thus, because the ongoing storm doctrine was inapplicable, the jury should neither have been instructed on it nor asked interrogatories about it even though the defendant asserted the doctrine as a special defense. See id.

Accordingly, because the plaintiff never pursued a claim that the defendant breached its duty of care by failing to remove ice and snow and, instead, alleged that a preexisting defect unrelated to the ongoing storm caused his fall, the ongoing storm doctrine has no application in the present case. See *Kraus* v. *Newton*, supra, 211 Conn. 197–98. Consequently, the court erred when it instructed the jury on the doctrine. See *Thames River Recycling, Inc.* v. *Gallo*, 50 Conn. App. 767, 774, 720 A.2d 242 (1998) (jury instructions must "correctly adapt the law to the case in question and . . . provide the jury with sufficient guidance" (internal quotation marks omitted)). For this same reason, the court's inclusion of the ongoing storm doctrine in the jury interrogatories was error.

II

We next consider whether the court's ongoing storm instruction and interrogatories were harmful. "[N]ot every error is harmful. . . . [B]efore a party is entitled to a new trial . . . he or she has the burden of demonstrating that the error was harmful. . . . An instructional impropriety is harmful if it is likely that it affected the verdict. . . . [W]e consider not only the nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury,

but the likelihood of actual prejudice as reflected in the individual trial record, taking into account (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled. . . . The inclusion of an inapplicable doctrine may be harmful if it confuses and misleads the jury . . . ." (Citations omitted; internal quotation marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 845, 225 A.3d 261 (2020). Similarly, the plaintiff must prove that the court's ongoing storm interrogatories prejudiced him. *Champeau* v. *Blitzer*, supra, 157 Conn. App. 210.

The plaintiff argues that the court's erroneous instruction and interrogatories were harmful because they misled the jury by making an irrelevant issue "a predominate feature of the case." He further argues that the wording of the instruction and interrogatories "misled the jury into believing that the defendant's negligence as to the defective railing had to be the sole proximate cause in order to permit a plaintiff's verdict. The trial court's ongoing storm instructions repeatedly intoned that recovery would be 'barred' if the storm proximately caused the injuries . . . ."[4] (Citations omitted.) We agree with the plaintiff.

First, by instructing the jury on a doctrine that was irrelevant to the case, the court likely misled and confused the jury. See *Faulkner* v. *Reid*, 176 Conn. 280, 281, 407 A.2d 958 (1978) ("jury can only be confused and misled by interjecting into their deliberations a

[4] The plaintiff further claims on appeal that the court's proximate cause instruction suffered from the same deficiency. In response, the defendant argues that the plaintiff waived any objection to the proximate cause instruction by not objecting to it and that the instruction overall set forth a correct statement of the law. Because we conclude that the ongoing storm instruction and interrogatories were given in error, and because they misstated the law of proximate cause, we need not address the plaintiff's claim as to the court's general proximate cause instruction.

doctrine inapplicable to the evidence as a matter of law"). This confusion was compounded by the court's decision to have the jury answer questions about the ongoing storm doctrine first and then instructing the jury that if it determined that the ongoing storm was the proximate cause of the plaintiff's injuries, it should not answer any other interrogatories and should return a defendant's verdict.

Second, the jury likely was confused and misled by the court's actual instruction on the ongoing storm doctrine. The instruction three times told the jury to consider whether the ongoing storm was *the* proximate cause of the plaintiff's injuries. First, the court began its instruction by telling the jury: "If you find that it was the ice that was *the proximate cause of the fall and not the alleged claims of a defective railing as alleged by the plaintiff*, you must consider whether the defense of ongoing storm is applicable." (Emphasis added.) Then, after telling the jury that the defendant contended that the ongoing storm was the proximate cause of the plaintiff's fall, the court instructed the jury that if it determined "that there was an ongoing storm and that the plaintiff's fall and subsequent injuries and damages were *proximately caused* . . . as a result of the storm, which placed ice on the porch and stairs that were *the proximate cause* of the injuries," the jury had to apply the ongoing storm doctrine. (Emphasis added.) Consistent with these instructions, the interrogatories the court submitted to the jury asked whether there was an ongoing storm at the time of the plaintiff's fall and whether "the defendant proved the icy condition from the ongoing storm was *the proximate cause*" of the plaintiff's fall. (Emphasis added.)

As described in detail in part I of this opinion, this instruction was an incorrect statement of the law because it told the jury that the existence of an ongoing storm impacted its causation analysis; the doctrine

relates solely to duty, however, which was not at issue in the case. See *Kraus* v. *Newton*, supra, 211 Conn. 197–98 (ongoing storm doctrine relates to defendant's duty of care to "exercise reasonable diligence in removing dangerous accumulations of snow and ice," *not* to cause of plaintiff's injuries); *Cooks* v. *O'Brien Properties, Inc.*, 48 Conn. App. 339, 343, 710 A.2d 788 (1998) (defendant's proposed instruction, which stated that, "[i]f you find that the plaintiff fell during an ongoing storm of freezing rain, sleet and/or snow, and that the ice or snow *caused* the fall, then you *must* find for the defendant," incorrectly stated holding of *Kraus* (emphasis altered; internal quotation marks omitted)). Such an error likely confused the jury by misleading it into thinking that whether the storm was ongoing impacted its analysis of what factors proximately caused the plaintiff's injuries.

Moreover, the court's repeated reference in the charge to "the" proximate cause and its suggestion that the jury had to find either the railing or the ongoing storm to be the proximate cause of the plaintiff's injuries was incorrect and likely misleading. By telling the jury that the ongoing storm doctrine was implicated if it found "that it was the ice that was the proximate cause of the fall and not the alleged claims of a defective railing as alleged by the plaintiff," the court essentially told the jury that there could be only a single proximate cause for the plaintiff's fall and that that proximate cause was *either* the ongoing storm *or* the defective railing but not *both*. Such an instruction ignores the fact that an injury can have more than one proximate cause; see *Coburn* v. *Lenox Homes, Inc.*, 186 Conn. 370, 383, 441 A.2d 620 (1982); and that, in the present case, it was possible that the plaintiff's fall was caused by *both* the icy porch and the defective railing. By instructing the jury to the contrary, it is likely that the court misled the jury into thinking that it had to return

a verdict for the defendant if it concluded that the plaintiff's fall was caused by the ongoing storm, even if it also concluded that the defective railing contributed to the fall. We have, on a number of occasions, concluded that instructing a jury to determine if negligence is *the* proximate cause, as opposed to *a* proximate cause, of a party's injuries misleads a jury. See *Champeau* v. *Blitzer*, supra, 157 Conn. App. 212–13 (interrogatory that used language of " '*the*' proximate cause," instead of " '*a*' proximate cause," gave jury " 'misleading impression that it had to find that [the defendants'] breach of the standard of care was the sole proximate cause of [the decedent's] death' " (emphasis added)); *Barksdale* v. *Harris*, 30 Conn. App. 754, 757–58, 622 A.2d 597 (new trial required because court's repeated use of " '*the* proximate cause,' " instead of " '*a* proximate cause,' " could have misled jury (emphasis added)), cert. denied, 225 Conn. 927, 625 A.2d 825 (1993).

The defendant argues that these cases are inapposite to the present case because in those cases the concern was whether the incorrect instruction improperly heightened the plaintiff's burden of proof by requiring the plaintiff to prove that the defendant's negligence was the sole proximate cause and not a proximate cause of the plaintiff's damages. Here, the instruction at issue related to the defendant's special defense, as to which it had the burden of proof. Consequently, the defendant argues that the court's reference to the storm being "the proximate cause" meant that the jury had to determine that the storm was the sole proximate cause for the defendant to prevail. As a result, the defendant argues, the instruction and corresponding interrogatories could not have harmed the plaintiff. We are not persuaded.

The court's instruction did not tell the jury to decide if the ongoing storm was the proximate cause of the

plaintiff's injuries as a standalone determination. Instead, the court expressly linked that determination with a determination of whether the defective railing was the proximate cause. The harm to the plaintiff is that the court essentially told the jury to choose between two potential proximate causes.

The defendant also argues that the court's erroneous instructions and interrogatories do not require reversal because they were corrected by the court's general causation instruction, which repeatedly instructed the jury that the plaintiff needed to prove only that the defendant's negligence was "*a* substantial factor in causing the resulting injury or loss"; (emphasis added); and told the jury that "the defendant's conduct can be a proximate cause of an injury if it is not the only cause or even the most significant cause of the injury, provided that it contribute[d] materially to the production of the injury, and, thus, [was] a substantial factor in bringing it . . . about."

The defendant argues that the circumstances in the present case are similar to those in *Phelps* v. *Lankes*, 74 Conn. App. 597, 813 A.2d 100 (2003). In *Phelps*, this court concluded that reversal was not required despite the trial court's charging the jury that the plaintiff had to prove that the defendant's negligence was "*the* proximate cause of the injuries claimed." (Emphasis added; internal quotation marks omitted.) Id., 603. We reached that conclusion because the trial court's single incorrect statement in its causation instruction was followed immediately thereafter, in the same instruction, by the court's twice instructing the jury that the plaintiff needed to prove that the defendant's negligence was "a substantial factor" in causing the plaintiff's injuries. (Emphasis omitted.) Id. In light of the entire instruction, this court concluded that, "[d]espite the challenged instruction, the court's charge as a whole was not improper." Id.

The defendant's reliance on *Phelps* is misplaced. In the present case, the court's erroneous instruction was given independent of its general causation instruction. In fact, its juxtaposition to the court's general causation instruction is significant. The court began its ongoing storm instruction after instructing the jury generally on causation and on the defendant's special defense that the plaintiff's injuries were caused by his own negligence. After discussing how to award damages if the jury concluded that both the defendant's negligence and the plaintiff's negligence were proximate causes of his injuries, the court concluded this part of its charge by correctly stating: "If you find that both parties were negligent and the negligence of each proximately caused the injuries, you must reduce your award in accordance with this comparative negligence rule."

The court then told the jury that it was going to talk about the ongoing storm defense. It instructed the jury: "If you find that it was the ice that was the proximate cause of the fall and not the alleged claims of a defective railing as alleged by the plaintiff, you must consider whether the defense of ongoing storm is applicable." The manner in which the court instructed the jury regarding the ongoing storm doctrine was in stark contrast to how it instructed the jury regarding causation in general and as related to comparative negligence. As to those charges, the court instructed the jury that there could be more than one proximate cause. When it came to the ongoing storm doctrine, though, the court instructed the jury that it had to determine whether the ice or the railing was "the" proximate cause. Thus, it is likely that the jury was misled into believing that the proximate cause analysis is different when the ongoing storm doctrine is at issue. Further, this erroneous guidance existed in both the instructions *and* the interrogatories. Thus, *Phelps* is inapposite to the present case.

The present case is closer to *Champeau* v. *Blitzer*, supra, 157 Conn. App. 212, in which this court held that the court's incorrect use of " 'the' proximate cause" in the jury interrogatories "was exacerbated by the jury charge in which the trial court alternated between references to 'the' proximate cause and 'a' proximate cause . . . ." The court concluded that the jury was misled by the charge even though the court used " 'the' proximate cause" only twice in the whole charge. Id. Specifically, this court held: "Although in the present case, there were only two instances in the charge to the jury that were improper, as we previously indicated, those errors were exacerbated by an interrogatory completed by the jury that also contained the improper standard for proximate cause. Unlike in *Phelps*, which involved only one instance of an improper instruction, the jury charge in the present case was likely to have had a deleterious effect, confusing the jury as to what the appropriate standard was for proximate cause." Id., 213. The same is true in the present case.

Accordingly, because the court likely confused and misled the jury by incorrectly instructing it on the ongoing storm doctrine, as well as the role that causation played with respect to the doctrine, we conclude that such errors were harmful.

III

Finally, we address the defendant's alternative grounds for affirmance. The defendant argues that the court's instructional error was not harmful because the plaintiff failed to prove two other essential elements of his claim and failed to submit necessary expert evidence in support of his claim. Specifically, the defendant claims that the plaintiff failed (1) to introduce evidence that the railing was defective, (2) to present expert testimony as to the standard of care regarding railings,

and (3) to prove that the defendant had notice of the alleged defect. We are not persuaded.

First, the plaintiff clearly introduced evidence that the railing was defective because he testified that two screws were missing from where the railing connected to the building and that the top of the railing was rotten. The plaintiff further testified that, due to those defects, the railing moved when he grabbed it. That testimony was enough for the jury to conclude that the railing was defective. Second, the plaintiff was not required to introduce expert testimony as to the standard of care for railings because such knowledge is within the ken of an average juror. See *Way* v. *Pavent*, 179 Conn. 377, 380, 426 A.2d 780 (1979) ("[t]he trier of fact need not close its eyes to matters of common knowledge solely because the evidence includes no expert testimony on those matters"); see also *Bader* v. *United Orthodox Synagogue*, 148 Conn. 449, 454, 172 A.2d 192 (1961) ("[e]xpert testimony was not required to support the claim of the plaintiff that the absence of a proper or suitable porch railing was a structural defect and therefore constituted . . . negligence"). Finally, the plaintiff also introduced sufficient evidence for the jury to conclude that the defendant had constructive notice of the defective railing. The plaintiff testified that the railing was defective and that it had been defective for twelve years, and the defendant's principal testified that he routinely inspected the railings at the building. On the basis of this evidence, the jury reasonably could have concluded that the defendant had constructive knowledge of the defect. See *Pollack* v. *Gampel*, 163 Conn. 462, 468, 313 A.2d 73 (1972) (plaintiff can establish constructive notice by showing that, if defendant had "exercised a reasonable inspection of the premises, [the defendant] would have discovered [the defect]"). Therefore, none of these claims undermines our conclusion

that the court's instructional error was harmful and that reversal is thus required.

In sum, the court erred in instructing the jury on the inapplicable ongoing storm doctrine and in submitting to the jury interrogatories regarding the doctrine, and such errors were harmful because they likely confused and misled the jury. Accordingly, reversal is required.

The judgment is reversed and the case is remanded for a new trial.

In this opinion ELGO, J., concurred.

FLYNN, J., concurring in part and dissenting in part. I agree that the second interrogatory submitted to the jury may have been problematic. It read: "Do you find by a preponderance of the evidence that the defendant proved the icy condition from the ongoing storm was the proximate cause, as I have defined that term for you, of the fall and damages sustained by the plaintiff?" Under our law, in the ordinary negligence claim, a plaintiff does not have to prove there is only one proximate cause of injury. There can be more than one proximate cause, so long as each contributing cause is a substantial causal factor and a cause in fact, meaning that the injury would not have happened without it. Because there was evidence that the railing on the stairs in question was defective and collapsed when the plaintiff, Luis Ocasio, tried to use it, the plaintiff was not foreclosed from recovery merely because the jury might find that the ice was also a contributing cause and there was no duty to remove it on the part of the defendant Verdura Construction, LLC, while the storm that produced it was still ongoing. This is dispositive of the case because it is reasonably possible that the jury was misled. I would end our opinion there. I concur in the reversal of the judgment on that ground.

I part company with the majority opinion because it goes too far when it states that the "ongoing storm doctrine was inapplicable and irrelevant because the plaintiff was not claiming that his fall was due to snow and ice that the defendant had failed to remove or treat. The record is clear that the theory of the plaintiff's case as presented to the jury was that his fall was due to the defective railing and not due to the presence of snow and ice on the porch." This conclusion does not take into account the defendant's evidence of a different cause, namely, the plaintiff's medical records, which reflect his accounts that his injury occurred as "he was walking up the stairs when he slipped on the ice and fell to the ground, injuring his left leg" and that he "slipped on [an] icy step . . . ." Neither of these records makes any reference to a broken railing as a cause of the plaintiff's fall and injury. Whether the ongoing storm doctrine was applicable or relevant was not just dependent on the plaintiff's evidence but on all of the evidence in the case, including the defendant's evidence. The plaintiff's complaint alleged that the defendant "failed to erect signs, barriers or otherwise isolate the icy area of the porch and its railings." The plaintiff sought to delete that allegation by amending his complaint. It was a matter of the court's discretion whether it would permit a late amendment one day into the trial and after everyone was on notice of the defendant's premarked exhibits and the theory of defense on which the defendant's case had been prepared. The court did not permit a late amendment to the complaint. The alleged failure of the defendant to "isolate the icy area" remained in the plaintiff's complaint. I thus do not agree that the analysis or conclusions concerning the issue of the ongoing storm doctrine are appropriate or necessary to the disposition of this appeal.

For the foregoing reasons, I concur in the result reached and respectfully dissent in part.

KENDALL SMITH *v.* COMMISSIONER OF CORRECTION (AC 44654)

Elgo, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been found guilty of several crimes, following a jury trial, and who had entered a plea of nolo contendere to a charge of being a persistent serious felony offender in connection with his role in an armed bank robbery, sought a writ of habeas corpus. The petitioner and another perpetrator, each openly carrying a gun, had entered the bank and taken money from the tellers' drawers and the safes. The petitioner claimed that his trial counsel, B, had rendered ineffective assistance and that his plea of nolo contendere had not been knowing, intelligent and voluntary. The habeas court denied the habeas petition, concluding, inter alia, that B's performance was not deficient and, thereafter, granted the petition for certification to appeal. *Held*:

1. The petitioner could not prevail on his claim that B provided ineffective assistance by failing to request an instruction requiring the jury to find that the firearm he used during the robbery was operable pursuant to the applicable sentence enhancement statute (§ 53-202k) with respect to the charges of robbery in the first degree and by failing to advise the petitioner of the public interest element of the persistent serious felony offender charge: the petitioner's conduct in brandishing a gun as a show of force during the robbery indicated to the victims that the gun could have been fired and, thus, satisfied the statutory (§ 53a-3 (19)) definition of a firearm and subjected him to sentence enhancement pursuant to § 53-202k; moreover, even if the jury instruction had been requested, the trial court would have properly denied the request, thus, the petitioner could not prove prejudice; furthermore, the petitioner failed to demonstrate that, but for B's alleged deficient performance in failing to advise him with respect to the public interest element of the charge of being a persistent serious felony offender pursuant to statute ((Rev. to 2007) § 53a-40 (c)), he would not have entered a nolo contendere plea with respect to that charge, as the plea canvass by the trial court reflected that the petitioner affirmatively answered the court's question as to whether he and B had discussed the evidence the state had to support the charge, it was reasonable for the habeas court to conclude that the petitioner's evidence at the habeas trial did not rebut the presumption that B had explained the nature of the offense in sufficient detail to give the petitioner notice of what he was being asked to admit, and the habeas court found that the petitioner's habeas testimony that he would not have entered a plea of nolo contendere had B properly advised him

was not credible, as the petitioner had an extensive criminal history and the state had a strong case favoring sentence enhancement.

2. The petitioner could not prevail on his claim that his plea of nolo contendere to the charge of being a persistent serious felony offender was not knowing, intelligent and voluntary, as he failed to rebut the presumption that B had informed him of the elements of the charge.

Argued April 4—officially released September 13, 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, *Bhatt, J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Deren Manasevit, assigned counsel, for the appellant (petitioner).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Michael J. Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Kendall Smith, appeals, following the granting of his petition for certification to appeal, from the judgment of the habeas court denying his sixth amended petition for a writ of habeas corpus. The petitioner claims that the habeas court improperly concluded that (1) he was not deprived of his right to the effective assistance of counsel during his underlying criminal trial and (2) he knowingly, intelligently, and voluntarily entered a plea of nolo contendere to a persistent serious felony offender charge. We affirm the judgment of the habeas court.

The following facts, as found by the habeas court, and procedural history are relevant to our resolution of the petitioner's claims. In 2010, following a jury trial,

the petitioner was found guilty of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (4). The jury also found that the petitioner had committed a class B felony with a firearm in violation of General Statutes § 53-202k, a sentence enhancement statute. The petitioner also entered a plea of nolo contendere to a charge brought in a part B information of being a persistent serious felony offender under General Statutes (Rev. to 2007) § 53a-40 (c).[1] All of the charges were related to the petitioner's alleged participation in an armed bank robbery with another perpetrator that occurred on January 23, 2008, in Stafford Springs. Attorney Lawrence Bates represented the petitioner throughout the trial. On May 5, 2010, following the court's acceptance of the jury's verdict and the nolo contendere plea, the court, *Fuger*, *J.*, sentenced the petitioner to a total effective term of fifty-five years of incarceration. The judgment of conviction was upheld following the petitioner's direct appeal to this court. *State* v. *Smith*, 156 Conn. App. 537, 113 A.3d 103, cert. denied, 317 Conn. 910, 115 A.3d 1106 (2015).[2]

On July 6, 2015, the petitioner, as a self-represented litigant, filed a petition for a writ of habeas corpus. Thereafter, the petitioner was appointed habeas counsel. Through counsel, the petitioner filed six amended petitions, with the final amended petition being filed on May 8, 2019. In the sixth amended petition, the petitioner alleged, inter alia, that he is illegally confined because Attorney Bates' performance did not meet "the

[1] All references in this opinion to § 53a-40 (c) are to the 2007 revision of the statute.

[2] The facts of the underlying conviction are set forth in this court's opinion affirming the judgment of conviction. Although it is not necessary to repeat those facts in their entirety here, we will set forth relevant facts as necessary in the context of the claims raised in this appeal.

objective duty of competent representation for attorneys representing criminal defendants" and, but for his deficient performance, the "result of petitioner's criminal trial . . . would have been different and more favorable to the petitioner." Relevant to the present appeal are the petitioner's allegations that Attorney Bates rendered ineffective representation with regard to his enhanced sentence under § 53-202k, for having committed a class B felony with a firearm, and his plea of nolo contendere to the charge of being a persistent serious felony offender.

Regarding the former allegation, the petitioner, raising a claim of ineffective assistance of counsel under the state and federal constitutions, alleged that "counsel failed to adequately research the legal issues presented by this case, namely that he did not argue, brief or request a proper jury charge concerning the requirement that the state must prove beyond a reasonable doubt that the firearm used during the commission of the robbery offense was operable . . . in order for the court to enhance the petitioner's sentence pursuant to . . . § 53-202k . . . ." Regarding the latter allegation, the petitioner, challenging his plea under the state and federal constitutions, alleged that Attorney Bates' representation was deficient with respect to the advice he rendered as to the persistent serious felony offender charge and, thus, in connection with his nolo contendere plea. The petitioner alleged that, as a result of the deficient advice provided to him by Attorney Bates, he did not knowingly, intelligently, and voluntarily enter his nolo contendere plea, and that he "would not have entered [the] plea to the charge of being a persistent serious felony offender if he had known and understood that, in order for his sentence to be enhanced as a persistent serious felony offender, it was necessary for the finder of fact to conclude that his extended incarceration would best serve the public interest."

Distinct from his claim of ineffective assistance of counsel, the petitioner alleges that his confinement is unlawful because he did not understand the "public interest" element of the persistent serious felony offender charge, that he did not knowingly, intelligently, and voluntarily enter his plea of nolo contendere, and that he would not have entered the plea "if he had known and understood" the "public interest" element.[3]

The respondent, the Commissioner of Correction, filed a return in which he either denied the substantive allegations set forth in the petitioner's sixth amended petition or left the petitioner to his proof. With respect to the petitioner's claim that his nolo contendere plea was not knowing, intelligent, and voluntary, the respondent raised the defense of procedural default. In his reply, the petitioner alleged that, to the extent that his claim concerning his nolo contendere plea is procedurally defaulted, cause and prejudice exists to overcome the default.

The claims raised in the present appeal pertain only to the habeas court's rejection of the petitioner's claims that (1) he received ineffective assistance of counsel because Attorney Bates did not request that the court instruct the jury that, under § 53-202k, it must find that the firearm used by him was operable, (2) he received ineffective assistance of counsel because Attorney Bates did not inform him that, under § 53a-40 (c), the state would need to prove his extended incarceration was in the public interest, and (3) he did not enter his

[3] In his habeas petition, the petitioner, relying on the state and federal constitutions, also alleged violations of the right to due process and a fair trial as a result of the state's presentation of false testimony and the court's admission of false testimony, a violation of the right to the effective assistance of appellate counsel, and a violation of the right to nonconflicted trial counsel. The habeas court denied each of these claims. The petitioner does not raise claims of error related to these aspects of the habeas court's decision.

plea of nolo contendere knowingly, intelligently, and voluntarily because he did not understand the "public interest" element of § 53a-40 (c).

On May 14, 2019, the court, *Bhatt*, *J.*, held a trial in this matter. Relevant to the claims raised on appeal, the petitioner presented testimony from himself and Attorney Bates. The petitioner testified that, after he was convicted of robbery and conspiracy to commit robbery, Attorney Bates spoke to him about the persistent serious felony offender charge. The petitioner testified that, during this conversation, Attorney Bates did not inform him that, for him to be found guilty of being a persistent serious felony offender, the state would need to prove that extending the petitioner's incarceration was in the public interest.[4] The petitioner further testified that he would not have entered the plea of nolo contendere if he had known that the state bore the burden of proving this element of the offense.

Habeas counsel for the petitioner examined Attorney Bates about his conversation with the petitioner after the petitioner was found guilty on the charges of robbery and conspiracy to commit robbery. Attorney Bates testified that, after the jury returned its verdict, he told the petitioner that he had every right to proceed to trial with respect to the persistent serious felony offender charge, but the petitioner did not want to proceed to trial with respect to that charge and elected to enter a plea of nolo contendere.

The petitioner's habeas counsel also examined Attorney Bates regarding the sentence enhancement statute, § 53-202k. Attorney Bates testified that he had researched the statute and believed that it required the

[4] The petitioner testified that Attorney Bates advised him that he should plea nolo contendere to the charge because "all [the state] had to show [was] that [he] had been convicted three times" and that there was nothing the petitioner could do to refute the charge.

jury to find that the firearm that the petitioner allegedly used during the alleged bank robbery was, in fact, operable. At trial, however, Attorney Bates did not request that the court instruct the jury that it must determine whether or not the firearm was operable.

On February 11, 2021, in a memorandum of decision, the court denied the petitioner's sixth amended petition for a writ of habeas corpus. With respect to the ineffective assistance of counsel claim related to Attorney Bates' failure to request a "firearm operability" instruction concerning § 53-202k, the court, after discussing the text of § 53-202k and several appellate cases related thereto, reasoned that there was no legal basis for the jury instruction that the petitioner alleged should have been requested at trial. Thus, the court determined that Attorney Bates was not deficient for failing to request the instruction at issue. The court also reasoned that the petitioner could not prove that he was prejudiced by Attorney Bates' failure to request the instruction because, "even if Bates had requested an instruction [that the jury must find that the firearm was operable], given our case law . . . the trial court would have been . . . well within its discretion to deny such a request" because operability was not an element of the offense.

With respect to the ineffective assistance of counsel claim related to Attorney Bates' advice concerning the persistent serious felony offender charge, the court found that, "[w]hen [the petitioner] entered his plea to being a persistent serious felony offender, the trial court conducted a thorough and appropriate canvass including asking [the petitioner] if he had discussed his decision with his attorney and had sufficient time to do so and whether his attorney had explained to him what the state would have to prove. [The petitioner] answered those questions in the affirmative and at no point did he indicate that he did not understand the charges or was being forced to plead or that Bates had

not explained the elements to him. It is well established that the canvassing court can rely on a defendant's responses during a plea canvass. . . . The court found the plea to be knowing, voluntary, and made with advice of competent counsel. Thus, this court can infer that Bates did discuss with [the petitioner] the elements of the offense and the state's evidence. There is no deficient performance. Even assuming that Bates' performance was deficient, [the petitioner's] habeas testimony that he would not have entered a plea of nolo contendere had Bates properly advised him is not credible." (Citations omitted.)

The court also denied the petitioner's related claim that his plea of nolo contendere was invalid because he did not understand that, under § 53a-40 (c), the state bore the burden of proving that his extended incarceration would best serve the public interest. The court reiterated that, in his ineffective assistance of counsel claim concerning this issue, the petitioner was unable to demonstrate that Attorney Bates rendered deficient performance or that he had been prejudiced thereby. The court reiterated that it did not find the petitioner's testimony credible insofar as he testified that he would not have pleaded nolo contendere if he had been advised of the public interest requirement and concluded that the petitioner had not demonstrated that his plea was not knowing, intelligent, and voluntary in nature.[5]

On March 4, 2021, the court granted the petitioner's petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[5] The court did not address the respondent's claim of procedural default with respect to this count of the sixth amended petition, noting that, regardless of whether this claim was procedurally defaulted, the petitioner's claim failed on its merits.

I

First, the petitioner claims that the court erred by concluding that he was not deprived of his right to the effective assistance of counsel during his criminal trial. "Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. 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. . . . 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. . . .

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 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. . . .

"In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish both prongs of the *Strickland* test. . . . [A] habeas court may dismiss the petitioner's claim if he fails to satisfy either prong. . . . Accordingly, a court need not determine the deficiency of counsel's performance if consideration of the prejudice prong will be dispositive of the ineffectiveness claim." (Citations omitted; internal quotation marks omitted.) *Sewell* v. *Commissioner of Correction*, 168 Conn. App. 735, 741–42, 147 A.3d 196

(2016), cert. denied, 324 Conn. 907, 152 A.3d 1245 (2017).

In this first claim raised on appeal, the petitioner asserts that the court erred in concluding that Attorney Bates was not ineffective for failing (1) to request an instruction requiring the jury to find the firearm he used during the bank robbery was operable under § 53-202k and (2) to advise the petitioner of the "public interest" element of the persistent serious felony offender charge. We are not persuaded with respect to either argument.

A

We first address the petitioner's claim that Attorney Bates rendered deficient performance by failing to request that the jury be instructed about operability for purposes of § 53-202k.[6]

Relevant to this claim, we note the following additional facts detailing the manner in which the bank robbery occurred, as set forth in this court's opinion affirming the judgment of conviction: "On January 23, 2008, at approximately 11:45 a.m., two men entered the front door of the Workers' Federal Credit Union in Stafford Springs wearing ski masks, gloves and dark clothing. The first man to enter, while carrying a gun in his left hand, jumped over the counter into the teller area, where three tellers were then working. He ordered the tellers to put up their hands and asked them where the money was. After taking the money from the tellers'

[6] General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

cash drawers and putting it in a bag, the man jumped back over the counter into the lobby area of the bank.

"While the first man was taking money from the tellers' cash drawers, the second man, who also was carrying a gun, ran toward the back of the bank to the desk of Stacey Fisher, another bank employee. On reaching Fisher's desk, the second man forced her at gunpoint to lead him into the vault area behind her so he could access the bank's safes. As the first man jumped back over the counter into the lobby area, the second man emerged from the vault area carrying four or five cash drawers from one of the bank's two safes. Upon meeting near the front door of the bank, the two men exited and got into a small or medium sized, silver or light colored car that had been parked in front of the building." (Footnote omitted.) *State* v. *Smith*, supra, 156 Conn. App. 541–42.

In his appellate brief, the petitioner asserts that "Bates *correctly* understood that § 53-202k requires proof [that] the firearm justifying application of the enhancement was capable of firing a shot, and his failure to seek an instruction on operability was both deficient and prejudicial. The habeas court's analysis of this issue was incorrect and therefore does not support a conclusion that Bates' representation was adequate." (Emphasis added.) The petitioner also argues that the statute is ambiguous because it states that the sentence enhancement statute applies when a person who commits a felony "represents by his words or conduct that he possesses any firearm as defined in section 53a-3 . . . ." General Statutes § 53-202k. The petitioner argues that the phrase "represents by his words or conduct that he possesses any firearm" appears to contradict the legislative requirement that the firearm fall under the definition set forth in § 53a-3 and, thus, gives rise to a statutory ambiguity that necessitates the use

of extratextual sources to resolve. From here, the petitioner urges that the statute be interpreted on the basis of the legislative history that, in his view, suggests that operability is an essential element of the sentence enhancement statute. We need not engage in a statutory interpretation analysis to resolve the petitioner's claim because § 53-202k has been the subject of prior judicial interpretation and that interpretation resolves the issue before us.

The relevant portion of § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3 . . . shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony." General Statutes § 53-202k. "There are two elements to § 53-202k. The first element is that the defendant has committed a class A, B or C felony. . . . The second element of § 53-202k is that the defendant used, was armed with and threatened the use of, displayed, or represented by his words that he possessed a firearm as 'firearm' is defined in [General Statutes] § 53a-3 (19)." *State* v. *Brown*, 259 Conn. 799, 807–808, 792 A.2d 86 (2002). Section 53a-3 (19) defines a " '[f]irearm' " as "any sawed-off shotgun, machine gun, rifle, shotgun, pistol, revolver or other weapon, whether loaded or unloaded from which a shot may be discharged."

Our Supreme Court's reasoning in *State* v. *Brown*, supra, 259 Conn. 799, is particularly relevant to our analysis of the present claim. In *Brown*, the defendant was convicted of robbery in the first degree in violation of §§ 53a-8 and 53a-134 (a) (4), conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a)

and 53a-134 (a) (4), and larceny in the second degree in violation of General Statutes §§ 53a-8 and 53a-123 (a) (3). Id., 801. The jury also found that the defendant was subject to an enhanced penalty under § 53-202k because he had used a firearm in the commission of the crime. Id., 805. The jury reasonably could have found that the defendant stole the victim's car after robbing the victim at gunpoint. Id., 802–803. A second armed individual, who drove the defendant to the victim's location, told the defendant to " '[j]ust pop him.' " Id., 803. Recognizing this as an instruction to shoot the victim, the victim implored the defendant to let him go. Id. The defendant told the victim to walk away and not look back. Id. As the victim walked away, however, he looked back at the defendant. Id. The defendant then threatened the victim, saying, " 'Do you want to get shot . . . .' " Id. The defendant did not shoot the victim, but he left the scene in the victim's automobile. Id.

In *Brown*, the defendant challenged the enhanced penalty imposed on him under § 53-202k. Id., 800–801. After this court affirmed the judgment of conviction, our Supreme Court granted certification limited to the question of "whether the trial court was required to define the term 'firearm' when instructing the jury on the sentence enhancement provision of § 53-202k." Id., 805. The defendant argued that the court's failure to instruct the jury on the definition of a firearm under § 53a-3 (19) rendered the jury instruction constitutionally defective. Id., 808. In particular, the defendant focused on the trial court's failure to instruct the jury, in accordance with § 53a-3 (19), that the state was required to prove that the gun that the defendant used in the robbery was capable of discharging a shot. Id., 809. The state argued that the instruction concerning operability was not necessary and the defendant was subject to the enhancement of his sentence because the evidence demonstrated that he had represented by

his words and conduct that the weapon he used during the robbery was capable of discharging a shot. Id.

In rejecting the defendant's claim, the court in *Brown* explained, "We conclude that the state was not required to prove that the gun held by the defendant was capable of discharging a shot. First, the statements by the defendant and the second perpetrator relative to shooting the victim were representations that the gun in the defendant's hand could be fired, and therefore representations that the gun was a firearm as defined by statute. Because of those representations, the jury properly could have applied § 53-202k without the state having proved that the gun could be fired. Second, the sentence enhancement provision properly may be applied to the defendant because we do not distinguish between the principal and an accessory when applying the sentence enhancement provision for the use of a firearm in the commission of a crime. . . . In the present case, the second perpetrator fired several shots at the police during the foot chase, which establishes that he used a weapon from which a shot could be discharged. The second perpetrator's gun, therefore, satisfied the statutory definition of a firearm and both the second perpetrator and the defendant are subject to sentence enhancement under § 53-202k because the second perpetrator 'use[d], or [was] armed with and threaten[ed] the use of, or display[ed]' a firearm. Accordingly, we conclude that the defendant's claim fails . . . ." (Citation omitted; footnote omitted.) Id., 810–11. The court also stated, "Not only did the defendant in the present case specifically represent that he had a gun, but his statement and that of the second perpetrator also represented that the gun held by the defendant could be fired. Such explicit representations that a gun is capable of firing a shot, however, may not always be necessary in order to apply the sentence enhancement provision of § 53-202k. It may be that brandishing a gun as a show

of force during a crime indicates to the victim that the gun may be fired and therefore satisfies the statutory definition of a firearm and subjects a defendant to sentence enhancement. That is not the question before us in this case, however, and we leave it for a later time." Id., 810 n.11.

We conclude that the facts of this case are similar to those in *Brown* and, therefore, that the analysis in *Brown* controls our disposition of the petitioner's claim. Like the defendant in *Brown*, the petitioner represented that his firearm was capable of firing a shot. The petitioner and his coconspirator pointed their guns at the bank tellers and ordered them to locate the money in the credit union and lead one of the perpetrators to the vault. *State* v. *Smith*, supra, 156 Conn. App. 541. The petitioner's use of a gun to force the bank tellers to assist him during the robbery represented to the tellers that the gun could be fired. Although the petitioner did not make the type of explicit representations concerning the operability of his gun that were present in *Brown*, we are satisfied that his conduct in brandishing his gun as a show of force during the bank robbery indicated to the victims that the gun could have been fired. Thus, we are satisfied that the petitioner's conduct satisfies the statutory definition of a firearm and subjected him to sentence enhancement pursuant to § 53-202k.

Noting the habeas court's reliance on *Brown*,[7] the petitioner argues that *State* v. *Grant*, 294 Conn. 151,

[7] We note that the habeas court also relied on *State* v. *Tinsley*, 47 Conn. App. 716, 720, 706 A.2d 1008, cert. denied, 244 Conn. 915, 713 A.2d 833 (1998), in which this court similarly rejected a claim that a defendant should not be subject to the enhanced penalty under § 53-202k because the evidence did not establish that he used or was armed with a firearm during the commission of the crime. In rejecting the claim, this court stated: "The defendant . . . claims that § 53-202k applies only after it is established that in the commission of the underlying felony for which the defendant was convicted, the weapon used was proven capable of discharging a shot. It has already been established that a guilty verdict under § 53a-134 (a) (4)

982 A.2d 169 (2009), and *State* v. *Velasco*, 253 Conn. 210, 751 A.2d 800 (2000), contravene *Brown* and suggest that the jury should have been instructed on operability in the present case. For the reasons that follow, we disagree with the petitioner's interpretation of these cases.

In *Grant*, our Supreme Court considered whether a BB gun was a "firearm" as defined in § 53a-3 (19) for the purpose of deciding whether a defendant was properly charged under § 53-202k with using a firearm in the commission of a felony. *State* v. *Grant*, supra, 294 Conn. 156–57. Contrary to the petitioner's assertion, this analysis did not require that operability be proven for § 53-202k to apply. The question of whether the BB gun was a "firearm" was salient to determining if the defendant *used* a firearm in committing a felony. Id., 157. The analysis did not concern whether the operability of a firearm was relevant in the context of a person committing a felony while *representing* he possesses an operable firearm, as was the case in *Brown*. See id., 156. In our view, *Grant* has no effect on the court's holding in *Brown* that operability need not be proven when a defendant *represents* that he possesses an operable firearm. The petitioner's reliance on *Grant* is, therefore, misplaced.

In *State* v. *Velasco*, supra, 253 Conn. 212, our Supreme Court addressed whether § 53-202k permits the court, rather than the jury, to find that a defendant used a firearm in the commission of a felony. The defendant

does not require proof of operability [of the gun]. A conviction can result whether or not the defendant possessed a gun. All that is required is that the defendant displays or threatens the use of what he represents by his words or conduct to be a [gun]. . . . To conclude otherwise would render this statutory provision inapplicable in situations where weapons cannot be recovered or where a defendant represents to have a gun but, in fact, does not. Certainly, the legislature did not intend to omit those frequently occurring scenarios from sentence enhancement." (Citation omitted; internal quotation marks omitted.) Id., 721–22.

in *Velasco* was found guilty of two counts of felony murder in violation of General Statutes § 53a-54c, and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (3). Id., 217. When sentenced, the trial court applied § 53-202k after determining that, on the basis of the evidence at trial, the state proved beyond a reasonable doubt the defendant had committed the underlying felony with a firearm. Id. On appeal, our Supreme Court vacated the sentence enhancement imposed under § 53-202k after concluding that the question of whether the accused used a proscribed firearm in the commission of a felony must be decided by the jury, not the court. Id., 214. In the present case, the jury was asked by interrogatory whether the petitioner had used a firearm in the commission of a felony. The court did not make that finding in place of the jury and, contrary to the petitioner's arguments, § 53-202k was not "automatically" applied in this case simply because the petitioner committed a violation of a felony, § 53a-134 (a) (4). Accordingly, we fail to see how *Velasco* supports the petitioner's assertion that an instruction on operability was warranted in the present case. For the foregoing reasons, we are persuaded that the court correctly relied on *Brown* in concluding that the petitioner failed to prove that trial counsel's failure to request an instruction on operability constituted deficient performance.

For the foregoing reasons, we also agree with the habeas court that, even if Attorney Bates was deficient in failing to seek an instruction on operability, the petitioner cannot prove prejudice. Under *Brown*, even if the jury instruction had been requested, the trial court would have properly denied the request. Accordingly, the court did not err in rejecting the petitioner's claim that counsel was ineffective for failing to request jury instructions on operability.

B

Next, we address the petitioner's claim that the court improperly concluded that Attorney Bates did not render effective representation because he failed to inform him of the "public interest" element of the persistent serious felony offender charge. We conclude that the court properly determined that the petitioner failed to demonstrate that Attorney Bates did not advise him of the essential elements of the offense.

We note the general proposition that, "even without an express statement by the court of the elements of the crimes charged, it is appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. . . . [U]nless a record contains some positive suggestion that the defendant's attorney had not informed the defendant of the elements of the crimes to which he was pleading guilty, the normal presumption applies." (Citations omitted; internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 783–84, 894 A.2d 963 (2006).

On careful examination of the record, we find support for the court's determination that Attorney Bates had informed the petitioner of the elements of the persistent serious felony offender charge. Initially, we observe that the habeas court reviewed the transcript of the canvass that the trial court conducted concerning the petitioner's nolo contendere plea. The plea canvass reflects that the petitioner affirmatively answered the court's question as to whether he and his counsel discussed the evidence the state had to show to support the charge. The following examination occurred during the canvass:

"The Court: Have you had enough time to talk with your attorney about your case and decision to enter a plea of nolo contendere to this part B information?

"[The Petitioner]: Yes.

"The Court: Have you also specifically discussed with your attorney the evidence that the state claims it has to show that you were involved in this matter, that there's evidence to support the [charge set forth in] the part B [information]?

"[The Petitioner]: Yes."

Later in the canvass, the petitioner responded affirmatively when the court asked him if he was "fully satisfied" with the representation provided to him by Attorney Bates.

On the basis of the petitioner's answers to the court's inquiry, the court reasonably could have presumed that trial counsel explained the nature of the offense in sufficient detail to give the petitioner notice of what he was being asked to admit. We note that the defendant pleaded nolo contendere pursuant to an information that explicitly listed § 53a-40 (c) as the governing statute, and he entered his plea in direct response to being asked for his plea on the charge of being "a persistent serious felony offender." Although the court did not refer to the state's burden of proving that sentence enhancement was in the public interest, there is no finding or allegation that the court's canvass of the petitioner was inadequate. It is well settled that "[a] trial court . . . may properly rely on . . . the responses of the [defendant] at the time he responded to the trial court's plea canvass, in determining that he was adequately informed of the elements of the offense charged." (Internal quotation marks omitted.) *State* v. *Lage*, 141 Conn. App. 510, 520, 61 A.3d 581 (2013).

The petitioner contends that Attorney Bates' testimony at the habeas trial reflects that the petitioner was not informed of the essential elements of the offense. Specifically, the petitioner relies on the examination

and cross-examination of Attorney Bates regarding one conversation he had with the petitioner after the jury returned its verdict finding the petitioner guilty of robbery and conspiracy to commit robbery. The following colloquy between the petitioner's counsel and Attorney Bates occurred:

"[Attorney Bates]: [A]t the end of the first part of the trial where there was a guilty finding and there was an opportunity to fight the . . . [persistent serious felony offender charge], I told . . . [the petitioner] he had every right to have it and that we could argue. He said I don't want to argue it, I'm all done.

"[The Petitioner's Counsel]: What did you tell him that you could argue?

"[Attorney Bates]: I didn't. We didn't get any further than what I just said to you.

"[The Petitioner's Counsel]: Did you tell him whether or not he had a defense?

"[Attorney Bates]: I told you what I said to him, that we could argue the point. And he said I'm through.

"[The Petitioner's Counsel]: And that was the entire extent of the conversation?

"[Attorney Bates]: Yes."

The petitioner also relies on the following exchange that occurred during the respondent's cross-examination of Attorney Bates:

"[The Respondent's Counsel]: You thought [in regard to the persistent serious felony offender charge] it would've been easily proven that his extended incarceration was in the public interest. Would you agree?

"[Attorney Bates]: Yes.

"[The Respondent's Counsel]: And [the petitioner] understood that as well.

"[Attorney Bates]: I don't know the—I'm not sure about that."

The petitioner urges us to interpret this testimony to suggest that *at no point during his representation of the petitioner*, did Attorney Bates advise him of the elements of the offense. However, Bates' testimony, quoted previously, described a conversation with the petitioner at a specific point in time. It was limited to what Bates told the petitioner after the jury found him guilty of the underlying offense. Bates' testimony did not suggest that he had not explained the elements of the offense prior to the finding of guilt. Attorney Bates' testimony does not suggest that the petitioner was never informed of the elements of the charge. It was not unreasonable for the court to conclude that the petitioner's evidence at the habeas trial did not rebut the presumption that Attorney Bates had explained the nature of the offense in sufficient detail to give the petitioner notice of what he was being asked to admit.[8] Accordingly, the habeas court did not err in denying the petitioner's claim after finding that counsel had informed the petitioner of the elements of the persistent serious felony offender charge.

Under *Strickland*, our conclusion that the petitioner has not proven deficient performance is a sufficient

[8] In a similar case, *State* v. *Reynolds*, 126 Conn. App. 291, 11 A.3d 198 (2011), this court considered whether a defendant had validly waived his right to a jury determination of his guilt under a part B information. The defendant in *Reynolds*, like the petitioner in the present case, attempted to demonstrate that he did not understand that the state bore the burden of demonstrating that an extended period of incarceration was in the public interest. Id., 297. In rejecting the claim, this court observed that a trial court may presume that the defendant's standby counsel had reviewed the elements necessary to enhance the defendant's sentence with the defendant, and that the defendant had not rebutted that presumption "by offering evidence that standby counsel could not later remember the content of her advice." Id., 305.

basis on which to reject the present claim of ineffective representation. See *Sewell* v. *Commissioner of Correction*, supra, 168 Conn. App. 742. However, we conclude that the petitioner's claim also fails because he has failed to demonstrate that, even if he was not advised with respect to and was unaware of the public interest element, he would not have entered the nolo contendere plea. The court, in analyzing the prejudice prong of *Strickland*, made the critical finding that, "[e]ven assuming that [Attorney] Bates' performance was deficient, [the petitioner's] habeas testimony, that he would not have entered a plea of nolo contendere had [Attorney Bates] properly advised him, *is not credible*." (Emphasis added.) As we have stated previously in this opinion, it is not the role of this court to second-guess the credibility determinations made by the trial court. See *Sewell* v. *Commissioner of Correction*, supra, 741; see also *David P.* v. *Commissioner of Correction*, 167 Conn. App. 455, 470, 143 A.3d 1158 (reviewing court must defer to credibility assessment of trial court based on its firsthand observation of conduct, demeanor, and attitude of witness), cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016). Also, the court, observing that the present claim did not involve the rejection of a plea offer but a decision to enter a nolo contendere plea, also noted that the state had a strong case favoring sentence enhancement and that the petitioner "[had] presented no evidence that the state would have been unable to show that he needed to be incarcerated for an extended period of time."[9] Like the habeas court,

[9] Specifically, the court stated: "The state needed to prove that [the petitioner] stands convicted of a felony, was previously convicted of and imprisoned for a felony, and that extended incarceration would best serve the public interest. . . . All three of these elements are easily satisfied. [The petitioner's] criminal record encompassed no fewer than twenty-three convictions involving firearms. These convictions included five robberies, including one in Massachusetts committed after the Stafford Springs credit union robbery. Seventeen of the twenty-three convictions were for felonies. . . . The sentencing court noted that [the petitioner] was a career, violent criminal offender with numerous convictions for serious crimes of violence

we conclude that the petitioner's extensive criminal history undermines his argument that, being properly advised with respect to the persistent serious felony offender charge, he would have elected to exercise his right to a trial. For the foregoing reasons, in our plenary review of the issue of prejudice, we conclude, as did the habeas court, that the petitioner has not demonstrated that, but for the alleged deficiency of Attorney Bates, he would not have pleaded nolo contendere with respect to the part B information.

II

Next, the petitioner claims that his plea of nolo contendere was not knowing, intelligent, and voluntary. We are not persuaded by this claim.

We begin by setting forth the relevant legal principles that guide our analysis of the petitioner's claim. "The underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Questions of law and mixed questions of law and fact receive plenary review." (Internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 174, 982 A.2d 620 (2009). "The application of the habeas court's factual findings to the pertinent legal standard . . . presents a mixed question of law and fact . . . ." *Duperry* v. *Solnit*, 261 Conn. 309, 335, 803 A.2d 287 (2002).

"The constitutional stricture that a plea of guilty must be made knowingly and voluntarily . . . requires not

in his past. That court further noted that [the petitioner's] repeated acts of criminality demonstrated his total inability and total lack of desire to be a law-abiding member of society, thereby forfeiting his right to freedom. The sentencing court then emphasized that, in its view, [the petitioner] should never be at freedom again in our society and should never be considered for parole or early release." (Citation omitted; footnote omitted.)

only that there be a voluntary waiver during a plea canvass of the right to a jury trial, the right of confrontation and the right against self-incrimination, but also that the defendant must be aware of and have an understanding of all of the elements of the crime or crimes with which he is charged . . . . [T]he plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." (Citations omitted; internal quotation marks omitted.) *State* v. *Hackett*, 16 Conn. App. 601, 602, 548 A.2d 16 (1988).

In support of the present claim, the petitioner relies on the factual premise that underlies the claim that we addressed in part I B of this opinion, specifically, that Attorney Bates failed to inform him of the elements of the persistent serious felony offender charge. The petitioner further argues that, because he did not know the elements of the charge, his plea of nolo contendere was not knowing, intelligent, and voluntary.

As the habeas court found, and we have addressed in part I B of this opinion, the petitioner did not rebut the presumption that counsel informed him of the elements of the charge. Therefore, we agree with the habeas court that this claim fails on its merits.

The judgment is affirmed.

In this opinion the other judges concurred.

PENNYMAC CORP. *v.* JOSEPH TARZIA ET AL.
(AC 44378)

Prescott, Alexander and Suarez, Js.

Syllabus

The plaintiff, P Co., sought to foreclose a mortgage on certain real property owned by the defendant T. P Co., as holder of the note and mortgage

at the time of the commencement of the action, sent a letter to T by certified mail return receipt requested, notifying him that the loan was in default and, pursuant to statute (§ 8-265ee (a)), provided him with the specific notice required to be given prior to its commencement of a foreclosure of a qualifying mortgage under the Emergency Mortgage Assistance Program (EMAP). Thereafter, P Co. assigned the note and mortgage to W Co., and W Co. was substituted as the plaintiff. Subsequently, the trial court rendered judgment of strict foreclosure, and set law days. T filed a motion to open on the last extended law day, claiming that the judgment needed to be opened so that he may pursue a motion to dismiss the action for P Co.'s failure to comply with the notice provision of § 8-265ee (a). Specifically, T claimed that P Co. never sent the EMAP notice and, in support of that contention, provided the affidavit of a consultant who previously worked in the United States Postal Service (USPS). The consultant claimed in a report that, although P Co. created a certified mail label, the EMAP notice was never actually placed in the mail system, as revealed by a tracking query he produced from the USPS website. Subsequently, the trial court denied T's motion. On appeal, T claimed, inter alia, that the trial court incorrectly determined that it had subject matter jurisdiction over the foreclosure action on the ground that P Co. provided T with the required EMAP notice. *Held* that the trial court correctly determined that it had subject matter jurisdiction over the present foreclosure action and that the court's factual findings that P Co. complied with the EMAP notice requirement under § 8-265ee (a) were not clearly erroneous, as W Co.'s evidence amply supported the trial court's factual finding that P Co. provided the required EMAP notice to T: W Co. provided the court with an affidavit by its counsel certifying that P Co. had mailed T the EMAP notice and, in support thereof, attached a photocopy of an envelope addressed by its counsel to T, which included the certified mail barcode and corresponding certified mail numbers, as well as the physical receipt provided by the USPS to P Co.'s counsel, and the lack of evidence of a return receipt postcard corresponding to the EMAP notice was inconsequential, as lack of receipt did not affect proof of EMAP compliance; moreover, T's contention that the trial court failed to give proper weight to his evidentiary submissions was unavailing because, despite an isolated statement by the trial court regarding the late and protracted state of the proceedings, the court explicitly stated that it had carefully reviewed and considered the motion, the related filings and exhibits attached thereto, and that it had weighed both parties' evidence before ultimately finding that T's submissions failed to refute W Co.'s evidence; furthermore, the trial court was free to discredit or find unpersuasive T's evidence, and this court declined to reweigh the evidence in T's favor on appeal.

Argued December 9, 2021—officially released September 13, 2022

Procedural History

Action to foreclose a mortgage on certain of the named defendant's real property, brought to the Superior Court in the judicial district of Stamford-Norwalk, where Wilmington Trust National Association as Trustee for MRFA Trust 2015-1 was substituted as the plaintiff; thereafter, the court, *Hon. William A. Mottolese*, judge trial referee, granted the plaintiff's motion for judgment of strict foreclosure and rendered judgment thereon; subsequently, the court, *Kavanewsky, J.*, denied the named defendant's motion to open the judgment, and the named defendant appealed to this court. *Affirmed.*

Alexander H. Schwartz, for the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (substitute plaintiff).

Opinion

ALEXANDER, J. The defendant Joseph Tarzia appeals from the trial court's denial of his motion to open the judgment of strict foreclosure rendered in favor of the substitute plaintiff, Wilmington Trust National Association as Trustee for MFRA Trust 2015-1.[1] On appeal, the defendant claims that the court incorrectly determined that it had subject matter jurisdiction over this foreclosure action on the ground that the

[1] The original plaintiff, Pennymac Corp., commenced this action against the following defendants: Joseph Tarzia; Webster Bank, N.A.; Capital One Bank (USA), N.A.; and Carmine Aquino. We refer to Joseph Tarzia as the defendant because he is the only defendant relevant to this appeal.

On May 29, 2018, Pennymac Corp. filed a motion to substitute Wilmington Trust National Association as Trustee for MFRA Trust 2015-1 as the plaintiff on the ground that it had acquired the right to collect the debt alleged in the complaint. On June 18, 2018, the court granted the motion to substitute. Consequently, we refer to Pennymac Corp. by name and to Wilmington Trust National Association as Trustee for MFRA Trust 2015-1 as the plaintiff.

original plaintiff, Pennymac Corp. (Pennymac), complied with General Statutes § 8-265ee (a), the notice provision of the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our disposition of this appeal. On May 31, 2017, Pennymac commenced this foreclosure action against the defendant. According to the complaint, on December 15, 2006, the defendant executed a promissory note in the amount of $1 million payable to the order of Washington Mutual Bank, FA, and secured by a mortgage on the property located at 70 Cranberry Road in Norwalk and Westport (property). The mortgage and the note eventually were assigned to Pennymac before it commenced this action.

On July 31, 2017, Pennymac filed an affidavit certifying that it had provided the defendant with the notice required by the EMAP.[2] In the affidavit, a paralegal

[2] As subsequently outlined in this opinion, the notice provision of the EMAP, § 8-265ee (a), requires in certain cases that a mortgagee, prior to its commencement of a foreclosure action, "give notice to . . . [the] mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage." This EMAP notice "shall advise the [mortgagor] of his delinquency or other default under the mortgage and shall state that the [mortgagor] has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the [Connecticut Housing Finance Authority] with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the [mortgagor] and mortgagee are unable to resolve the delinquency or default." General Statutes (Supp. 2022) § 8-265ee (a).

We note that, although the legislature has amended § 8-265ee (a) since the events underlying this appeal; see Public Acts 2021, No. 21-44; those amendments have no bearing on the merits of this appeal. All references herein to § 8-265ee are to the version appearing in the 2022 supplement to the General Statutes.

employed by the plaintiff's counsel[3] averred that, "based on [the] business records [of the plaintiff's counsel] and its regular business practices, [Pennymac] has complied with the [EMAP] by [the plaintiff's counsel] giving on April 19, 2016 to all mortgagors a notice containing the information required by said statute." Attached to the affidavit is a photocopy of an envelope addressed from the plaintiff's counsel to the defendant, depicting the certified mail barcode and corresponding certified mail number. Also attached to the affidavit is a letter, dated April 19, 2016, from the plaintiff's counsel to the defendant providing him, among other things, notice pursuant to the EMAP.

In April, 2018, Pennymac assigned the note and the mortgage to the plaintiff. On May 29, 2018, Pennymac filed a motion to substitute the plaintiff as the party plaintiff, which the court granted on June 18, 2018. On June 11, 2019, the plaintiff filed a motion for judgment of strict foreclosure. On January 13, 2020, the court rendered a judgment of strict foreclosure and set law days to commence on April 14, 2020. The court then issued a series of five orders opening the judgment of strict foreclosure and extending the commencement of law days until June 2, 2020, July 7, 2020, August 4, 2020, September 9, 2020, and finally to October 6, 2020. The defendant did not appeal from the January 13, 2020 judgment of strict foreclosure or any of the subsequent orders extending the law days.

On the October 6, 2020 law day, the defendant filed a motion to open the judgment of strict foreclosure. In his motion, the defendant asserted that the judgment of strict foreclosure must be opened "in order to permit him to pursue a motion to dismiss this action for [the]

[3] Both Pennymac and the plaintiff were represented by the same law firm, Bendett & McHugh, P.C. For clarity, we refer to Bendett & McHugh, P.C., as the plaintiff's counsel.

plaintiff's failure to comply with the [EMAP]." The defendant contemporaneously filed with his motion to open: (1) an October 6, 2020 affidavit by the defendant's counsel, Alexander H. Schwartz; and (2) an unsigned, unsworn report (report) authored by Peter Wade, a senior consultant for U.S. Postal Mail Fraud Investigations at Humatec, which is an expert witness consulting firm.

In his affidavit, the defendant's counsel avers that, on July 20, 2020, he retained Wade to provide an opinion as to whether the certified letter "prepared by" the plaintiff's counsel containing the EMAP notice "was delivered" to the defendant. The defendant's counsel describes Wade's qualifications as an individual with "decades of experience with the U.S. Postal Service [(USPS)] and Postal Inspection Service," with a specialization "in postal inspection polices and investigative methods and techniques." The defendant's counsel states that Wade previously served as the Assistant Regional Chief Postal Inspector for the Northeast Region, and Postmaster for the U.S. Virgin Islands and Puerto Rico. The defendant's counsel concluded his affidavit by stating that he received Wade's report on October 5, 2020, and that "a true copy of [the report] is attached hereto."

In the report, Wade opines that the certified mail letter from the plaintiff's counsel to the defendant containing the EMAP notice "has never been placed in the U.S. mail." To support this opinion, Wade states that "the USPS keeps track of the progress of certified mail from its initial induction at a mail processing center through to the final disposition of that letter." Wade then states that on October 4, 2020, he performed a tracking query on the USPS website for the certified mail number depicted on the envelope that the plaintiff's counsel attached to its July 31, 2017 affidavit of EMAP compliance. Wade states that this query revealed

that the plaintiff's counsel had "created" a certified mail label, however, the certified mail letter "*was not yet in the system.*" (Emphasis in original.) Wade attached to his report a printout of the USPS website that reveals the result of his tracking query. This printout provides in relevant part: "[l]abel [c]reated, not yet in system" and that "[a] status update is not yet available on your package. It will be available when the shipper provides an update or the package is delivered to USPS."[4]

On October 8, 2020, the plaintiff filed an objection to the defendant's motion to open. Therein, the plaintiff contended that the July 31, 2017 affidavit of EMAP compliance established that the EMAP notice was provided to the defendant. The plaintiff argued that the EMAP compliance affidavit was filed on the docket three years ago and previously was uncontested by the defendant. The plaintiff also explained that the USPS provided the plaintiff's counsel with a receipt when it physically deposited the certified mail containing the EMAP notice with the USPS. The plaintiff attached this USPS receipt to its objection, which shows that, on April 19, 2016, the plaintiff's counsel deposited with the Farmington branch of the USPS a letter addressed to the defendant by certified mail return receipt requested. Each page of the USPS receipt is marked with a dated stamp from the Farmington branch of the USPS. The plaintiff finally argued that Wade's report is flawed because he could not have obtained tracking information for a certified mail letter sent more than four years prior to the creation of his report because the USPS online tracking system only retains records for two

[4] Wade also states in his report that, on October 3, 2020, he personally sent an exemplary certified mail letter to the plaintiff's counsel using Stamps.com software, which a USPS tracking query reveals was in "preshipment." Wade further attaches to his report a random USPS tracking query for a certified mail letter that was delivered. Wade contends that, because the result of all three of these USPS tracking queries are different, the plaintiff's counsel never mailed the EMAP notice to the defendant.

years. The plaintiff attached a printout from the USPS website evincing its data retention policy. On October 16, 2020, the plaintiff filed an amended objection to the defendant's motion to open, arguing that the motion was moot because title vested with the plaintiff after the October 6, 2020 law day passed.

On October 26, 2020, the defendant filed a reply memorandum in further support of his motion to open, to which he attached an October 20, 2020 affidavit by Wade. The defendant's reply reiterates the conclusions of Wade's affidavit in which he opines, without citation, that "[i]t is true that the [USPS] retains records of certified mail delivery for two years. However, the two year period of time commences from the end of the month in which that certified item was delivered to the addressee. Had this certified letter which was prepared for mailing on April 19, 2016, been delivered on or before September 20, 2018, there would be no record of that article in the [USPS] tracking system today. The fact that the data is available demonstrates that the item was not delivered." (Emphasis omitted.) The defendant further argued that his motion to open was not moot because he filed his motion to open on the law day, which imposed an automatic appellate stay tolling the law days until the expiration of the applicable appeal period.[5]

On October 29, 2020, the court, without holding a hearing, issued an order denying the defendant's motion to open. The court stated at the outset that it had "care-

[5] The defendant does not renew this argument on appeal, however, we note that, once the time to appeal from the initial foreclosure judgment has expired, the mere filing of a motion to open does not impose an automatic appellate stay to toll the law day. See, e.g., *Deutsche Bank National Trust Co.* v. *Pardo*, 170 Conn. App. 642, 652–53, 155 A.3d 764 (motion to open challenging court's jurisdiction filed *prior* to passage of law day, but heard and decided *after* law day, does not trigger automatic stay that tolls running of law days), cert. denied, 325 Conn. 912, 159 A.3d 231 (2017).

fully reviewed and considered" the motion to open, the related filings, and all the exhibits attached thereto. The court determined that the motion to open was not moot because it was filed timely. The court then found that the plaintiff's evidence established that Pennymac provided the defendant with the EMAP notice. The court reasoned that "the plaintiff has shown in its own affidavit that it did send the required notice to the defendant, properly addressed, in the manner prescribed by the [EMAP]. It has provided a USPS receipt to that effect. . . . Further, the defendant has not provided sufficient cause to [establish] that the notice was [not] mailed. The defendant's claim in the affidavits he has provided, that the notice never entered the USPS 'mail stream,' does not necessarily refute the evidence that the plaintiff did what the [EMAP] requires. And finally, the court gives little weight to the defendant's claims, especially given the context of the late and protracted stage of these proceedings." (Citation omitted.) This appeal followed.

On appeal, the defendant claims that the court incorrectly determined that it had subject matter jurisdiction over this foreclosure action on the ground that Pennymac provided the defendant with the required EMAP notice.[6] The defendant narrowly argues that the court improperly credited the plaintiff's evidence and discredited Wade's expert "opinion" not because "it was outweighed by other, more weighty evidence, but because of *when* during the course of litigation [the] defendant

[6] The defendant states in his principal appellate brief that his "challenge [is] not that he did not receive the EMAP notice. He claimed and proved that [Pennymac] never sent the notice to him in the first place," and that he "does not claim that the [court] misconstrued the law . . . and thereby committed a clear error of law." In light of the unique arguments and facts presented by this appeal, we confine our decision to the precise issue presented. See footnotes 5, 7, 8, 9, and 11 of this opinion.

offered it." (Emphasis added.) The plaintiff responds that the court properly denied the defendant's motion to open on the basis of the plaintiff's evidence, which established that Pennymac had complied with the EMAP notice requirement.[7]

We first set forth the standard of review and legal principles relevant to our resolution of this appeal. The

[7] The plaintiff advances two additional arguments that require little discussion. First, the plaintiff argues that this appeal is moot because title to the property absolutely vested in the plaintiff as a result of the passage of the October 6, 2020 law day and, thus, there is no practical relief that can be granted to the defendant on appeal. An appeal in a foreclosure action ordinarily is moot after the passage of the law day because title is absolute in the encumbrancer. See *Wachovia Mortgage, FSB* v. *Toczek*, 189 Conn. App. 812, 818–20, 209 A.3d 725, cert. denied, 333 Conn. 914, 216 A.3d 650 (2019). One rare exception to this general rule is an appeal from a motion to open that challenges whether "the court lacked jurisdiction over either the person or the case at the time the judgment of strict foreclosure was entered." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *McKeith*, 156 Conn. App. 36, 41, 111 A.3d 545 (2015); see also *U.S. Bank National Assn.* v. *Rothermel*, 339 Conn. 366, 377–80, 260 A.3d 1187 (2021) (outlining "rare and exceptional cases" in which courts may "exercise a limited form of continuing jurisdiction over motions to open judgments of strict foreclosure after the passage of the law days"); *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 576, 953 A.2d 868 (2008) (The trial court's lack of jurisdiction is a proper ground to open the foreclosure judgment after the passage of law days because "[n]o principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment, whenever and wherever declared upon as a source of a right, may always be challenged." (Internal quotation marks omitted.)). Therefore, this appeal is not moot due to the passage of the law day because, even though the plaintiff has title to the property, the defendant's motion to open challenged the court's subject matter jurisdiction.

Second, the plaintiff argues that the defendant's appeal constitutes an impermissible collateral attack on the judgment of strict foreclosure, from which the defendant did not appeal. See *Bank of New York Mellon* v. *Tope*, 202 Conn. App. 540, 549–50, 246 A.3d 4 (appeal from court's denial of motion to open challenging court's subject matter jurisdiction to render judgment of strict foreclosure constituted impermissible collateral attack because defendant failed to establish that "the trial court's lack of subject matter jurisdiction is entirely obvious"), cert. granted, 336 Conn. 950, 251 A.3d 618 (2021), and cert. granted, 339 Conn. 901, 260 A.3d 483 (2021). In light of our conclusion that the court properly denied the defendant's motion to open, we need not reach the plaintiff's alternative collateral attack argument.

sole dispositive issue in this appeal is whether the court properly determined that it had subject matter jurisdiction because Pennymac had complied with the EMAP notice requirement, which is a mixed question of law and fact.[8] We exercise plenary review over the court's ultimate legal determination as to whether it had subject matter jurisdiction because that is a question of law. See *Caverly* v. *State*, 342 Conn. 226, 233, 269 A.3d 94 (2022) (determination as to trial court's subject matter jurisdiction is question of law). "When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citation omitted; internal quotation marks omitted.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 382, 222 A.3d 950 (2020). Conversely, the court's factual finding that Pennymac provided the EMAP notice to the defendant is subject to the clearly erroneous standard of review. "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

See, e.g., *Riley* v. *Travelers Home & Marine Ins. Co.*, 333 Conn. 60, 87 n.11, 214 A.3d 345 (2019) (declining to reach alternative argument).

[8] Both parties on appeal assert that we should apply an abuse of discretion review because this is an appeal from the denial of a motion to open. Although both parties are correct that we ordinarily review a court's ruling on a motion to open a judgment for an abuse of discretion; see *Conroy* v. *Idlibi*, 343 Conn. 201, 204, 272 A.3d 1121 (2022); the dispositive issue in this appeal is not whether the trial court properly exercised its discretion in denying the motion to open but, rather, whether the trial court properly determined that it had subject matter jurisdiction under the circumstances of this case. See *Citibank, N.A.* v. *Lindland*, 310 Conn. 147, 166, 75 A.3d 651 (2013) (exercising plenary review in appeal from motion to open challenging court's subject matter jurisdiction). The issue of subject matter jurisdiction is not a matter of discretion. Id.

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 15, 6 A.3d 163 (2010); id. (using mixed standard of review to question of whether service conferred personal jurisdiction over defendant); see also *Deutsche Bank National Trust Co.* v. *McKeith*, 156 Conn. App. 36, 40, 111 A.3d 545 (2015) (same).

The EMAP notice requirement is contained in § 8-265ee (a), which provides in relevant part: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to . . . [the] mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice. Such notice shall advise the [mortgagor] of his delinquency or other default under the mortgage and shall state that the [mortgagor] has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the [Connecticut Housing Finance Authority] with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the mortgagor and mortgagee are unable to resolve the delinquency or default."[9] General Statutes (Supp. 2022) § 8-265ee (a).

[9] There is no dispute on appeal that Pennymac was required to comply with the provisions of § 8-265ee prior to commencing this foreclosure action. See, e.g., *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 290, 145 A.3d 408 ("the obligation to give notice pursuant to § 8-265ee before commencing a foreclosure action applies only if the plaintiff is seeking to

This court has held that a mortgagee's failure to comply with the EMAP notice requirement deprives a court of subject matter jurisdiction. This court recently held, as a matter of first impression, that "a mortgagee that wishes to commence a foreclosure of an applicable mortgage must provide the prescribed EMAP notice in accordance with § 8-265ee (a) prior to the commencement of a foreclosure action, and the failure to do so deprives the trial court of subject matter jurisdiction." *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 646, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020). Applying this rule, this court in *Hammons* concluded that, although "a previous mortgagee . . . through its loan servicer, had mailed an EMAP notice to the defendant prior to the commencement of a separate foreclosure action that was subsequently dismissed," there was "no dispute that the plaintiff—as the original plaintiff in the present action—did not mail the defendant an EMAP notice as required by § 8-265ee (a)." Id., 645; see also *KeyBank, N.A.* v. *Yazar*, 206 Conn. App. 625, 634, 261 A.3d 9 (applying *Hammons* to conclude that court lacked subject matter jurisdiction because original plaintiff "did not mail the defendant an EMAP notice in connection with the present action"), cert. granted, 340 Conn. 901, 263 A.3d 100 (2021).[10] Accordingly, for the court to have subject mat-

foreclose a mortgage that satisfies certain standards enumerated in [General Statutes] § 8-265ff (e)"), cert. denied, 323 Conn. 939, 151 A.3d 387 (2016).

[10] Our Supreme Court granted the plaintiff's petition for certification to appeal from this court's judgment in *Yazar* as to two issues: (1) "Did the Appellate Court correctly conclude that a mortgagee's failure to comply with the . . . [EMAP] notice requirements set forth in . . . § 8-265ee (a) deprives the trial court of subject matter jurisdiction over the mortgagee's foreclosure action?" And (2) "[d]id the Appellate Court correctly conclude that an EMAP notice that had been sent by a mortgagee to a mortgagor prior to a first foreclosure action, which was later dismissed, did not satisfy the notice requirements of § 8-265ee (a) in connection with a second foreclosure action subsequently commenced against the mortgagor based on the same default under the same mortgage?" (Internal quotation marks omitted.) *KeyBank, N.A.* v. *Yazar*, 340 Conn. 901, 901, 263 A.3d 100 (2021). Nevertheless, "there is no reason to conclude that a granting of certification by our

ter jurisdiction, Pennymac must have provided the required EMAP notice to the defendant by mail prior to the commencement of the present action.

Moreover, the EMAP "does not require a return receipt" for the provision of the required notice to a mortgagor, and "the lack of a return receipt in the record does not affect [a mortgagee's] compliance with the [EMAP]." *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 279, 186 A.3d 708 (2018). Consequently, we are guided by the general principles regarding the proof required to establish that a letter was actually placed in the mail. Id., 269–71 (noting that distinction between first class mail and certified mail return receipt is manner of delivery). Whether a letter actually was placed in the mail "may be proved either by direct or circumstantial evidence. It may be proved by the testimony of the person who deposited it or by proof of facts from which it may be reasonably inferred that it was duly deposited. . . . Any other rule would ignore the realities of today's business practice." (Internal quotation marks omitted.) *Bank of New York Mellon* v. *Mazzeo*, 195 Conn. App. 357, 376, 225 A.3d 290 (2020).

In the present case, although both parties presented conflicting evidence as to whether Pennymac provided the required EMAP notice to the defendant,[11] we conclude that the plaintiff's evidence amply supports the

Supreme Court necessarily signifies disapproval of the decision from which certification to appeal was granted. There is no authority to support the proposition that a grant of certification by our Supreme Court immediately invalidates or overrules this court's decision; a grant of certification stays further proceedings and subjects this court's decision to further review. In such circumstances, prior to a final determination of the cause by our Supreme Court, a decision of this court is binding precedent on this court." (Emphasis omitted; internal quotation marks omitted.) *Ortiz* v. *Commissioner of Correction*, 211 Conn. App. 378, 386 n.4, 272 A.3d 692 (2022).

[11] We note that "where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents

court's factual finding that Pennymac provided the required EMAP notice to the defendant. Particularly, the plaintiff provided the court with the July 31, 2017 affidavit by the plaintiff's counsel certifying that "based on [the] business records [of the plaintiff's counsel]

submitted by the parties." (Internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 350, 141 A.3d 784 (2016). Here, assuming without deciding that the parties' conflicting submissions created a critical factual dispute, the court's failure to hold an evidentiary hearing to resolve this dispute is beyond the scope of this appeal for two reasons.

First, neither party requested that the court hold a hearing to resolve any critical factual jurisdictional dispute, either prior to or after the court's decision denying the defendant's motion to open. This court has held that it is a party's burden to request an evidentiary hearing to resolve a critical jurisdictional factual dispute and, in the absence of such a request, a trial court properly can resolve a critical jurisdictional factual dispute without holding an evidentiary hearing. See, e.g., *Priore* v. *Haig*, 196 Conn. App. 675, 687, 230 A.3d 714 (trial court properly determined critical jurisdictional factual dispute without hearing because, inter alia, plaintiff failed to request evidentiary hearing until after court ruled on motion to dismiss), rev'd on other grounds, 344 Conn. 636, A.3d (2022); *Walshon* v. *Ballon Stoll Bader & Nadler, P.C.*, 121 Conn. App. 366, 371, 996 A.2d 1195 (2010) (trial court properly decided critical factual dispute on basis of parties' pleadings and affidavits because, inter alia, plaintiff did not request evidentiary hearing). Thus, we decline to reverse the judgment of the trial court on a ground that was not raised before it. See *Diaz* v. *Commissioner of Correction*, 335 Conn. 53, 58, 225 A.3d 953 (2020) ("[O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.)).

Second, the defendant does not claim on appeal that the court failed to hold a hearing to resolve a critical factual jurisdictional dispute. See, e.g., *Johnson* v. *Preleski*, 335 Conn. 138, 152 n.15, 229 A.3d 97 (2020) (" 'our system is an adversarial one in which the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived' "); *Bank of New York Mellon* v. *Francois*, 198 Conn. App. 885, 890–91, 234 A.3d 1089 (2020) (declining to address issues on appeal that were not briefed). Consequently, we decline to sua sponte raise and dispose of this appeal on this unpreserved and unraised ground. See, e.g., *State* v. *Stephenson*, 337 Conn. 643, 650–54, 255 A.3d 865 (2020) (Appellate Court abused its discretion by disposing of appeal on "distinct question" that was not raised by parties on appeal).

and its regular business practices," it had mailed the defendant the EMAP notice on April 19, 2016.[12] In support, the plaintiff's counsel attached a photocopy of an envelope addressed by the plaintiff's counsel to the defendant, which includes the certified mail barcode and corresponding certified mail numbers. In its objection to the defendant's motion to open, the plaintiff submitted the physical receipt that the Farmington branch of the USPS provided the plaintiff's counsel when it physically deposited the EMAP notice with the USPS. The USPS receipt shows that, on April 19, 2016, the plaintiff's counsel deposited with the Farmington branch of the USPS the subject letter to the defendant by certified mail return receipt requested, and the receipt is date stamped by the Farmington branch of the USPS. The fact that the plaintiff did not present evidence of the return receipt corresponding to the EMAP notice is inconsequential. See, e.g., *Aurora Loan Services, LLC* v. *Condron*, supra, 181 Conn. App. 279 (lack of return receipt "does not affect" proof of EMAP compliance). Accordingly, the plaintiff's evidence supports the court's finding that Pennymac provided the defendant with the required EMAP notice.

[12] The evidence that the plaintiff's counsel mailed the EMAP notice as part of its regular business practice constitutes circumstantial evidence, which alone supports the court's finding. Circumstantial evidence that a customary or ordinary procedure was followed is sufficient to support a finding that a letter was mailed. See, e.g., *Kerin* v. *Udolf*, 165 Conn. 264, 268, 334 A.2d 434 (1973) (mailing of installment check was established because defendant and his employee testified that they followed their customary procedure to stamp and then deposit check in mail); *Central National Bank* v. *Stoddard*, 83 Conn. 332, 76 A. 472 (1910) (mailing of bank notices was established because they were "in properly addressed and stamped envelopes" deposited "in the usual place in the bank for letters to be mailed, and that they were taken from that place by one whose duty it was to post them," and defendant "did not deny having received the notices"); *State* v. *Morelli*, 25 Conn. App. 605, 610–11, 595 A.2d 932 (1991) (mailing of breath tests was established because police officer who administered tests testified that it was department's " 'course of habit' " to mail tests results to subject of test).

The defendant spends a majority of his appellate brief challenging the final sentence of the court's decision that it gave "little weight" to the defendant's submissions "given the context of the late and protracted state of these proceedings." We reject the defendant's contention. Despite the court's isolated statement as to the protracted state of the proceedings, its analysis of the issues before it reflects that the court did, in fact, base its decision on a careful review of the evidence and the applicable law. The court explicitly stated at the outset of its decision that it had "carefully reviewed and considered" the motion to open, the related filings, and all the exhibits attached thereto. The court later stated that it had "carefully reviewed all of the filings that bear on" Pennymac's compliance with the EMAP notice requirement. The court weighed both parties' evidence and ultimately found that the defendant's submissions failed to refute the plaintiff's evidence, which established that the EMAP notice requirement had been satisfied. The court was free to discredit or find unpersuasive the defendant's evidence, and we decline the defendant's invitation to reweigh the evidence in his favor on appeal.[13] See, e.g., *Deutsche Bank National Trust Co.* v. *McKeith*, supra, 156 Conn. App. 43 (trial court properly credited marshal's return and discredited affidavit in resolving jurisdictional question); *Sakon* v. *Glastonbury*, 111 Conn. App. 242, 254–55, 958 A.2d 801 (2008) (declining to reweigh evidence on appeal), cert. denied, 290 Conn. 916, 965 A.2d 554 (2009). Thus, there is no basis on which to conclude that the court summarily denied the defendant's motion to open solely because of *when* it was filed.

[13] After a thorough review of the record, it is clear that the defendant waited until the final law day to challenge Pennymac's compliance with the EMAP notice requirement, which was more than three years after Pennymac had filed its affidavit of compliance with the EMAP. The defendant challenged the notice approximately ten months after the court rendered judgment of strict foreclosure and almost three months after the defendant's counsel retained Wade as an expert.

In light of the foregoing, we conclude that the court correctly determined that it had subject matter jurisdiction over this action and that the court's factual finding that Pennymac complied with the EMAP notice requirement was not clearly erroneous because it was supported by the plaintiff's evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

DARRYL CRENSHAW *v.* COMMISSIONER OF CORRECTION (AC 44915)

Prescott, Elgo and Seeley, Js.

Syllabus

The petitioner, who had been convicted of the murder, assault and kidnapping of the victim, sought a writ of habeas corpus. He claimed that his trial counsel, M, rendered deficient performance by failing to present a specific theory of defense to establish that the petitioner lacked the intent to cause the victim's death. The petitioner had driven to a nail salon parking lot where he met the victim, whom he had recently begun dating. The petitioner punched the victim in the face as she entered his car and punched her in the face a second time as they drove away. F, who was in his car in the parking lot at the time, witnessed both punches. The petitioner later gave the police a statement in which he admitted that he would choke the victim when he became angry. A state medical examiner, C, concluded that the victim had been strangled and had suffered blunt force trauma to her head and neck but was unable to say whether the head injury or strangulation caused her death. C stated that a person with the victim's strangulation injury could have survived and that it was possible that the victim did not lose consciousness immediately after the infliction of the head injury but could have survived for up to ten hours. At the habeas trial, the state's chief medical examiner, G, agreed with C as to the cause and manner of the victim's death but could not rule out the possibility that her head injuries were caused by later trauma to the same area of the head. Although M testified that his strategy was to present a cohesive defense that accounted for all of the evidence and showed that the petitioner lacked the intent to kill regardless of which injury caused the victim's death, the petitioner claimed that M rendered deficient representation because the only reasonable strategy was to advocate that the two punches were the cause

of death insofar as they created a temporal distance between the fatal act and the victim's death that he could have relied on to demonstrate lack of intent. The petitioner further claimed that M never recognized or focused on the punches as being the cause of the victim's death and that he did not understand the relevant medical and forensic science. *Held*:

1. The habeas court did not abuse its discretion in denying the petitioner certification to appeal from the judgment denying his petition for a writ of habeas corpus; the petitioner failed to demonstrate that his claims involved issues that were debatable among jurists of reason, that a court could resolve them in a different manner or that the questions were adequate to deserve encouragement to proceed further.

2. The habeas court properly determined that the petitioner failed to establish that M rendered constitutionally deficient performance regarding the two punch defense theory or that he failed to prepare sufficiently for trial, learn the relevant forensic science and adequately cross-examine witnesses:

a. M presented a comprehensive, objectively reasonable theory of defense that addressed all the evidence at trial and focused on the petitioner's lack of intent to cause the victim's death: instead of relying exclusively on the punches in the parking lot as being the cause of death, M accounted for evidence that the two punch theory did not address, the most important of which was that strangulation, as C testified, was just as plausible as the cause of death as a head injury; moreover, M's decision not to link the victim's head injury to the punches in the parking lot was supported by the testimony of C and G, who stated that the victim may have experienced a lucid period before dying as a result of the head injury and, thus, that the fatal injury could have been inflicted later, after the parking lot incident; furthermore, M's defense strategy encompassed the general principle of lack of intent behind the two punch theory, as M testified that punching someone does not equate with an intent to kill and asserted during cross-examination of C and in closing argument to the jury that the possibility that the victim experienced a lucid period before dying as a result of the head injury demonstrated that the petitioner lacked the specific intent to cause her death.

b. The record supported the habeas court's finding that M sufficiently understood the medical science at issue, adequately prepared for trial and presented a well thought out theory of defense: contrary to the petitioner's contention that M had "no idea" about certain medical principles and was unfamiliar with much of the forensic science underlying his defense, M's testimony, which the court credited, demonstrated that he familiarized himself with the relevant medical science by meeting with C twice and taking notes and focusing on understanding what was being discussed before brainstorming with legal colleagues and deciding how to utilize C's testimony; moreover, although M did not ask C at trial whether an individual could experience a lucid interval following

strangulation and then die, that did not compel an inference that M did not understand the medical science, and it was reasonable to present a theory of defense that relied not on the punches in the parking lot but, rather, accounted for strangulation and head trauma, both of which C and G agreed could have caused the victim's death; furthermore, M's decision to impeach F's testimony was not unreasonable, as the petitioner claimed, as M's inquiry about F's statement to the police that he saw one punch before changing his story to say that he saw two punches was an attempt by M to lower the number of punches that occurred so as to bolster the defense of lack of intent.

Argued May 23—officially released September 13, 2022

Procedural History

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

David R. Kritzman, for the appellant (petitioner).

Alessandra M. Santacroce, certified legal intern, with whom were *Michele C. Lukban*, senior assistant state's attorney, and, on the brief, *Sharmese L. Walcott*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. The petitioner, Darryl Crenshaw, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal, and (2) improperly concluded that he failed to establish that his trial counsel's performance was constitutionally deficient. We disagree and, accordingly, dismiss the appeal.

The following facts and procedural history, as set forth by our Supreme Court in the petitioner's direct appeal from his conviction or found by the habeas court, are relevant to our resolution of this appeal. "In June or July, 2008, the victim began dating the [petitioner]. . . . On August 7, 2008, at approximately 5:15 p.m., the victim arrived at the house of Shavonne Coachman, a friend . . . [and] . . . they drove together to Supreme Clientele, a beauty salon (salon) . . . . Shortly thereafter, the [petitioner] arrived at the salon, and the victim went outside. A patron of the salon, Timothy Freeman, who was sitting in his car in the parking lot, saw the [petitioner] and the victim flail their arms as they argued. . . . After the victim entered the [petitioner's] vehicle, the [petitioner] punched her in the face and proceeded to drive away. Freeman described the incident as a sucker [punch] . . . . As the [petitioner] drove away, he punched the victim in the face a second time. By the time Coachman ran to the front door of the salon, the [petitioner] and victim were gone. . . . The victim never came back [to the salon].

"At around 6 or 7 p.m. that evening, the [petitioner and the victim] went to the apartment of Eruverto Flores, [the boyfriend of Elisa Astacio, the victim's friend and coworker] . . . . The victim had a blood clot in her eye, the inside of her left eye was red and bloodshot, and the area under her eye was swollen. Flores testified that it was obvious that the [petitioner] had hit the victim. . . . Flores testified that the victim was pretty much sitting [in the apartment] with her head down . . . not really interacting with anybody, just sitting there. She did not participate in the conversation. About fifteen or twenty minutes later, the [petitioner] and the victim left together. . . .

"Between 2 and 3 a.m. on August 8, 2008, the [petitioner's] next door neighbor, Guy Maynard, saw the [petitioner] pull up in his vehicle to the front of the [petition-

er's] residence . . . . Maynard testified that, after the car stopped and the lights went off, the [petitioner] got out and . . . walked around the front of the car to the [passenger] side, where he opened the door and picked up somebody out of the front seat of the car. The [petitioner] cradled the individual like you would hold a child, with both arms underneath, and [c]arried [her toward] the front of the house. Maynard could tell that the person being carried was slight and African-American, and he believed the person was probably a female. . . . The [petitioner] carried the person into his apartment. After some time had passed, Maynard saw the flickering of lights from a television in the [petitioner's] apartment. Maynard did not hear any screaming or arguing. . . .

"Later, during the early morning hours of August 8, Astacio received a call from the [petitioner] after she arrived at work. The [petitioner] informed Astacio that he had fucked up and that he and the victim had gotten into an argument during which he slapped her . . . . [T]he [petitioner] said that the victim could not come to work that day and asked her to make up an excuse for the victim. . . . After this conversation . . . Coachman told Astacio what had occurred at the salon. Coachman then called the victim's parents, who reported to the police that the victim had been kidnapped.

"At approximately 9 or 10 a.m. that same day, the [petitioner] met [Teosha Sease, a woman he had planned a date with for that day] and brought her to Six Flags [New England amusement park in Agawam, Massachusetts]. At one point while they were at Six Flags, the [petitioner] became upset and exclaimed that he saw [the victim's] face and she wasn't breathing. When Sease asked the [petitioner] what he was talking about, he stated that he's not a murder[er]; he's a good person . . . . The [petitioner] and Sease remained at

[Six Flags] until 10 or 10:30 p.m., when Torchy Colvin, an acquaintance of the [petitioner], came to pick them up. . . . The [petitioner] told Colvin and Sease that they could take any of his possessions from his house because he was going south to live with family members. . . .

"On August 10, 2008, the police executed a search warrant for the [petitioner's] residence. They discovered the victim's body in one of the bedrooms. Blood-like stains were found on a laundry basket in the bedroom, a bath towel and several articles of clothing, including on a pair of denim shorts. One of the victim's fake nail[s] was missing, and a fingernail was broken. Subsequent forensic analysis revealed that the [petitioner's] blood was found under the victim's fingernails . . . . In addition, the victim's blood was found in the front passenger side of the [petitioner's] vehicle.

"An autopsy revealed that the victim had suffered a variety of injuries, including trauma to the head, scalp, arms, left eye and abdomen, indicative of direct injuries to those areas. The victim also had abrasions on her neck, consistent with fingernail marks, and evidence of petechial hemorrhaging in the membranes of her eyes and gums. [Harold Wayne Carver II, the] chief medical examiner concluded that the victim had been strangled and also had suffered blunt force trauma to her head and neck. He also concluded that the victim was alive when these injuries were inflicted. . . .

"The police ultimately found the [petitioner] living under an alias in Mexico. After the [petitioner] was extradited to the United States from Mexico, he provided a sworn statement in which he described the circumstances leading up to the victim's death. He stated that the victim had made him jealous and that he pushed her during an argument. He stated that he slapped the victim while they were lying on his bed. When the victim said please, [n]o, he said: [Y]ou got a

man at home to take care of you, why are you runnin[g] around. He stated that he grabbed her by the neck and choked her. [The petitioner stated that he] choked and slapped her every time [he] got mad. [He] would choke her hard [and] then stop. [He] would get angry again and continue to choke her. He then said that the victim got tired and went to bed, and that he slept on the couch. The next morning, the victim would not wake up, but the [petitioner] felt her pulse and thought she was alive. The [petitioner] explained that he then went to Six Flags, and, when he returned, the victim was barely breathing. The [petitioner] said that he propped her head up and laid her down in the bed, [but that] she wasn't breathing. He then took off her clothes and tucked her into bed, just hoping she would wake up. He believed that the victim had died from suffocation. Although it is uncontested that the [petitioner caused] the victim's death, the [petitioner] claimed that the victim's death was accidental." (Footnotes omitted; internal quotation marks omitted.) *State* v. *Crenshaw*, 313 Conn. 69, 72–79, 95 A.3d 1113 (2014).

The habeas court in its memorandum of decision denying the petition noted: "The record reveals that . . . Carver testified at the petitioner's criminal trial . . . that he could not say which injury [the strangulation or a head injury] caused [the victim's] death, and that either of the two injuries individually could have been the cause. He also testified that a person with the [victim's] head injury may or may not immediately lose consciousness and could survive two to ten hours between the infliction of lethal head trauma and death. . . . Carver set forth three possible scenarios following the infliction of the [victim's] head trauma, if it was the head trauma that caused her death: (1) the [victim] did not immediately lose consciousness but lost consciousness later; (2) the [victim] lost consciousness, regained consciousness and lapsed back into unconsciousness

as the swelling and blood accumulation accrued; or (3) the [victim] became unconscious immediately and did not wake up. . . . Carver could not testify as to which of the scenarios occurred in this case. Carver also testified that a person with the [victim's] strangulation injury could survive." At no point was Carver asked whether he believed the two punches inflicted by the petitioner at the salon parking lot were the definitive cause of the head injuries.

The petitioner was charged with murder in violation of General Statutes § 53a-54a (a), assault in the third degree in violation of General Statutes § 53a-61 (a) (1), and two counts of kidnapping in the second degree in violation of General Statutes § 53a-94 (a). On October 6, 2010, following a jury trial, the petitioner was convicted on all counts. On direct appeal, our Supreme Court reversed the trial court's judgment as to one of the two kidnapping convictions and remanded the case for resentencing. See *State* v. *Crenshaw*, supra, 313 Conn. 72, 98–99. On remand, the trial court vacated the sentence on one of the two kidnapping counts, rendered judgment of acquittal on that count and imposed a total effective sentence of seventy-eight years of incarceration. *State* v. *Crenshaw*, 172 Conn. App. 526, 528–29, 161 A.3d 638, cert. denied, 326 Conn. 911, 165 A.3d 1252 (2017).

The petitioner commenced this habeas action in 2016, alleging, among other claims, ineffective assistance of his criminal trial counsel, Robert Meredith.[1] The habeas court conducted a trial on January 14 and 15, 2020, during which the petitioner presented the testimony of Meredith, James R. Gill, Carver's successor as the state's chief medical examiner, and Brian Carlow, an attorney

[1] The additional claims asserted in the habeas petition were deemed abandoned by the habeas court, and the petitioner has not challenged that ruling on appeal.

whom the petitioner presented as a legal expert. On June 28, 2021, the habeas court, *Chaplin*, *J.*, issued a memorandum of decision in which it denied the petitioner's habeas petition. The petitioner subsequently filed a petition for certification to appeal, which the court also denied. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal from the denial of his petition. We disagree.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . .

"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. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 414–15, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

For the reasons set forth in part II of this opinion, we conclude that the petitioner has failed to demonstrate that his claims involve issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions he raised are adequate to deserve encouragement to proceed further. Thus, we further conclude that the habeas court did not abuse its discretion in denying the petition for certification of appeal.

II

We now turn to the petitioner's substantive claim on appeal. The petitioner asserts that the habeas court improperly concluded that he failed to establish that his trial counsel's performance was constitutionally deficient. Specifically, the petitioner alleges that Meredith was ineffective because he failed (1) to recognize and present a specific theory of defense, and (2) to prepare adequately for trial, learn the relevant forensic science, and adequately examine the expert and fact witnesses. We conclude that the court properly determined that the petitioner failed to establish that Meredith's performance was constitutionally deficient.

We first set forth our standard of review and the relevant legal principles. "Our standard of review of a habeas court's judgment on ineffective assistance of

counsel claims is well settled. 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.) *Humble* v. *Commissioner of Correction*, 180 Conn. App. 697, 703–704, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"[I]t 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. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677–78, 51 A.3d 948 (2012).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. *Strickland* requires that a petitioner satisfy both a performance prong 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. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either

prong." (Citation omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830, 234 A.3d 78 (2020), aff'd, 341 Conn. 279, 267 A.3d 120 (2021).[2]

In order for a petitioner to prevail on a claim of ineffective assistance on the basis of deficient performance, he must show that, "considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 627, 212 A.3d 678 (2019). "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. . . . *Strickland* v. *Washington*, supra, 466 U.S. 688–89." (Internal quotation marks omitted.) *State* v. *Santiago*, 213 Conn. App. 358, 367–68, 277 A.3d 924 (2022), petition for cert. filed (Conn. July 5, 2022) (No. 220104).

[2] In the present case, the habeas court concluded that the petitioner had failed to establish that Meredith rendered deficient performance and did not address the issue of prejudice. See, e.g., *Charles* v. *Commissioner of Correction*, 206 Conn. App. 341, 346–47, 261 A.3d 184 (trial court need not address both prongs of test set forth in *Strickland* v. *Washington*, supra, 466 U.S. 687, when denying habeas petition), cert. denied, 339 Conn. 919, 262 A.3d 139 (2021).

"[J]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . 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*." (Emphasis added; internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, 178 Conn. App. 266, 278, 174 A.3d 824 (2017), aff'd, 332 Conn. 615, 212 A.3d 678 (2019); see also *Santiago* v. *Commissioner of Correction*, supra, 213 Conn. App. 367–68. Indeed, our Supreme Court has recognized that "[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. . . . [A] reviewing court is required not simply to give [the trial attorney] 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.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 637.

At the habeas trial, the petitioner argued that Meredith's performance was deficient because he had a duty to raise a defense focused on the lack of specific intent

to cause the death of the victim[3] based on what he labels as the "two punch theory." This theory is, in essence, a factual assertion that it was the two punches at the salon parking lot that caused the victim's death, and that, when the victim was at Flores' apartment, she experienced a lucid interval and subsequently died from the consequences of the punches without any further inflicted injuries. The petitioner argued that advocating this theory of the cause of death, as opposed to death by strangulation, was the only objectively reasonable strategy because it created a temporal distance between the fatal act and the victim's death.[4] The petitioner further contended that this theory permitted the argument that the punches were the cause of death without any further infliction of trauma to the victim's head and that it "dovetailed perfectly with the state's evidence . . . ."

According to the petitioner, all of these reasons supported the argument that he did not intend to cause the victim's death, for no reasonable person would expect two isolated punches to cause a person to die hours later. The petitioner consequently argued that Meredith's failure to present and argue this "two punch theory" was objectively unreasonable. The petitioner additionally argued that Meredith's performance was deficient because he failed to prepare sufficiently for trial, learn the relevant forensic science, and adequately cross-examine the expert and fact witnesses. The petitioner challenges the habeas court's rejection of these arguments, which we address in turn.

A

The petitioner first argues that the habeas court improperly determined that Meredith did not render

[3] General Statutes § 53a-54a provides in relevant part: "(a) A person is guilty of murder when, *with intent to cause the death of another person*, he causes the death of such person . . . ." (Emphasis added.)

[4] This "temporal distance" refers to the fact that the punches at the salon parking lot occurred in the early evening before the petitioner and the victim went to Flores' apartment.

deficient performance when he failed to present the "two punch theory" of defense. Specifically, he contends that the "two punch theory" was the only reasonable strategy for Meredith to have used to demonstrate that the petitioner did not intend to cause the death of the victim. We agree with the habeas court's conclusion that the petitioner did not meet his burden of demonstrating that Meredith's trial strategy was objectively unreasonable. We conclude that the trial strategy employed by Meredith, which included establishing the petitioner's lack of intent to kill the victim, was supported by ample tactical justifications and "falls into the category of trial strategy or judgment calls that we consistently have declined to second guess." (Internal quotation marks omitted.) *Crocker* v. *Commissioner of Correction*, 126 Conn. App. 110, 132, 10 A.3d 1079, cert. denied, 300 Conn. 919, 14 A.3d 333 (2011). Accordingly, we conclude that the petitioner's argument must fail.

The following additional facts are relevant to our discussion of this argument. At the habeas trial, "Meredith testified that his theory of defense was that the petitioner never intended to kill the victim and that he developed his theory at trial through [Carver's] testimony and the petitioner's statement to the police. He testified that [Carver's] testimony helped establish the petitioner's lack of intent to kill by corroborating the petitioner's statement wherein he indicated that he would choke the victim before whenever he was angry and did not have reason to believe that if he choked her again on a subsequent occasion that she would die as a result. . . . Meredith [additionally] indicated that, if the petitioner punched the victim and inflicted the head injuries without a weapon, it further supported the [defense] theory that the petitioner did not intend to kill her. [Meredith] also noted that there was no evidence of the [victim's] time of death, the time frame of the events involving her death was very broad and

a lot of the evidence in the petitioner's case 'cut both ways.'

"[Meredith additionally] indicated that his plan was to put together a cohesive defense to address all of the variables and use the petitioner's statement and physical evidence to demonstrate to the jury that the petitioner lacked the requisite intent for a murder conviction." In other words, Meredith's overarching strategy was that the petitioner had not intended to kill the victim, regardless of whether she died from the two punches in the salon parking lot, strangulation, or any injury or injuries that had occurred during the relevant time period. The habeas court found Meredith's testimony to be credible.

At the habeas trial, "[Gill] testified that he agreed with Carver's determinations regarding [the] manner and cause of death. Specifically, he agreed that there were two distinct injuries, neck compression and head trauma, and either could have resulted in the victim's death. He testified that the three scenarios discussed at the underlying trial by [Carver] are three equally plausible explanations for the victim's death. . . .[5] Additionally, he testified that lethal neck compression would not be followed by a lucid interval." (Footnote added.) Unlike Carver, Gill testified that the victim's head injuries were consistent with the two punches inflicted at the salon parking lot, but he also could not rule out the possibility that the injuries were caused by later trauma to the same area of the head. The court credited Gill's testimony.

[5] As noted previously, Carver testified about three possible scenarios that could have occurred "following the infliction of the [victim's] head trauma, if it was the head trauma that caused her death: (1) the [victim would] not immediately lose consciousness but [would lose] consciousness later; (2) the [victim would lose] consciousness, [regain] consciousness and [lapse] back into unconsciousness as the swelling and blood accumulation accrued; or (3) the [victim would become] unconscious immediately and . . . not wake up."

The court concluded that the petitioner had failed to establish that Meredith's performance was constitutionally deficient. Specifically, it determined that it was clear from Meredith's "credible testimony that there was ample tactical justification for the course he took in defending the petitioner, and, thus, the petitioner [had] failed to demonstrate that counsel's actions were unreasonable under the facts of this case." We agree.

At the outset, we note that, on appeal, the petitioner contends that Meredith's representation was deficient because, "[a]lthough Meredith's defense was generically based upon the theory that [the victim] died from head trauma, [Meredith] never recognized, much less 'focused' on, the two punches in the salon parking lot as the cause of death." The petitioner repeatedly has argued that the "two punch theory" was "the best" theory of defense.[6] We disagree for two principal reasons. First, it reflects a misunderstanding of the appropriate standard for determining whether the petitioner was deprived of his constitutional right to effective counsel. The test for deficient performance is whether trial counsel's strategy was objectively reasonable considering all of the circumstances; see, e.g., *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 277–78; and, for the reasons we will set forth, we conclude that Meredith's strategy met this standard. Second, the petitioner's argument rests on a false factual premise because the record reveals that Meredith in fact asserted the essence of the "two punch theory" to the jury while still accounting for other evidence in the case that the jury reasonably may have credited.

[6] In his appellate brief, the petitioner argues that Meredith's omission of the "two punch theory" constituted deficient representation, for it was "the best available defense." At oral argument before this court, the petitioner readily conceded that Meredith did develop and implement a lack of intent strategy at trial, but he continued to argue that Meredith's performance was deficient nonetheless because the "two punch scenario" was "absolutely" and "by far" the "best" theory of defense.

Meredith's strategy was objectively reasonable because it was, as he explained in his testimony, a cohesive defense that addressed all of the evidence in the criminal trial. Notably, there was additional evidence presented that the "two punch theory" failed to address, the most important being that strangulation was just as plausible as the cause of death as a head injury.[7] Instead of relying exclusively on the two punches in the parking lot as the cause of death, Meredith's approach accounted for the possibility that the jury might determine that strangulation was the cause of death. In his testimony, Meredith reasoned: "Carver said that . . . [the victim] could [have] died from strangulation alone or she could [have] survived that strangulation. And [the petitioner's] statement said . . . I would choke her before whenever I was mad and she would never die and this time she did . . . so it shows a lack of intent because he's choked her before, and if he choked her again at a subsequent occasion, he wouldn't think or have reason to believe that she would die because of that."[8] Accordingly, we conclude that it was sound trial strategy for Meredith to address Carver's testimony that strangulation could have been the cause of death, rather than to focus exclusively on the "two punch theory."

We further conclude that it was reasonable for Meredith to refrain from focusing solely on the punches in the

[7] The additional evidence includes, but is not limited to, the fact that there were two equally plausible causes of death; the petitioner's statements to the police, in which he stated that he choked and hit the victim frequently, had done so on the night in question, and that he believed the victim died from suffocation; and the lack of any conclusive time of death.

[8] Moreover, it was undeniably reasonable, if not critical, for Meredith to formulate a strategy that accounted for the petitioner's version of events, which the jury was exposed to through the admission into evidence of his statement to the police that he had choked the victim. See *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 262, 257 A.3d 423 ("[w]e agree with the habeas court's skepticism as to whether it could ever be objectively deficient performance for defense counsel to use available facts, especially the client's own story, to offer the jury information that, if

parking lot as the cause of death because the "blows" to the victim's head that caused the fatal injury could have taken place at some other point, and, thus, he developed a tactical strategy that "cover[ed] any hit." Meredith's belief that there may have been additional "blows" or violence following the parking lot incident was well founded. Carver and Gill testified that it was *possible* that the victim experienced a lucid state following the head trauma. Additionally, they both testified that it was equally possible that the victim slipped into immediate unconsciousness following a fatal blow, whether that event was or was not the punches in the salon parking lot. This testimony supports the theory that the fatal injury could have been inflicted later, after the incident in the parking lot and, therefore, that the victim's death was not caused definitively by the two punches in the salon parking lot. Thus, Meredith's strategy was reasonable, regardless of the fact that he expressly did not link the two punches in the salon parking lot to the head injury.

Furthermore, as the respondent, the Commissioner of Correction, has pointed out in his brief, the strategy that Meredith set forth at the criminal trial encompassed the general principle behind the "two punch theory," that is, the petitioner lacked the intent to cause the death of the victim. In Meredith's testimony, which the habeas court found to be credible, he stated that his "theory of defense was that, in a broad sense, that [the petitioner] never intended to kill [the victim]. Period." Meredith recognized the factual significance of the punches that had occurred in the salon parking lot and accounted for them in his defense strategy. He explained at the habeas trial, "if [the petitioner] punched her and inflicted those wounds, then just [because] you punch someone doesn't mean you are

accepted, would result in an acquittal on the most serious charge" (internal quotation marks omitted)), cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021).

gonna kill them." In fact, in his cross-examination of Carver and in his closing statement to the jury, Meredith asserted the essence of the "two punch theory," that is, the possibility that the victim, after having been punched in the head, experienced some sort of lucid period before dying as a result of the head injury, in an effort to demonstrate the absence of the specific intent to cause the victim's death.

The most instructive example of Meredith's referring to the underpinnings of the "two punch theory" was a hypothetical question he posed to Carver during his cross-examination: "Now, let me ask you this. Was your autopsy consistent with the following scenario, someone complaining of a headache, closing their eyes, rocking back and forth on the Thursday evening . . . having incurred a head injury, as you found, and then being subsequently found [deceased] on Sunday and then brought to your facility sometime Sunday . . . incurring the head injury on Thursday, complaining about a headache and dizziness on the Thursday evening—is your autopsy consistent with that scenario?" Carver responded, "[t]here's nothing inconsistent about it."

Although Meredith did not reference any punches in the hypothetical, he did so in his closing argument to the jury with the following statements: "[The petitioner] didn't know what type of injury had happened when he had punched [the victim] in the head [at the salon parking lot]; he didn't know . . . . He doesn't know what caused her to fall into this death. He's not like . . . Carver; he doesn't know when a head injury happens. In his mind, he probably punched her, that's not going to kill someone . . . . He can't process what he did to [the victim]. He can't understand what happened to [the victim] because he doesn't know how him hitting her like he did ended up in her dying." In his closing remarks, Meredith also reminded the jury of the hypothetical question he had asked Carver: "Now, pay attention to the hypothetical question I asked of [Carver] on

cross-examination; please pay attention to that because that will help you determine whether or not [the petitioner's] story was credible or not."

In summary, we agree with the habeas court's conclusion that the petitioner failed to demonstrate that Meredith's performance was constitutionally deficient. The petitioner is tasked with overcoming the presumption that Meredith's decisions were objectively reasonable, and he can successfully do so only by demonstrating that there was no "tactical justification for the course taken." (Internal quotation marks omitted.) *Zachs* v. *Commissioner of Correction*, 205 Conn. App. 243, 256, 257 A.3d 423, cert. denied, 338 Conn. 909, 258 A.3d 1279 (2021). Meredith developed and presented a theory of defense, which focused on the petitioner's lack of intent to cause the victim's death, that was comprehensive and objectively reasonable, despite Meredith's decision not to exclusively argue that the punches in the parking lot were the cause of death. The fact that Meredith did not present the lack of specific intent defense in the precise manner that the petitioner now prefers[9] does not dictate a conclusion that Meredith's performance was deficient. See, e.g., *Ricardo R.* v. *Commissioner of Correction*, 185 Conn. App. 787, 803–804, 198 A.3d 630 (2018), cert. denied, 330 Conn. 959, 199 A.3d 560 (2019).[10] We conclude that the habeas court properly

[9] The habeas court noted that Carlow had acknowledged that "it is common for defense lawyers to differ on theories of defense and how to pursue them." As stated previously, our Supreme Court has recognized that "[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*, supra, 332 Conn. 637.

[10] The petitioner also argues that the "two punch theory" was critical because the state's witnesses corroborated this theory. We do not find this argument to be compelling. Although we recognize that there is a utility in using the state's witnesses to form a defense, it does not render the failure to do so deficient performance. See *Harrington* v. *Richter*, 562 U.S. 86, 106, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) ("[r]are the situations in which the 'wide latitude counsel must have in making tactical decisions' will be limited to any one technique or approach").

determined that the petitioner failed to establish deficient performance regarding the "two punch theory."

B

The petitioner next argues that Meredith rendered deficient performance because he failed to prepare sufficiently for trial, learn the relevant forensic science, and adequately cross-examine the expert and fact witnesses. Specifically, the petitioner argues that Meredith (1) failed to understand the medical science relevant to the case and, consequently, failed to cross-examine Carver on pertinent issues, and (2) improperly impeached Freeman, who witnessed the two punches at the salon parking lot, instead of using him to bolster the petitioner's defense. The habeas court found that Meredith had sufficient understanding of the medical science and adequately did prepare for, and present, a "well thought out theory of defense . . . ." We conclude that these facts are supported by the record, and, thus, the petitioner's claim must fail.

It is well established that "[i]t is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the counsel guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial." (Internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 801, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018). Furthermore, "[a]n attorney's line of questioning on examination of a witness clearly is tactical in nature. [As such, this] court will not, in hindsight, second-guess counsel's trial strategy. . . . The fact that counsel arguably could have inquired more deeply into certain areas, or failed to inquire at all into areas of claimed importance, falls

short of establishing deficient performance." (Internal quotation marks omitted.) *Chase* v. *Commissioner of Correction*, 210 Conn. App. 492, 501, 270 A.3d 199, cert. denied, 343 Conn. 903, 272 A.3d 199 (2022).

First, we address the petitioner's argument that Meredith failed to learn the relevant forensic science in preparation for trial and, as a result, did not cross-examine Carver properly. The petitioner argues that Meredith "was unfamiliar with much of the relevant forensic science underlying his defense." After our thorough review of the record, we agree with the habeas court's conclusion that Meredith "had sufficient knowledge and understanding of the pertinent forensic and medical science evidence . . . ."

Despite the petitioner's statements throughout his brief that Meredith had "no idea" as to certain medical principles, the record shows that Meredith simply could not recall whether he had such knowledge at the time of the criminal trial.[11] Roughly ten years had passed since Meredith's representation of the petitioner, and, "[a]s this court previously has explained, [t]ime inevitably fogs the memory of busy attorneys. That inevitability does not reverse the *Strickland* presumption of effective performance. Without evidence establishing that counsel's strategy arose from the vagaries of ignorance,

[11] The petitioner argued that Meredith "had no idea" as to the amount of time that elapsed between the infliction of a fatal neck compression injury and death, that he "did not understand" whether a person could experience a lucid moment following a neck compression, and that he had "no idea" whether he ever understood the difference between a period of survival following a head trauma versus a neck compression. However, we emphasize that Meredith testified that he *could not recall* if he had knowledge of such information at the time of the criminal trial, nearly ten years prior. Carlow acknowledged at the habeas trial that Meredith "did not testify that he did not understand the medical testimony or issues in the petitioner's criminal case." We iterate that the habeas court expressly credited Meredith's testimony.

inattention or ineptitude . . . *Strickland*'s strong presumption must stand." (Internal quotation marks omitted.) *Coltherst* v. *Commissioner of Correction*, 208 Conn. App. 470, 483, 264 A.3d 1080 (2021), cert. denied, 340 Conn. 920, 267 A.3d 857 (2022).

Meredith's testimony, which the habeas court credited, demonstrated that he took adequate steps to familiarize and educate himself regarding the relevant medical science. Meredith, along with his cocounsel and a legal intern, met with Carver twice in preparation for the trial. Meredith took some notes, but he acknowledged that, during important meetings, he tended to take fewer notes and instead focused on understanding what was being discussed. Meredith then "brainstorm[ed]" with his colleagues and, ultimately, decided that using Carver's testimony that the victim may have died of strangulation was important because it "matched up" with the petitioner's statement that he had choked the victim in the past but she always survived, thus demonstrating a lack of intent to kill.

Additionally, the petitioner argues that, had Meredith understood the relevant medical science properly, he would have focused solely on the two punches at the salon parking lot to establish the lack of intent defense. Carver and Gill testified that a person who is choked to death will not regain consciousness. According to Carlow, it was more difficult for Meredith to persuade the jury that the petitioner had not intended to kill the victim by strangulation. Thus, as Carlow explained at the habeas trial, "it was imperative for trial counsel to know whether or not a lucid interval could occur following a lethal neck compression [because] it was easier to argue lack of intent to kill based on two punches to the [victim's] head followed by a lucid interval with no further head trauma than choking the [victim] to death without an intervening lucid interval

because a lucid interval separates the time of death from the cause of death."

The petitioner is correct that Meredith did not ask Carver whether an individual could experience a lucid interval following a strangulation and then die, but we do not agree that the failure to ask this question compels an inference that Meredith did not understand the medical science. We conclude that it was reasonable for Meredith to present a theory of defense that did not exclusively rely on the two punches at the salon parking lot, as we thoroughly discussed in part II A of this opinion. Furthermore, Meredith's failure to pursue a line of inquiry into whether an individual could experience a lucid interval following a strangulation and then die does not establish that he did not understand the medical science. This argument by the petitioner is one of strategy masquerading as an inadequate preparation argument, and it therefore must fail.[12]

Both medical examiners, Carver at the criminal trial and Gill at the habeas trial, testified that the cause of death was either head trauma or strangulation. It was objectively reasonable, if not crucial, for Meredith to present a theory of defense that accounted for the victim's death under either scenario. Meredith needed to be prepared to argue to the jury that the petitioner did not intend to cause the death of the victim, whether she died by strangulation or from head trauma. Meredith's strategic decision to address both possible causes of death was made after he reviewed the evidence in the case, including the petitioner's statement, after he met

[12] Our conclusion is supported by the habeas court's statement that Carlow "opined that trial counsel failed to explore the medical science *in order to utilize a stronger theory of defense* in the petitioner's case." (Emphasis added.) We emphasize that the standard for determining whether an attorney's strategy was constitutionally deficient is whether it was objectively reasonable considering all of the circumstances. See, e.g., *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 277–78.

with Carver on two occasions, and after he discussed the case with his colleagues. On the basis of Meredith's objectively reasonable defense strategy, we conclude that the habeas court properly determined that "Meredith sufficiently understood and investigated the relevant issues and presented a well thought out theory of defense given the set of factual circumstances in the petitioner's underlying criminal trial."

We next address the petitioner's argument that Meredith's performance was deficient because he impeached Freeman, who witnessed the punches in the parking lot, instead of bolstering his credibility to support the defense. At the criminal trial, Freeman testified and "indicated that he was sitting in his car outside of the salon on August 7, 2008, when he observed a man 'sucker punch' a woman twice in the face." At the habeas trial, Meredith testified that, during his cross-examination of Freeman, he inquired about Freeman's account having changed after Freeman realized that he knew the victim's family. Meredith "indicated [that] he wanted to draw attention to the fact that Freeman originally stated that he witnessed the petitioner punch the [victim] once, and then changed his statement to indicate that he witnessed the petitioner punch the [victim] twice and that he 'sucker punched' her. [Meredith explained] that his rationale behind impeaching Freeman on cross-examination was to attempt to lower the number of punches that occurred because that would serve to bolster the defense of lack of intent."

Also at the habeas trial, "Carlow . . . testified that, rather than impeaching Freeman's testimony, [Meredith] should have utilized it to bolster the defense by setting forth a timeline wherein the [victim] was punched twice by the petitioner, as Freeman testified, experienced a lucid interval at Flores' apartment and subsequently died as a result of the blunt force trauma."

The petitioner argues that Meredith's "ill-advised strategy to impeach Freeman's credibility and ability to observe was the product of inadequate preparation." We disagree.

First, the only reason the petitioner has put forth as to why challenging Freeman's credibility was "ill-advised" is that Freeman's testimony supported the "two punch theory." This appears to be nothing other than an argument that the "two punch theory" was the only reasonable defense strategy, and, once again, we disagree with that contention.

Second, we note that, when a petitioner is unable to meet his burden of showing that trial counsel's strategy was unreasonable, he is also unlikely to succeed in arguing that trial counsel's related cross-examination was unreasonable. See, e.g., *Velasco* v. *Commissioner of Correction*, 119 Conn. App. 164, 172, 987 A.2d 1031 (attorney's line of questioning of witness clearly is tactical in nature and this court will not second-guess counsel's trial strategy), cert. denied, 297 Conn. 901, 994 A.2d 1289 (2010); see also *Ricardo R.* v. *Commissioner of Correction*, supra, 185 Conn. App. 802 ("[a]lthough the petitioner, with the benefit of hindsight, may now prefer that trial counsel had undermined [the witness'] testimony . . . he fails to sufficiently demonstrate how the line of questioning [trial counsel] actually pursued was not part of a sound trial strategy, or how it fell outside the range of competence displayed by lawyers with ordinary training and skill in the criminal law").[13]

[13] The petitioner also argued that Meredith was deficient in failing to object to the admission of spermatozoa evidence found on the victim. After conducting a thorough review of the record, we conclude that this argument lacks merit. At the habeas trial, Meredith testified that he viewed this evidence as having beneficial value to his theory of defense because the presence of spermatozoa indicated that the petitioner and the victim had sexual intercourse that evening, which supported the petitioner's statement that she was alive at that time and was consistent with the normal course of their contentious relationship. Indulging in a strong presumption in favor of the adequacy of trial counsel's performance, as we are required to do,

In summary, we conclude that the habeas court properly determined that the petitioner failed to demonstrate that Meredith's performance was deficient. In reaching this decision, we stress that "[c]ompetent representation is not to be equated with perfection." (Internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 218, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017). Consequently, we further conclude that the petitioner has failed to show that his claim of ineffective assistance of counsel involves issues that are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the issues are adequate to deserve encouragement to proceed further. Thus, the habeas court did not abuse its discretion in denying the petition for certification to appeal with respect to these claims.

The appeal is dismissed.

In this opinion the other judges concurred.

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we conclude that the petitioner has failed to show that this decision was not sound trial strategy.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 215

MEMORANDUM DECISIONS

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
v. RAFAEL TREVINO ET AL.
(AC 45313)

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

Argued September 6—officially released September 13, 2022

Named defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Spader*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

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SUPREME COURT PENDING CASES

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

HAROLD T. BANKS, JR. *v.* COMMISSIONER OF CORRECTION,
SC 20621
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded That Review of Challenges to Habeas Court's Handling of Habeas Proceedings is Unavailable Under *State* v. *Golding* and Plain Error Doctrine for Any Issue That Is Not Included in Petition for Certification to Appeal That is Denied. The petitioner, who had been convicted of various crimes in 2012, filed a habeas petition in December, 2017, collaterally attacking his conviction. The habeas court dismissed the petition pursuant to General Statutes § 52-470 (c) and (e), concluding that it was untimely and that the petitioner, having declined to present any evidence of the reason for the delay in filing the petition, failed to rebut the presumption that the delay was without good cause. Thereafter, the petitioner filed a petition for certification to appeal pursuant to General Statutes § 52-470 (g), citing only one ground for appeal, namely, whether the habeas court erred in finding that there was not good cause to allow the petitioner's untimely habeas petition to proceed. The habeas court denied the petition for certification to appeal. The petitioner appealed to the Appellate Court, claiming that the habeas court abused its discretion in denying his petition for certification to appeal because (1) his habeas counsel provided ineffective assistance and (2) he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence in support of his claim that good cause existed to rebut the presumption of unreasonable delay in the filing of his habeas petition. The petitioner conceded that he failed to preserve the aforementioned claims for review by failing to include them in his petition for certification to appeal, as required by § 52-470 (g). He nevertheless contended that his unpreserved claims were reviewable under *State* v. *Golding*, 213 Conn. 233, 239-40 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773 (2015). The Appellate Court (205 Conn. App. 337) disagreed, explaining that permitting a habeas petitioner to seek *Golding* review of a claim that was not raised in, or incorporated into, the petition for certification to appeal would circumvent the requirements of § 52-470 (g) and undermine the goals that the legislature sought to achieve in enacting § 52-470 (g), namely, to discourage the filing of frivolous habeas appeals. Further, contrary to the petition-

er's contention, the court also concluded that the petitioner's claims were not reviewable under the plain error doctrine, stating a plain error analysis of claims never raised in connection with a petition for certification to appeal expands the scope of review and undermines the purpose of § 52-470 (g). The court accordingly dismissed the appeal. The petitioner was granted certification to appeal, and the Supreme Court will decide (1) whether the Appellate Court correctly interpreted *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514 (2006), *Cookish* v. *Commissioner of Correction*, 337 Conn. 348 (2020), and other decisions of the Supreme Court in concluding that plain error review of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal and (2) whether the Appellate Court correctly interpreted *Mozell* v. *Commissioner of Correction*, 291 Conn. 62 (2009), *Moye* v. *Commissioner of Correction*, 316 Conn. 779 (2015), and other decisions of the Supreme Court in concluding that review under *Golding* of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal.

BENJAMIN BOSQUE *v.* COMMISSIONER OF CORRECTION, SC 20622
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Concluded That Review of Challenges to Habeas Court's Handling of Habeas Proceedings is Unavailable Under *State* v. *Golding* and Plain Error Doctrine for Any Issue That Is Not Included in Petition for Certification to Appeal That is Denied. The petitioner, who was convicted of conspiracy to commit robbery in the first degree, burglary in the first degree, sexual assault in the first degree and robbery in the first degree, filed a third petition for a writ of habeas corpus. The respondent commissioner filed a request for an order to show cause as to why the habeas petition should be permitted to proceed, as it was not filed within the statutory limit of two years from the date on which the judgment in the prior petition became final. Following an evidentiary hearing at which the petitioner, through counsel, declined the opportunity to present evidence, the habeas court dismissed the petition as untimely because the petitioner failed to demonstrate good cause for the late filing. The petitioner sought certification to appeal on the issue of whether the habeas court erred in finding that there was not good cause to allow his untimely petition to proceed. The habeas court denied certification, and the petitioner appealed to the Appellate Court (205 Conn. App. 480). The petitioner

claimed that the habeas court abused its discretion in denying him certification to appeal because (1) his habeas counsel provided ineffective assistance and (2) he was denied his constitutional right to counsel because the habeas court failed to intervene when counsel did not present any evidence to show that good cause existed for the delay in filing the petition. The petitioner acknowledged that he did not raise the claims in his petition for certification to appeal as required by General Statutes § 52-470 (g) but argued that they were nonetheless reviewable under *State* v. *Golding*, 213 Conn. 233 (1989), or for plain error because they challenged the habeas court's handling of the proceedings themselves rather than raised unpreserved substantive issues. The Appellate Court declined to review the claims, holding that the petitioner was not entitled to review under *Golding* or for plain error of claims that he did not raise in his petition for certification to appeal. The Appellate Court noted that affording such extraordinary review in a habeas appeal of claims that were not raised in the denied petition for certification to appeal would circumvent the requirements of, and expand the scope of review authorized by, § 52-470 (g) and undermine the legislative goals in enacting the statute of preventing frivolous habeas appeals and hastening the final conclusion of the criminal justice process. The petitioner sought certification to appeal from the Appellate Court's judgment, which the Supreme Court granted as to whether the Appellate Court correctly interpreted governing precedent in concluding that review under *Golding* or for plain error of challenges to the habeas court's handling of the habeas proceedings is unavailable for any issue that is not included in the petition for certification to appeal.

DIRECT ENERGY SERVICES, LLC, et al. *v.* PUBLIC UTILITIES REGULATORY AUTHORITY, SC 20643
Judicial District of New Britain

Administrative Appeal; Whether Restrictions on Renewable Energy Program Violate Dormant Commerce, Free Speech or Contracts Clauses of Federal Constitution; Whether Plaintiffs Waived Constitutional Claims by Not Raising Them Before Agency. The plaintiff electric supply companies are required to demonstrate that a minimum percentage of their electricity is derived from specific types of renewable energy sources. To show as much, the companies purchase "renewable energy credits" that represent renewable energy produced by third party generators. In 2005, the defendant agency created a program under which the plaintiff companies issued "variable renewal offers" (VROs) to customers that promised that the

plaintiffs would obtain more than the minimum required renewable energy credits. In October, 2020, the defendant issued a final decision promulgating new rules that prohibited VROs from containing renewable energy credits that were sourced outside of particular geographic areas; this geographic restriction was based on the defendant's finding that the state's air quality is significantly and adversely affected by fossil fuel production in the southwest New England watershed. The defendant also promulgated a resource restriction, which required renewable energy credits to be derived from resources that meet the state's definition of a class I facility, as well as a marketing restriction, which prohibited suppliers from marketing products as renewable energy unless the supplier had either an ownership interest in or a power purchase agreement for a renewable energy source. The plaintiffs appealed to the Superior Court, claiming that the restrictions violate the federal constitution's dormant commerce clause, which limits the power of the states to enact laws that affect interstate commerce, as well as the free speech and contracts clauses of the federal constitution. The trial court found as a threshold issue that the restrictions do not clearly discriminate against interstate commerce but merely have an adverse effect thereon. The resulting burden on interstate commerce, the court found, is not excessive in relation to the putative local benefit, namely, the VRO program's goal of developing renewable energy sources in areas that have a more direct impact on the state's environmental goals, and, therefore, the restrictions do not violate the dormant commerce clause. The court also found that the plaintiffs waived their claims regarding the free speech and contracts clauses by failing to raise them during the administrative proceedings. The trial court therefore affirmed the defendant's decision, the plaintiffs appealed to the Appellate Court, and the Supreme Court transferred this appeal to itself pursuant to General Statutes § 51-199 (c). The plaintiffs claim that the geographic and marketing restrictions violate the dormant commerce clause, contending that the trial court erred in failing to conclude that the geographic restriction facially discriminates against interstate commerce and, therefore, deserves strict scrutiny. Moreover, if not facially discriminatory, the plaintiffs argue that the geographic restriction, as well as the marketing restriction, impose a disproportionate burden on interstate commerce that outweighs any benefit. They also claim that the trial court erred in concluding that they waived their first amendment and contracts clause claims and, finally, that the defendant's decision is invalid because it did not satisfy the procedural requirements of the Uniform Administrative Procedure Act.

STATE *v.* JOHN A. MASSARO, SC 20653
Judicial District of Litchfield at Torrington,
Geographical Area No. 18

Criminal; Sale of Narcotics; Discovery Sanctions; Whether Improper Exclusion of Witness' Prior Inconsistent Statement Is Harmless Error; Whether State's Treatment of Defense Witness as Expert Is Harmless Error. On July 13, 2017, a Torrington police officer saw the defendant and Sarah Mikuski engage in what that officer believed to be a "hand to hand" narcotics transaction. The defendant eluded the police, but Mikuski and her boyfriend were detained and found in possession of drug paraphernalia along with a small, clear plastic bag containing crack cocaine. Mikuski told the officer that she had purchased drugs from the defendant in the past and that, on this occasion, she gave him $26 in exchange for crack cocaine. The defendant was arrested and charged with illegal sale of a narcotic substance. On March 5, 2018, the defendant's investigator, Benjamin Pagoni, interviewed Mikuski. She told Pagoni that, on the day of the incident, she had been in possession of narcotics and gave them to the defendant; Pagoni memorialized that interview in a memorandum. The defendant pleaded not guilty, claiming that it was Mikuski who had sold the cocaine to him for the purpose of raising money to buy heroin, which was her drug of choice. Prior to trial, the state requested, pursuant to Practice Book § 40-13, that the defendant disclose his intended witnesses as well as any witness "statements" in his possession. Defense counsel failed to turn over Pagoni's memorandum in response, reasoning that the memorandum was protected attorney work product. At trial, Mikuski, along with her boyfriend, testified that she had texted the defendant on July 13, 2017, and, after calling him, he sold her narcotics. To rebut that testimony with Mikuski's prior inconsistent statement during her interview, the defendant sought to call Pagoni, and the state objected. The state argued that Mikuski's statement during the interview should be excluded as a discovery sanction for the defendant's failure to disclose Pagoni's memorandum as a witness statement, and the court agreed. Consequently, it ordered that evidence of the written statement was inadmissible and that Pagoni's testimony would be limited to impeaching Mikuski's testimony that she had purchased the crack cocaine from the defendant. On cross-examination, the state challenged Pagoni's recollection of events, and, in response, he indirectly referred to his memorandum. The court instructed the jury to ignore that reference, and Pagoni, the defendant's only witness, went on to answer the state's questions as to general characteristics of the illicit drug trade. After the jury returned

a guilty verdict, the trial court denied the defendant's motion for a new trial, and he appealed to the Appellate Court (205 Conn. App. 687), which held that the trial court erred in finding that the Pagoni memorandum was a statement that needed to be disclosed under § 40-13. That court concluded, however, that the error was not of a constitutional nature and that the resulting sanctions were harmless given the "ample evidence" that the defendant sold drugs to Mikuski. That court also rejected as harmless error the defendant's claim that the trial court, in contravention of the parties' pretrial agreement, erred in allowing the state to convert Pagoni into an expert witness by asking him about general characteristics of the illicit drug trade. The Supreme Court, pursuant to General Statutes § 51-197f, granted defendant's petition for certification to appeal, limited to whether the Appellate Court correctly concluded that the discovery sanctions were harmless and that treating Pagoni like an expert witness was harmless error.

HIGH WATCH RECOVERY CENTER, INC. *v.* DEPARTMENT OF PUBLIC HEALTH et al., SC 20666
Judicial District of New Britain

Administrative Appeal; Whether Appellate Court Properly Concluded That a Certificate of Need Hearing Was Not a "Contested Case" Under the Uniform Administrative Procedure Act; Whether Appellate Court Correctly Concluded That Plaintiff's Letter Requesting Intervenor Status Was Not a Legally Sufficient Request for a Public Hearing. The defendant, Birch Hill Recovery Center, LLC (Birch Hill), submitted an application for a certificate of need to the Office of Health Care Access (OHCA) to establish a substance abuse treatment facility. The OHCA issued a notice stating that it would hold a hearing and that the notice was issued pursuant to General Statutes (Rev. to 2017) § 19a-639a (f) (2), which provides that the OHCA "may" hold a public hearing with respect to any certificate of need application. The plaintiff submitted a letter to the OHCA requesting that it be granted intervenor status in the proceeding. The OHCA granted the plaintiff's request and held a hearing on the application. Birch Hill and the defendant Department of Public Health then entered into an agreement in which Birch Hill's application was approved. The plaintiff appealed to the trial court pursuant to General Statutes § 4-183 (a) of the UAPA, which provides that "[a] person" may appeal from an agency's "final decision." General Statutes § 4-166 (5) defines a "final decision" as an "agency determination in a contested case," and § 4-166 (4) in turn defines a "contested case" as "a proceeding . . . in which the legal rights . . . of a party are

required by state statute or regulation to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held." The trial court granted the defendants' motions to dismiss the appeal on the ground that there was no "final decision" in a "contested case." The plaintiff appealed, and the Appellate Court (207 Conn. App. 397) affirmed the judgment. The court determined that the legislature intended for the word "may" in § 19a-639a (f) (2) to confer discretion, and, thus, a hearing was not statutorily required on Birch Hill's application. It then ruled that the mere opportunity for a hearing coupled with the holding of a hearing in the absence of a specific statute or regulation under which the hearing was required to be held was insufficient to constitute a contested case, citing *Middlebury* v. *Dept. of Environmental Protection*, 283 Conn. 156 (2007), and *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792 (1993). In addition, the court rejected the plaintiff's claim that its letter requesting intervenor status constituted a request for a public hearing pursuant to § 19a-639a (e), concluding that the letter failed to satisfy § 19a-639a (e) because (1) it did not contain a request that a public hearing be held on the application and (2) there was nothing in the letter from which it could be inferred that the numerical requirements of § 19a-639a (e) were met. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly followed *Middlebury* and *Summit* in concluding that a certificate of need hearing conducted pursuant to § 19a-639a (f) (2) was not a "contested case," as defined by § 4-166 (4). If the answer to the first question is "yes," the court will then decide whether the Appellate Court correctly concluded that the plaintiff's letter requesting intervenor status in a certificate of need hearing that had been scheduled and noticed pursuant to § 19a-639a (f) was not a legally sufficient request for a public hearing pursuant to subsection (e) of that statute.

DAVID MARKATOS et al. *v.* ZONING BOARD OF APPEALS OF THE TOWN OF NEW CANAAN, SC 20682
Judicial District of Hartford

Zoning; Whether Trial Court Properly Found That Abutting Landowners Did Not Establish That They Were Entitled to Intervene As of Right or Permissively in Appeal From Zoning Board Decision. Grace Farms Foundation, Inc. owns a seventy-five acre parcel of land in New Canaan. In 2017, the town's Planning and Zoning Commission issued Grace Farms a special permit with 100 conditions that allowed it to operate as a place to foster community and explore

nature, the arts and faith. Condition six prohibited any material change in the approved use, or intensification of any use, unless specifically authorized. In 2019, the zoning enforcement officer issued a zoning permit authorizing Grace Farms to convert a former dwelling on the property to administrative offices, which would increase the number of employees accommodated from five to twenty-three. The plaintiffs, who are abutting landowners, appealed to the Zoning Board of Appeals. The zoning board upheld the zoning permit, and the plaintiffs appealed to the Superior Court. The proposed intervenors, who are also abutting landowners, filed a motion to intervene but later withdrew it. The trial court, following a hearing, remanded the case to the zoning board to inquire of the commission on the purpose and meaning of the conditions of the special permit and report back to the court for further proceedings. The proposed intervenors filed a new motion to intervene, which the trial court denied. The trial court rejected their reliance on *Bucky* v. *Zoning Board of Appeals*, 33 Conn. Supp. 607 (1976), for the proposition that a property owner who is statutorily aggrieved as an abutting landowner for purposes of appealing from a zoning board decision pursuant to General Statutes § 8-8 can intervene as a matter of right in such an appeal. The trial court found that subsequent cases have not supported such an automatic result and that *Bucky* is distinguishable because the motion to intervene in the present case was untimely and the proposed intervenors failed to satisfy the other requirements for intervention. Following the grant of certification by the Appellate Court, the proposed intervenors filed this appeal, and the Supreme Court transferred the appeal to itself. Grace Farms claims that the Supreme Court lacks jurisdiction because the appeal was not taken from a final judgment and the proposed intervenors cannot make a colorable claim to intervention as of right. The proposed intervenors claim on appeal that the trial court erred in finding that they did not satisfy the requirements for intervention as of right because (1) their motion was timely, as their interests became implicated only after the case was remanded to the zoning board and it became apparent that the scope of the appeal had broadened beyond the narrow question originally presented of whether conversion of the former dwelling violated condition six of the special permit to the scope of the activities allowed by the special permit; (2) *Bucky* recognized that landowners have a direct and substantial interest in a zoning dispute involving abutting property; and (3) they established that disposition of the appeal without their involvement will significantly impair their interests and that their interests differ materially from, and are not adequately represented by, those of the other parties to the appeal. The

proposed intervenors also claim that the trial court abused its discretion by not allowing them to intervene permissively.

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

Jessie Opinion
Chief Staff Attorney

NOTICES

Notice of Merger and Continued Assignment of Cases from Superior Court Geographical Area

Merger and Continued Assignment of Cases from Superior Court Geographical Area No. 20 at Norwalk to Superior Court Geographical Area No. 1 at Stamford; Continued Assignment of Housing Cases in the Stamford/Norwalk Judicial District to the Stamford/Norwalk Judicial District Courthouse

Since 2020, court matters assigned to Geographical Area No. 20 at Norwalk (GA 20) have been conducted at Geographical Area No. 1 at Stamford (GA 1), located at 123 Hoyt Street, Stamford. Pending GA 20 matters will remain at GA 1, and, going forward, GA 1 and GA 20 will merge, and all business will be assigned to GA 1.

Likewise, since 2020, court matters assigned to the Superior Court Housing Session at Norwalk have been conducted at the Stamford/Norwalk Judicial District Courthouse, also located at 123 Hoyt Street, Stamford. All housing matters in the Stamford/Norwalk Judicial District will continue to be heard at the Stamford/Norwalk Judicial District Courthouse.

The GA 20 building, located at 17 Belden Avenue, Norwalk, will be re-purposed for other judicial branch uses.

Arrangements necessary to effectuate the merger of operations are underway. Please contact Megan McCaffrey, Judicial District Chief Clerk, Stamford Superior Court, at 203-965-5308 with any questions.

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Application for Reinstatement of Rebecca L. Johnson NNH-CV05-4012328-S

Notice is hereby given that, pursuant to Connecticut Practice Book Section 2-53, a hearing on the Application for Reinstatement of Rebecca L. Johnson shall be held before the New London County Standing Committee on Recommendations for Admissions to the Bar in person on Tuesday, September 27, 2022 at 10:00 a.m. at the New London Superior Court located at 70 Huntington Street, New London, Connecticut.