HARMINDER SINGH *v.* CVS ET AL.
(AC 39484)

Alvord, Mullins and Bear, Js.

Syllabus

The plaintiff appealed from the decision of the Workers' Compensation Review Board affirming the decision of the Workers' Compensation Commissioner, who concluded that the plaintiff had reached maximum medical improvement for a compensable toe injury and that he was not entitled to benefits for total incapacity from that injury under the applicable statute (§ 31-307). *Held* that there was no merit to the plaintiff's claim that the board improperly affirmed the commissioner's determination, as the commissioner's conclusion that the plaintiff's chronic and degenerative medical condition was not caused by his compensable toe injury was sustained by the underlying facts in the record.

Argued April 20—officially released July 25, 2017

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fourth District denying and dismissing the claim for certain benefits and granting in part the plaintiff's motion to correct, brought to the Workers' Compensation Review Board, which affirmed

the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Andrew E. Wallace, for the appellant (plaintiff).

James T. Baldwin, for the appellee (named defendant).

Opinion

PER CURIAM. The plaintiff, Harminder Singh, appeals from the decision of the Workers' Compensation Review Board (board) affirming the decision of the Workers' Compensation Commissioner (commissioner), who concluded that the plaintiff had reached maximum medical improvement for a compensable toe injury and that he was not entitled to benefits for total incapacity from that injury under General Statutes § 31-307.[1] The board affirmed the commissioner's determination on the ground that the plaintiff's medical condition was the result of degenerative processes unrelated to the compensable injury. The board concluded that evidence in the record found persuasive and credible by the commissioner supported that determination. On appeal, the plaintiff claims that the commissioner improperly failed to (1) apply credible evidence in accordance with the applicable law, specifically General Statutes § 31-349, and (2) perform an analysis of the plaintiff's total disability consistent with the precedent in *Osterlund* v. *State*, 135 Conn. 498, 66 A.2d 363 (1949), and, therefore, the board improperly affirmed the decision of the commissioner.

After careful review of the record, including the board's well reasoned decision, and the parties' appellate briefs, we conclude that the plaintiff's claims on appeal are without merit. The board properly affirmed

[1] The defendants to this appeal are the named defendant, CVS, which was the plaintiff's employer, and Gallagher Bassett Services, Inc., the insurance administrator.

the commissioner's determination that the plaintiff's chronic and degenerative medical condition was not caused by his compensable toe injury. "[O]ur role is to determine whether the review [board's] decision results from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them . . . . [Therefore, we ask] whether the commissioner's conclusion can be sustained by the underlying facts." (Internal quotation marks omitted.) *Jodlowski* v. *Stanley Works*, 169 Conn. App. 103, 108, 147 A.3d 741 (2016). In this case, the answer to that question is yes, the commissioner's conclusion can be sustained by such facts.

The decision of the Workers' Compensation Review Board is affirmed.

BANK OF NEW YORK, TRUSTEE *v.* ATHINA SAVVIDIS ET AL.
(AC 39080)

DiPentima, C. J., and Keller and Graham, Js.

Syllabus

The plaintiff bank, as trustee, sought to foreclose a mortgage on certain real property owned by the defendant mortgagors. Following the trial court's rendering of a judgment of strict foreclosure, the plaintiff filed a notice with the court that the defendants had commenced a bankruptcy proceeding, thereby staying the judgment. Thereafter, the bankruptcy court issued an order granting the plaintiff relief from the automatic stay, and the plaintiff filed a motion with the trial court to reenter the judgment and to reset the law days. In support of its motion, the plaintiff submitted an updated calculation of debt with an attached affidavit of debt from its servicing agent, B. The calculation of debt was less than the calculation of debt that the plaintiff previously had submitted approximately two years earlier, despite the accrual of interest. At the hearing on the plaintiff's motion, the defendants' counsel argued that the court should not rely on B's affidavit in calculating the outstanding debt. The trial court inquired of counsel as to how the defendants were harmed by the more advantageous updated calculation of debt, and whether counsel had any basis on which to challenge B's affidavit. In response,

counsel stated that B's affidavit was inconsistent with the prior affidavit and he requested an evidentiary hearing on the matter, but indicated that he would not offer any evidence to contradict B's affidavit. Thereafter, the trial court declined counsel's request for an evidentiary hearing, reentered the judgment of strict foreclosure, reset the law days, and calculated the outstanding debt relying on B's affidavit. On appeal, the defendants challenged the trial court's reliance on B's affidavit in calculating their outstanding debt. *Held* that the trial court properly relied on B's affidavit in calculating the outstanding debt, the defendants on appeal having failed to articulate any colorable claim of prejudice by the court's decision: although the updated calculation of debt with B's attached affidavit was inconsistent with the one that the plaintiff previously had submitted, the updated calculation of debt was less than the prior calculation of debt, and the defendants did not rebut the plaintiff's contention that there was effectively no harm to them; moreover, the trial court did not abuse its discretion in declining to conduct an evidentiary hearing on the matter in light of the defendants' affirmation that they would not offer any additional evidence to challenge the figures set forth in B's affidavit.

Argued April 25—officially released July 25, 2017

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants were defaulted for failure to plead; thereafter, the court, *Adams*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered a judgment of foreclosure by sale; subsequently, the court, *Mintz*, *J.*, granted the motion to open the judgment filed by the named defendant et al. and rendered a judgment of strict foreclosure; thereafter, the court, *Povodator*, *J.*, granted the plaintiff's motion to reenter the judgment and to reset the law days, and the named defendant et al. appealed to this court. *Affirmed.*

Joseph DaSilva, *Jr.*, with whom, on the brief, was *Marc J. Grenier*, for the appellants (named defendant et al.).

Jonathan A. Adamec, for the appellee (plaintiff).

Opinion

GRAHAM, J. The defendants Athina Savvidis and Anastasios Savvidis[1] appeal from the judgment of strict foreclosure reentered by the trial court in favor of the plaintiff, Bank of New York, as trustee,[2] following the lifting of a bankruptcy stay. On appeal, the defendants contend that the trial court improperly relied on an affidavit furnished by the plaintiff in calculating the outstanding debt. We affirm the judgment of the trial court.

This appeal concerns real property owned by the defendants and known as 106B Comstock Hill Avenue in Norwalk (property). On April 14, 2003, the defendants executed a promissory note (note) in favor of America's Wholesale Lender[3] in the principal amount of $550,000. The note was secured by a mortgage deed on the property (mortgage).

On October 3, 2006, the plaintiff commenced this foreclosure action in its capacity as owner and holder of the note and mortgage. The operative complaint, the plaintiff's January 31, 2007 amended complaint, alleged in relevant part that the note was in default, that the defendants had been provided written notice thereof, and that the defendants had failed to cure that default. Accordingly, the plaintiff sought to "declare [the] note to be due in full and to foreclose the mortgage securing said note." Over the next decade, multiple judgments

[1] Although Sophia Savvidis, Progressive Credit Union, and Norwalk Hospital also were named as defendants in the plaintiff's complaint, none of those defendants have appealed from the judgment of the trial court. We, therefore, refer to Athina Savvidis and Anastasios Savvidis as the defendants in this opinion.

[2] The plaintiff is the trustee of the Certificate Holders of CHL Mortgage Pass-Through Trust 2003-15.

[3] America's Wholesaler Lender is the trade name of Countrywide Home Loans, Inc. *America's Wholesale Lender* v. *Pagano*, 87 Conn. App. 474, 475, 866 A.2d 698 (2005).

of foreclosure were entered by the trial court, only to be stayed by the filing of bankruptcy petitions by the defendants under title 11, chapter 13, of the United States Code. See *U.S. Bank National Assn., Trustee* v. *Works*, 160 Conn. App. 49, 52, 124 A.3d 935 (filing of bankruptcy petition pursuant to title 11 operates "as an automatic stay of the plaintiff's foreclosure action"), cert. denied, 320 Conn. 904, 127 A.3d 188 (2015).

Relevant to this appeal are the events subsequent to the rendering of a judgment of strict foreclosure by the court on June 8, 2015. On September 9, 2015, the plaintiff, in accordance with General Statutes § 49-15 (b),[4] filed a notice that the defendants had commenced yet another bankruptcy proceeding, thereby staying the judgment of foreclosure recently reentered by the trial court. On January 7, 2016, the United States Bankruptcy Court for the District of Connecticut issued an order granting relief from that automatic stay "to permit the [plaintiff] to exercise [its] rights, if any, with respect to [the property] in accordance with applicable non-bankruptcy law." The plaintiff thereafter filed a motion to reset the law days and to reenter the judgment on the ground that the June 8, 2015 judgment of strict foreclosure had been opened and the law days vacated pursuant to § 49-15 (b).

In support of that motion, the plaintiff submitted an updated calculation of debt dated March 9, 2016. That

[4] General Statutes § 49-15 (b) provides in relevant part: "Upon the filing of a bankruptcy petition by a mortgagor under Title 11 . . . any judgment against the mortgagor foreclosing the title to real estate by strict foreclosure shall be opened automatically without action by any party or the court, provided, the provisions of such judgment, other than the establishment of law days, shall not be set aside under this subsection, provided no such judgment shall be opened after the title has become absolute in any encumbrancer or the mortgagee, or any person claiming under such encumbrancer or mortgagee. The mortgagor shall file a copy of the bankruptcy petition, or an affidavit setting forth the date the bankruptcy petition was filed, with the clerk of the court in which the foreclosure matter is pending. . . ."

filing stated that the total due as of February 18, 2016 was $794,608.66. Attached to that filing was an affidavit of debt dated March 3, 2016, and signed under oath by Tina Marie Braune, a "Document Execution Specialist of Nationstar Mortgage LLC," which was the plaintiff's servicing agent at that time. In her affidavit, Braune provided a detailed breakdown of the various components of that calculation, including unpaid principal, interest, and property tax and hazard insurance advances.

The parties appeared before the court on March 14, 2016, at which time the court indicated that it had "a couple of questions or problems with some of the numbers that don't make sense" in comparison to the calculation of debt submitted by the plaintiff two years earlier. The plaintiff previously had filed a calculation of debt dated February 11, 2014 (2014 calculation), which indicated that the total due to February 18, 2014 was $801,528.16. That filing was accompanied by an affidavit of debt dated November 12, 2013, and signed under oath by Kimberly Gina Harvey, an assistant vice president at Bank of America N.A.[5] Comparing the 2014 calculation to the one presently before it, the court observed that "[t]he total debt has actually gone down which doesn't make sense since you're dealing with a substantial increase in interest." The court then noted a significant discrepancy with respect to the property tax and hazard insurance advances detailed in the respective affidavits, "that seems to be the source . . . of why notwithstanding increased interest over time the aggregate actually has gone down somewhat." The parties requested a one week continuance to review the matter, which the court granted.

The parties returned to court on March 21, 2016. The plaintiff had filed an additional calculation of debt dated

[5] In her affidavit, Harvey indicated that Bank of America N.A. was "the plaintiff's servicing agent for the subject loan . . . ."

March 18, 2016, which was identical in all material respects to the March 9, 2016 calculation, save for the inclusion of $2328.81 in additional interest that recently had accrued. The defendants' counsel indicated that he had "no problem" with that additional interest but remained "deeply concerned" that the 2014 calculation was higher than the one presently before the court. In response, the court inquired whether the defendants had any reason or evidentiary basis for the court to doubt the accuracy of the updated calculation of debt furnished by the plaintiff, which the court noted was "more advantageous" to the defendants. The defendants' counsel offered no such reason, apart from the fact that the plaintiffs had introduced inconsistent affidavits. The plaintiff's counsel confirmed that the Braune "numbers are correct for the affidavit of debt."

The defendants' counsel nonetheless argued that the court should not rely on Braune's affidavit because "the plaintiff . . . is now seeking to collect roughly half of what it allegedly" paid in property tax and hazard insurance advances. The court noted that it had two alternatives: accept the updated calculation of debt predicated on Braune's affidavit or conduct an evidentiary hearing. The defendants' counsel stated that he did not want an evidentiary hearing, but an explanation for why the numbers had decreased.

The court inquired of the defendants' counsel how the defendants were harmed by the present calculation of debt, and whether he had "any basis" on which to challenge Braune's affidavit. In response, counsel pointed only to its inconsistency with the prior affidavit. The court responded that "there is a presumptive quality to what is being submitted. Absent a request for an ability to challenge the evidentiary value and weight to be given presumptively, I rely on unchallenged submissions such as this affidavit." The defendants' counsel then requested an evidentiary hearing but indicated that

he would not be offering any evidence to contradict the affidavit.

The court then ruled in relevant part: "Absent any proffer of evidence that challenges the validity or accuracy of the most recent affidavit . . . I believe I am entitled to and should proceed on the basis of the affidavit as submitted absent a claim that you're going to be offering evidence to challenge those numbers." The court issued an order reentering the judgment of strict foreclosure, in which it reset the law days and found the outstanding debt to be $796,922.47.[6]

On appeal, the defendants claim that the court improperly relied on Braune's March 3, 2016 affidavit in calculating the debt. In response, the plaintiff argues that, irrespective of the merits of that claim, the defendants cannot demonstrate that they were substantially prejudiced by the court's evidentiary ruling. We agree with the plaintiff.

The standard governing such claims is well established. "Our standard of review regarding challenges to a trial court's evidentiary rulings is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . Additionally, it is well settled that even if the evidence was improperly admitted, the [defendant] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *National City Mortgage Co.* v. *Stoecker*, 92 Conn. App. 787, 797, 888 A.2d 95, cert. denied, 277 Conn. 925, 895 A.2d 799 (2006).

The record reflects that the trial court rendered a judgment of strict foreclosure on June 8, 2015. At that

[6] That figure is $4575.69 less than the debt set by the court nine months earlier.

time, the court, without objection by the defendants, determined the outstanding debt to be $801,498.16. Ultimately, the defendants' filing of a bankruptcy petition precluded that foreclosure from proceeding.

Following the January 7, 2016 order of the bankruptcy court granting the plaintiff relief to exercise its right to foreclose on the property, the plaintiff moved for a reentry of the judgment of strict foreclosure, which necessitated a resetting of the law days and a recalculation of the debt. Although more than nine months had passed, during which additional interest had accrued, the plaintiff nonetheless submitted an updated calculation of debt and an accompanying affidavit that set forth a total due that was thousands of dollars *less* than the debt previously set by the court. When pressed by the court as to how that reduction in the amount owed to the plaintiff prejudiced the defendants, the defendants' counsel provided no answer. Furthermore, although the court considered conducting an evidentiary hearing on the matter, it declined to do so in light of the defendants' affirmation that they would not be offering any additional evidence to challenge the figures set forth in Braune's affidavit.

On appeal, the defendants have articulated no colorable claim of prejudice. Although the plaintiff argued in its appellate brief that "[t]here was effectively no harm to the defendants by the trial court's decision," the defendants did not rebut that contention. On our review of the record, we can discern no substantial prejudice to the defendants. Moreover, we are mindful that "[a] foreclosure action is an equitable proceeding . . . [and the] determination of what equity requires is a matter for the discretion of the trial court." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Angle*, 284 Conn. 322, 326, 933 A.2d 1143

(2007). We conclude that the defendants have not demonstrated that the trial court abused its discretion in the present case.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

MARY MARCIANO *v.* OLDE OAK VILLAGE CONDOMINIUM ASSOCIATION, INC.
(AC 38543)

Lavine, Sheldon and Flynn, Js.

Syllabus

The plaintiff condominium owner sought to recover damages from the defendant condominium association under a theory of premises liability after she sustained personal injuries from a fall while exiting the rear of her condominium unit. The plaintiff alleged in her complaint that the defendant had possession and control over the premises where she fell. The condominium association declaration provided that each condominium owner was responsible for the maintenance, repair, and replacement of the area three feet parallel to the rear boundary of his or her unit. The plaintiff failed to respond to the defendant's requests for admissions that, inter alia, the location where she fell was less than three feet from the rear boundary of her condominium unit. The trial court granted the defendant's motion for summary judgment and concluded that, by virtue of the plaintiff's failure to respond to the defendant's requests for admissions, she was deemed to have admitted that the maintenance of the area where she fell was her responsibility, and that the defendant was not in possession or control of that area. On the plaintiff's appeal from the summary judgment rendered in favor of the defendant, *held* that the trial court properly concluded that there was no genuine issue of material fact that the defendant did not have possession and control over the area on which she fell and that the defendant was entitled to judgment as a matter of law; by failing to respond to the defendant's requests for admissions, the plaintiff was deemed to have admitted that she was responsible for maintaining the area where she fell, which defeated her assertion that the defendant had a duty to maintain the site of the incident.

Argued May 16—officially released July 25, 2017

Procedural History

Action to recover damages for personal injuries sustained as a result of the defendant's alleged negligence, brought to the Superior Court in the judicial district of New Haven, where the court, *Alander*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Robert J. Santoro, with whom, on the brief, was *Andrew S. Knott*, for the appellant (plaintiff).

Leah M. Nollenberger, with whom was *Robert G. Clemente* and, on the brief, *Lorinda S. Coon*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Mary Marciano, appeals from the grant of summary judgment by the trial court in favor of the defendant, Olde Oak Village Condominium Association, Inc. The plaintiff had sought damages from the defendant for its alleged negligence after she suffered personal injuries from a fall on April 14, 2012, while exiting her condominium unit from a rear entrance. The plaintiff alleged in her complaint that the defendant had possession and control over the premises where her fall took place. On appeal, the plaintiff claims that the court erroneously concluded that there was no genuine issue of material fact that the defendant did not have possession and control over the area on which she fell. We affirm the judgment of the trial court.

Our standard of review is set forth in Practice Book § 17-49, which provides in relevant part that summary judgment "shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "[T]he scope of our review of the trial court's decision

to grant the plaintiff's motion for summary judgment is plenary." (Internal quotation marks omitted.) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012).

Our resolution of the plaintiff's claim hinges on our examination of her complaint, which alleges that the defendant was responsible for the upkeep of the lawn on which the plaintiff fell and that her fall was due to the "negligence and carelessness of the defendant" due to its failure to maintain the area in which the plaintiff fell and warn the plaintiff of a dangerous condition.

As the trial court noted in its October 20, 2015 memorandum of decision granting the defendant's motion for summary judgment, the parties were in agreement "that the defendant had the duty to use reasonable care to maintain in a reasonably safe condition those areas of the premises over which it exercised control." The court also noted that the condominium association declaration, which was admitted into evidence in support of the defendant's motion for summary judgment, provided that each condominium owner shall be responsible for the maintenance, repair, and replacement of certain limited common elements, which included the area three feet parallel to the rear boundary of the unit.

The plaintiff failed to timely answer the defendant's requests for admissions and did not file any objection to the requests or seek to further extend the March 1, 2014 deadline set by the court for the plaintiff's answer. Those requests stated, inter alia, "[y]our fall occurred when you stepped on a rock on the ground at the bottom of your rear deck stairs," and that "[t]he location of the rock on the ground where you fell is less than three feet from the rear boundary of your unit."[1] The court

[1] In addition, by virtue of her failure to timely respond to the defendant's requests for admissions, the plaintiff is deemed to have admitted that she was "responsible for the maintenance of the area" in which she fell pursuant to the condominium declaration, and that the defendant "was not responsible for maintaining the area three feet parallel to the rear boundary of [the plaintiff's] unit."

concluded that, by virtue of the plaintiff's failure to respond to these requests for admissions, the plaintiff was deemed to have admitted that maintenance of the area in which the plaintiff fell was the responsibility of the unit owner and the defendant was not in possession and control of the area of the fall.

"Liability for injuries caused by defective premises . . . does not depend on who holds legal title, but rather on who has possession and control of the property. . . . Thus, the dispositive issue in deciding whether a duty exists is whether the [defendant] has any right to possession and control of the property." (Citation omitted; internal quotation marks omitted.) *Sweeney* v. *Friends of Hammonasset*, 140 Conn. App. 40, 50, 58 A.3d 293 (2013). When a party has not timely responded or objected to a request for admission or sought to amend or withdraw that admission, then "any presumption of truth in the plaintiff's assertion in her complaint that the defendant had a duty to maintain the site of the incident [is] defeated." *Filipek* v. *Burns*, 76 Conn. App. 165, 168, 818 A.2d 866 (2003); see also Practice Book § 13-24 (a) ("[a]ny matter admitted under this section is conclusively established unless the judicial authority on motion permits withdrawal or amendment of the admission"). In light of the facts the plaintiff is deemed to have admitted, the court properly concluded that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law.

The judgment is affirmed.

ELIZABETH G. DIGIUSEPPE *v.* VINCENT J. DIGIUSEPPE
(AC 38679)

Lavine, Sheldon and Keller, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court denying the plaintiff's motion for contempt and ordering the defendant to pay what he owed for the college expenses of his two minor children. As part of their separation agreement, the parties had agreed that should certain education accounts for each child become insufficient, the defendant would be solely responsible for the additional college education expenses. When the defendant failed to pay for the children's college expenses, the plaintiff filed the motion for contempt. *Held*:

1. This court declined to review the defendant's claim that the trial court erred in not finding a latent ambiguity in the college expenses provision of the parties' agreement when examining it in conjunction with another document that was signed by the parties regarding education support orders under statute (§ 46b-56c), the defendant having failed to distinctly raise the claim at trial; a careful review of the record demonstrated that the defendant did not assert before the trial court any claim concerning a latent ambiguity in the agreement created by the other document that was executed by the parties, but rather that he based his objection to the plaintiff's motion for contempt on two entirely different arguments, and this court was under no obligation to consider a claim that was not distinctly raised at the trial level.
2. The defendant's claim that the trial court erred in finding that he was responsible for all of his children's college expenses was not reviewable; although the defendant claimed on appeal that the parties' agreement was unenforceable because it contained no reasonable limitations on his liability for the college expenses, he did not inquire of the trial court as to the exact limits of the college expenses for which he was liable, nor did he argue that the provision in the agreement for the payment of college expenses was so uncertain and indefinite as to be unenforceable, and, therefore, he failed to preserve the claim by distinctly raising it before the trial court.

Argued March 22—officially released July 25, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Litchfield, where the court, *Ginocchio*, *J.*, rendered judgment dissolving the marriage and granting

certain relief in accordance with the parties' separation agreement; thereafter, the court, *Hon. Elizabeth A. Gallagher*, judge trial referee, denied the plaintiff's motion for contempt and issued certain orders, and the defendant appealed to this court. *Affirmed.*

Steven H. Levy, for the appellant (defendant).

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

Opinion

KELLER, J. The defendant, Vincent J. DiGiuseppe, appeals from the judgment of the trial court rendered when it denied a postdissolution motion for contempt filed by the plaintiff, Elizabeth G. DiGiuseppe, and ordered him to pay what he owed for his children's college expenses. The issue on appeal concerns the extent of the defendant's obligation to pay for the college expenses of the parties' two children beyond what is covered by Connecticut Higher Education Trust (CHET) accounts that the parties had established for each of them. The defendant claims that the court erred in (1) not finding a latent ambiguity in the provision of the parties' separation agreement (agreement) regarding college expenses when examining it in conjunction with another document signed by the parties entitled "Education Support Orders [General Statutes § 46b-56c]" (form), which would render the agreement unenforceable, and (2) its determination that the defendant is responsible for 100 percent of college expenses of the two children without limitation. We conclude that the defendant failed to preserve either of his claims before the trial court, and, therefore, we decline to review them.

The following facts, as found by the court in its written memorandum of decision, and procedural history

are relevant to this appeal: "The parties were divorced on June 25, 2013. Their [agreement] contained a provision for the payment of the educational expenses of their two children, who are currently [nineteen] and [eighteen] years old. [The plaintiff] has moved for contempt based on [the defendant's] failure to pay the children's college expenses. . . .

"The parties do not communicate. When [the plaintiff] learned that [the defendant] was refusing to pay the children's college expenses, [the plaintiff] attempted to contact [the defendant], but he refused to communicate with her.

"At the time of the hearing on the motion for contempt, the parties' son was entering his second year at Bentley College, and their daughter was hoping to begin her freshman year at Syracuse University. The provisions for the postmajority educational expenses are set forth in paragraph 8 of the parties' [separation] agreement.

"Paragraph 8.1 of the parties' separation agreement provides: 'The parties established CHET accounts for the benefit of each of their children. These CHET accounts shall be used for the college education of both children. Should the CHET accounts be insufficient to educate both of the parties' children, the [defendant] shall be solely responsible for the additional college education expenses for the benefit of the parties' children.'

"Paragraph 8.2 provides: 'In the event there is a balance in the CHET accounts after the children have completed their college educations, the parties may divide any remaining balance equally. However, in the event the [defendant] contributes any additional funds to these accounts after the date of dissolution, the

[defendant] shall be entitled to a refund of these contributions if all of the CHET account funds are not used for the college education of the parties' children.'

"The parties had engaged a mediator, Attorney Jeannine Talbot, to assist them in settling the issues arising from the impending dissolution of their marriage. . . . As she does in every mediation where the parties have a child under the age of [twenty-three], Attorney Talbot advised the parties concerning the provisions of . . . General Statutes [§] 46b-56c.[1] The language that the parties chose to put in their agreement did not reference the statute.

[1] General Statutes § 46b-56c provides in relevant part: "(a) For purposes of this section, an educational support order is an order entered by a court requiring a parent to provide support for a child or children to attend for up to a total of four full academic years an institution of higher education . . . for the purpose of attaining a bachelor's or other undergraduate degree . . . . An educational support order may be entered with respect to any child who has not attained twenty-three years of age and shall terminate not later than the date on which the child attains twenty-three years of age.

"(b) (1) On motion or petition of a parent, the court may enter an educational support order at the time of entry of a decree of dissolution . . . and no educational support order may be entered thereafter unless the decree explicitly provides that a motion or petition for an educational support order may be filed by either parent at a subsequent date. If no educational support order is entered at the time of entry of a decree of dissolution . . . and the parents have a child who has not attained twenty-three years of age, the court shall inform the parents that no educational support order may be entered thereafter. The court may accept a parent's waiver of the right to file a motion or petition for an educational support order upon a finding that the parent fully understands the consequences of such waiver. . . .

"(c) The court may not enter an educational support order pursuant to this section unless the court finds as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education . . . if the family were intact. . . .

"(f) The educational support order may include support for any necessary educational expense, including room, board, dues, tuition, fees, registration and application costs, but such expenses shall not be more than the amount charged by The University of Connecticut for a full-time in-state student at the time the child for whom educational support is being ordered matriculates, except this limit may be exceeded by agreement of the parents. An educational support order may also include the cost of books and medical insurance for such child."

"Since Attorney Talbot did not, as mediator, represent either party, she advised them that they had an opportunity to take their proposed agreement to their own attorney in order to have it reviewed. There is no evidence that [the defendant] engaged an attorney for that purpose. [The plaintiff] did take the proposed agreement to her own attorney to review. The proposed agreement reviewed by [the plaintiff's] attorney did not include any reference to . . . [§] 46b-56c; nor did it include any document other than the proposed agreement.

"A document which was produced and distributed by the Litchfield Superior Court clerk's office concerning educational support orders pursuant to . . . [§] 46b-56c was given to the parties for their signature by Attorney Talbot on June 4, 2013. The box requesting the court to enter an educational support order was checked. Attorney Talbot told the parties that, by signing the form, they were asking the court to enter an educational support order.

"[The plaintiff] did not remember being told anything about the statute in connection with the agreement about educational expenses. She does not recall [the] University of Connecticut being mentioned at all. She did not recall any discussion about the terms of the statute. . . .

"In entering judgment after the dissolution hearing, the court, *Ginocchio*, *J.*, did not enter an educational support order pursuant to . . . [§] 46b-56c. Rather, finding the agreement to be fair and equitable to both sides, the court incorporated the entire agreement of the parties into its judgment dissolving the parties' marriage." (Footnote added.)

The court continued: "It is further clear that neither party requested such an order, nor did the court at the

time of dissolution make the predicate findings necessary to issue such an order. . . .[2] Although the mediator had the parties sign the form provided by the Litchfield Superior Court clerk's office, the credible evidence demonstrates that the parties did not request it; nor did the court enter an order in accordance with or sign the form." (Footnote added.)

The court found that the language of paragraph 8 of the parties' agreement is clear and unambiguous, as it contains no limiting language and no language referencing § 46b-56c. To the contrary, the court found that the language of paragraph 8.2 clearly states that the CHET accounts will be used for the children's educational expenses and further anticipates that more funds might be required of the defendant. The court concluded that paragraph 8 clearly and unequivocally imposes on the defendant the sole obligation to pay for the educational expenses of the parties' children and did not grant him sole decision-making authority with respect to college selection or allow him to stop paying tuition based on lack of communication between him and his son.

In ruling on the plaintiff's motion for contempt, the court, "[b]ased on the somewhat adequate evidence [that the defendant] offered to explain his failure to honor the order of the court," declined to hold the defendant in contempt, but concluded that "there is no reason for any refusal or delay on the part of the defendant in honoring his contractual obligations. Accordingly, [the defendant] is ordered to pay whatever amounts he owes for his children's college expenses within ten days of notice of this decision."

Additional facts and procedural history will be set forth as necessary.

[2] See General Statutes § 46b-56c (c), set forth in footnote 1 of this opinion.

I

The defendant's first claim is that the court erred in not finding a latent ambiguity in the provision of the parties' agreement regarding college expenses when examining it in conjunction with the form signed by the parties, which would render the agreement unenforceable.[3] The plaintiff argues that we should decline

[3] Upon our examination of the form utilized by the Litchfield Superior Court, we disagree that it is intended to constitute an agreement to an educational support order subject to all the provisions and limitations of § 46b-56c at the time of a judgment of dissolution, as the defendant claims. The form is an advisement of rights and waiver form intended to comply with the provisions of § 46b-56 (b) (1), which mandates that the court assure that the parties seeking a dissolution understand the consequences of not requesting an educational support order be issued at the time of the dissolution. The form notifies divorcing parties that if they wish to request the inclusion of an educational support order as part of their divorce decree, they must so notify the court at the time of the dissolution. It allows for the parties to advise the court that they are waiving their right to request an educational support order, requesting the court to retain jurisdiction to consider the issue at a future time, or asking the court to enter an educational support order on that day. It is insufficient to inform the court as to the precise nature of the educational support order the parties desire, as even a statutory order may vary in its terms. See General Statutes § 46b-56c (f) and (g).

The box the parties checked reads: "I ask the court to enter an Educational Support Order today." Neither the court nor the clerk signed it. The judgment file incorporated the parties' agreement and made its provisions an order of the court, which encompassed the parties' agreement as to college expenses. A box on the judgment file reflecting any further order regarding educational support is not checked. We further note that the preamble to the parties' agreement provides that the execution of the agreement reflected their "intention that henceforth there shall be as between them only such rights and obligations as are specifically provided in this Agreement." In section 11, they further agreed that their agreement "contains the entire understanding of the parties. There are no representations, promises, warranties, covenants or undertakings other than those expressly set forth herein."

Moreover, the educational support order statute contemplates that such orders may be entered pursuant to any other provision of the general statutes authorizing the court to make an order of support for a child. See § 46b-56c (b) (4). Indeed, pursuant to General Statutes § 46b-66 (a), which governs orders of postmajority support, the parties to a dissolution may enter into any written agreement that "provides for the care, *education*, maintenance or support of a child beyond the age of eighteen . . . ." (Emphasis added.) See also *Hirtle* v. *Hirtle*, 217 Conn. 394, 399–400, 586 A.2d 578 (1991).

to review this claim because it is unpreserved. After a thorough and independent review of the record, we agree with the plaintiff.

In the present case, the defendant's claim of a latent ambiguity in the parties' agreement was not distinctly raised at trial. In the defendant's principal brief and reply brief, although he refers to the admission of extrinsic evidence that may have supported his newly raised theory, notably, his and Talbot's testimony and the form, he fails to identify where in the transcript of the contempt proceeding he requested that the court apply this particular principle of contract law and, more specifically, the manner in which he asked the court to determine that a latent ambiguity in the agreement existed.

Instead, the defendant based his objection to the plaintiff's motion for contempt arguments on two entirely different arguments. First, he argued that, at the time he entered into the parties' agreement, he understood that § 46b-56c governed his college expense obligation. He claimed that his understanding of the agreement was due to representations made to him by Talbot during the parties' mediation and to the submission of the signed form at the time of the judgment of dissolution, which Talbot indicated would limit his college expense obligations to those that may be imposed under § 46b-56c. He further argued that the form was incorporated into the judgment by agreement.[4]

[4] The court noted, however, that "[a]s [the defendant] has pointed out, unilateral mistake is not a defense to a breach of contract claim." The court found that the parties did not request the form nor did the dissolution court enter an order in accordance with any representations made on the form or sign the form, nor was the form attached to the agreement or incorporated into the judgment. The judge who presided over the dissolution did not check the box contained in the judgment form that provides for the entry of an educational support order; rather, the court found only that the parties' agreement was fair and equitable and incorporated it into the judgment of dissolution. Furthermore, in the canvasses conducted of both parties by

Second, and primarily, the defendant argued that as a matter of law, § 46b-56c governed his college expense obligation because he did not specifically waive its provisions.

That these were the defendant's only claims raised before the trial court is indisputable upon review of the following excerpts from the transcript of the contempt hearing. The court, in addressing the plaintiff's counsel, stated:

"The Court: [The defendant's] position is he's—the only reason he—he signed that because he thought he was limited, the tuition was limited to whatever the tuition at [the University of Connecticut] was.

"And—and his position further is, I believe, that any agreement made in this state about the college education is subject to [§ 46b-56c], unless it is explicitly waived. And therefore, since it was not explicitly waived, then he doesn't have to pay the entire tuition for Syracuse. He only has to pay it up to the amount that he would have to pay at [the University of Connecticut]. That's his position. . . . I understand it's not relevant to your position, but it may be relevant to his position.

"[The Defendant's Counsel]: And you very succinctly reiterated my position, Your Honor."

A careful review of the record demonstrates that the defendant did not assert before the trial court a claim that the form executed by the parties and submitted to the court at the time of judgment created a latent ambiguity between the agreement and the court form, and, therefore, the court could not enforce section 8 of the agreement.

Talbot during the dissolution hearing, there is no reference to the court form, and she asked each of them only if they wished to have their agreement incorporated into the judgment.

It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. See Practice Book § 60-5; see also *Burnham* v. *Karl & Gelb*, *P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000). "The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." (Emphasis in original; internal quotation marks omitted.) *State* v. *Colon*, 82 Conn. App. 658, 659, 847 A.2d 315, cert. denied, 269 Conn. 915, 852 A.2d 745 (2004). "We repeatedly have held that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *State* v. *Agron*, 323 Conn. 629, 633 n.2, 148 A.3d 1052 (2016). "We will not promote a Kafkaesque academic test by which [a trial judge] may be determined on appeal to have failed because of questions never asked of [her] or issues never clearly presented to [her]." (Internal quotation marks omitted.) *Burnham* v. *Karl & Gelb*, *P.C.*, supra, 171. Therefore, we decline to review the defendant's first claim because it was not distinctly raised at the contempt hearing.

II

The defendant's second claim is that the court erred in its determination that the defendant is responsible for 100 percent of college expenses of the two children without limitation. The defendant notes that the court, despite his request for an articulation pursuant to Practice Book § 66-5, failed to determine the specific college expenses that he is responsible to pay. The court denied the motion for articulation, stating: "The court's memorandum of decision speaks for itself. The issue before the court was whether the parties' agreement and the judgment of the court mandated that the financial responsibility of the defendant for the college education

of the parties' children was limited by . . . [§] 46b-56c."[5]

The defendant now argues on appeal that if § 46b-56c, with its limits on the nature of college expenditures that can be ordered, is inapplicable because the court correctly determined that the parties arrived at their own educational support order, paragraph 8 of the agreement nevertheless is unenforceable because it contains no reasonable limitations on the defendant's liability and, under well established contract law, a contract must be definite and certain as to its terms and requirements. See *Bender* v. *Bender*, 292 Conn. 696, 728, 975 A.2d 636 (2009).

The plaintiff argues that, like the claim we addressed in part I of this opinion, this claim was not raised before the court and is accordingly not preserved for appeal. Our review of the record reflects that the defendant did not make any inquiry of the court as to the exact limits of the college expenses for which he was liable, nor did he argue that the provision in the agreement for the payment of college expenses was so uncertain and indefinite as to be unenforceable. The only issue before the trial court was whether his failure to pay tuition, room, and board for the parties' children was justified.[6] Thus, we agree with the plaintiff and decline to reach the merits of this claim.

[5] This court granted the defendant's motion for review of the trial court's denial of the motion for articulation filed on June 8, 2016, but denied the relief he requested. "[A]n articulation elaborates upon, or explains, a matter that the trial court decided." *State* v. *Walker*, 319 Conn. 668, 680, 126 A.3d 1087 (2015). The rule regarding motions for articulation cannot be used to "import into the record matters that were never presented to the trial court . . . ." (Citations omitted.) W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2016–2017 Ed.) § 66-5, comment 5, p. 190; see also *State* v. *Brunetti*, 279 Conn. 39, 55 n.27, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007).

[6] The defendant asserts that there is an expansive list of possible college related expenses for which he could be held responsible. In his brief, the defendant poses a number of "what if" questions with respect to possible

As we noted previously in part I of this opinion, it is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. The court noted in its denial of the defendant's motion for articulation that this particular issue was not presented during the contempt hearing, and a thorough and independent review of the record reveals that the defendant never sought a precise designation of all other college expenses for which he might be liable in the future.[7] The plaintiff sought only to have the defendant held in contempt for failing to provide payment for tuition, room, and board related to the two undergraduate colleges in which the children, ages eighteen and nineteen, had enrolled. The defendant did not dispute that tuition, room, and board may not be reasonably encompassed by the term "college expenses," in the parties' agreement. Accordingly, we also decline to consider the defendant's second claim.

The judgment is affirmed.

In this opinion the other judges concurred.

future requests for a variety of arguably college related expenses, e.g., first-class airfare, study abroad, and graduate school, which were not the subject of the motion for contempt. "[C]ourts are called upon to determine existing controversies, and thus may not be used as a vehicle to obtain advisory judicial opinions on points of law. . . ." (Internal quotation marks omitted.) *State* v. *Preston*, 286 Conn. 367, 374, 944 A.2d 276 (2008).

[7] We note that, following Attorney Talbot's canvass of the defendant during the dissolution proceedings, the court, *Ginocchio*, *J.*, and the defendant engaged in the following colloquy:

"The Court: All right, I'm just—my only question is you have assets here, you have a substantial salary, you know the situation better than anyone, but you didn't take advantage of an opportunity to speak to a lawyer about this?

"The Witness: You know, the main purpose of what I went through was for my children, and that's what I feel based upon what our lifestyle has been, my children need that.

"The Court: All right, as long as you know if you start speaking to someone else or you do talk to a lawyer and someone might tell you perhaps you were overly generous or something to that extent, you will not be able to come back here and say, oh, I made a mistake or I probably should have been a little more careful about how I made the decisions. . . . I will give you the opportunity today if you wanted to speak with a lawyer, I will give you that opportunity. But if you're okay with it.

"The Witness: I'm fine with it."

TRAVIS HAMPTON *v.* COMMISSIONER OF CORRECTION
(AC 39280)

DiPentima, C. J., and Keller and Prescott, Js.

Syllabus

The petitioner, who had been convicted of various offenses with his accomplice, M, arising out of the sexual assault of the victim at gunpoint, sought a writ of habeas corpus alleging that defense counsel at his criminal trial had rendered ineffective assistance. The jury in the underlying criminal trial had acquitted the petitioner of count seven of the information, which charged him with sexual assault as a principal, but found him guilty under count eight of the information, which charged him with sexual assault as an accessory. In the instructions to the jury, the trial court erroneously stated that the petitioner could be convicted as a principal or accessory with respect to count eight. In the petitioner's direct appeal from his conviction, our Supreme Court determined that defense counsel had waived any claim that the jury had not been charged correctly as to count eight because he had acquiesced to the charge as given. The petitioner alleged in his petition for a writ of habeas corpus that he was prejudiced by defense counsel's deficient performance because the jury was permitted to return a nonunanimous verdict of guilty as to count eight, as it was unclear whether the jury found him guilty as a principal or as an accessory. The habeas court concluded that the petitioner was not prejudiced by any allegedly deficient performance because the petitioner had been acquitted of count seven, which charged him with sexual assault as a principal only, such that no juror logically could have found him guilty as a principal in count eight. The habeas court therefore concluded that the jury must have unanimously found him guilty under count eight as an accessory to M's assault of the victim. The habeas court rendered judgment denying the petition and, thereafter, granted the petition or certification to appeal, and this appeal followed. *Held* that the habeas court properly denied the petition for a writ of habeas corpus, that court having properly determined that the precise harm that the petitioner asserted by defense counsel's deficient performance was not so significant that there was a reasonable probability that the outcome of the trial with respect to count eight would have been different; there was no reasonable probability that some jurors could have convicted the petitioner of sexual assault as a principal on count eight while others could have convicted him as an accessory with respect to that same count, or that the verdict on count eight would have been different had the court not made the instructional mistake, as the jury had before it the amended information, which solely alleged in count eight that the petitioner intentionally aided M in sexually

assaulting the victim, the prosecutor had explained during his closing argument that count eight pertained to the petitioner's acts that helped M assault the victim, the jurors acquitted the petitioner of count seven, which had charged the petitioner as a principal only, and there was only a mere possibility that the court's improper instruction on count eight caused juror confusion, which was insufficient to meet the high burden of proving that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the trial as to count eight would have been different.

Argued April 12—officially released July 25, 2017

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

Jade N. Baldwin, for the appellant (petitioner).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. The petitioner, Travis Hampton, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus.[1] On appeal, the petitioner claims that the habeas court improperly concluded that his claim of ineffective assistance of trial counsel fails on the prejudice prong of the test set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Having thoroughly reviewed the record, we conclude that the habeas court properly denied the petition and, accordingly, affirm the judgment.

[1] The habeas court subsequently granted certification to appeal from the judgment pursuant to General Statutes § 52-470 (b).

The following facts, as set forth by our Supreme Court in the petitioner's direct criminal appeal, and procedural history are relevant to this appeal. "At approximately 1:30 a.m. on August 23, 2003, the [petitioner] was with his friend, James Mitchell, when Mitchell received a telephone call from the victim, a young woman he knew, asking for a ride to her home in East Hartford. Mitchell drove his car to the location of the victim and picked her up. The three then drove to a nearby restaurant. After entering the restaurant and remaining there for a while, the [petitioner] and the victim returned to the car, where Mitchell had remained. Mitchell told the victim that he would drive her home, but he did not. Instead, Mitchell began angrily questioning the victim as to the whereabouts of her brother, who, both Mitchell and the [petitioner] suspected, was involved in a romantic relationship with Mitchell's former girlfriend. The victim informed Mitchell and the [petitioner] that her brother was staying at her grandfather's house, but after driving there, Mitchell and the [petitioner] realized that the victim had lied to them. Mitchell then drove first to his mother's house in Hartford, and then to an apartment complex. The victim repeatedly pleaded with Mitchell to take her home, but he did not comply. Mitchell drove his car from the apartment complex and brought the victim and the [petitioner] to a closed gas station near Market Street in Hartford and parked behind the building, where it was dark. . . .

"Mitchell then told the victim to get out of the car because he wanted to talk to her. Mitchell, the [petitioner] and the victim exited the car. The victim, anticipating that 'something bad' was about to happen, started to walk away, but stopped when the [petitioner] took a shotgun out of the car and pointed it at her face. After the victim refused to tell Mitchell her brother's location, Mitchell became angry and ordered the victim

to take her clothes off. The victim removed her pants, and Mitchell sexually assaulted her by engaging in vaginal intercourse with her. The [petitioner] kept the shotgun pointed at the victim throughout the assault.

"Angry and scared, the victim pleaded with Mitchell and the [petitioner] to let her go. Mitchell then gave the victim the choice to climb into a nearby dumpster or attempt to run away. As the victim started running, Mitchell fired the shotgun hitting her in the stomach. The victim continued to run toward the front of the gas station, and Mitchell followed her in the car while the [petitioner] pursued her on foot, holding the shotgun. Despite the victim pleading with the [petitioner] to stop, he shot and wounded her in the right side. The victim, bleeding profusely, ran across Market Street and tried to hide behind some trees on the side of the road. The [petitioner] followed her and shot at her several more times, hitting her in the face and the upper thigh. The victim then dropped to the ground and pretended to be dead. The [petitioner] walked over to the victim, who was lying on the ground, and shot her one final time in her left arm. Thinking that the victim was dead, the [petitioner] got back into the car, which Mitchell was driving, and they drove away. They quickly returned, however, to verify that the victim was dead. The [petitioner] got out of the car, walked over to the motionless victim, kicked her once, and said, 'She's dead.' The [petitioner] and Mitchell then again drove away.

"The victim subsequently was discovered by a passerby and ultimately was taken to the hospital, where, after receiving medical attention, she informed authorities that Mitchell and a person that she did not know, later identified as the [petitioner], had sexually assaulted and shot her. Late in the evening of August 27, 2003, Mitchell and the [petitioner] were arrested."

(Footnotes omitted.) *State* v. *Hampton*, 293 Conn. 435, 438–41, 988 A.2d 167 (2009).

Thereafter, the petitioner was charged, via an amended information dated January 17, 2006, with attempt to commit murder in violation of General Statutes §§ 53a-49 (a) and 53a-54a, conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a, kidnapping in the first degree in violation of General Statutes §§ 53a-92 (a) (2) (A) and 53a-8, conspiracy to commit kidnapping in the first degree in violation of General Statutes §§ 53a-48 and 53a-92 (a) (2) (A), assault in the first degree with a firearm in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, conspiracy to commit assault in the first degree in violation of §§ 53a-48 (a) and 53a-59 (a) (5), sexual assault in the first degree as a principal in violation of General Statutes § 53a-70 (a) (1), sexual assault in the first degree as an accessory in violation of §§ 53a-70 (a) (1) and 53a-8, conspiracy to commit sexual assault in the first degree in violation of §§ 53a-48 and 53a-70 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). Id., 438.

The petitioner's case was tried before a jury of six. See id., 448 n.12. During the trial, the state presented evidence of *three* separate sexual acts that the victim had been forced to engage in—vaginal intercourse with Mitchell, fellatio with the petitioner, and vaginal intercourse with the petitioner[2]—although the petitioner

[2] As summarized in its closing argument before the jury, the state theorized that the sexual assaults occurred as follows: "[The victim] told you that after James Mitchell forced her to engage in sexual intercourse, this [petitioner] was sitting there holding a shotgun basically between his legs while he relaxed on the backseat of the car and watched James Mitchell force her . . . to engage in penile-vaginal intercourse. . . . [The victim] told you that while she had a shotgun pointed at her head she did put her mouth once, twice down on [the petitioner's] penis. . . . [The petitioner] did not ejaculate, but . . . he then gave the shotgun over to Mr. Mitchell, and [the petitioner] then attempted to have penile-vaginal intercourse with [the victim]. In fact, he did place his penis . . . into her vagina briefly."

only was charged with *two* counts of first degree sexual assault in the amended information—one count encompassing the fellatio and vaginal intercourse allegedly committed by the petitioner personally, and one count encompassing the vaginal intercourse by Mitchell to which the petitioner allegedly was an accessory. More specifically, count seven alleged in relevant part that "the [petitioner] . . . did compel [the victim] . . . to engage in sexual intercourse by the threatened use of force against her which caused her to fear physical injury," and count eight alleged in relevant part that "the [petitioner] . . . did intentionally aid James Mitchell in compelling [the victim] . . . to engage in sexual intercourse by the threatened use of force against her which caused her to fear physical injury."

Notably, during trial, "the [petitioner] did not file a request to charge. Before it charged the jury, the trial court held a charging conference at which it reviewed, page by page, its written charge with the parties. The trial court gave both parties a printed copy of the jury instructions for their review. During the charging conference, with regard to counts seven and eight of the information . . . the trial court specifically inquired of the parties as to whether there would be a unanimity problem because the state had failed to allege in the information which specific acts of sexual intercourse had occurred. In response, the state pointed out that count eight of the information concerned the [petitioner's] participation in aiding Mitchell in Mitchell's sexual assault of the victim. Because the evidence supported a finding that Mitchell had engaged only in vaginal intercourse with the victim, the state noted that there would be only one factual basis upon which the jury could find the [petitioner] guilty, and, thus, there would be no unanimity problem." (Footnote omitted; emphasis omitted.) Id., 445–46.

With regard to unanimity on count seven, the court, the prosecutor, and the court officer engaged in the following colloquy:

"The Court: . . . But there's one sexual assault [charge] in which he's the principal it's alleged?

"[The Prosecutor]: Yes.

"The Court: Even though the testimony involved two sexual assaults?

"[The Prosecutor]: Right. . . .

"The Court: . . . But it's . . . alleged that [the petitioner] had sex with her in two different fashions. . . .

"[The Prosecutor]: She—it's just charged that [the petitioner] forced her to engage in sexual intercourse, and it's not distinguished as to what type.

"The Court: Well, then the question is, is there any requirement of specific unanimity on that? . . . We'll have to look that up. . . .

"The Court: . . . [M]y issue is particularly as far as the argument is concerned and the charge is concerned. Certainly the jury would not have to believe both.

"[The Prosecutor]: Right.

"The Court: But could you have three believing one type of sexual contact and three believing the other or five and one or whatever permutation you come up with? And that's—do you have any cases for me on that for me to decide on? Do you have any position on that, you can't add another count on sexual assault?

"[The Prosecutor]: No. And there was no request for a bill of particulars, so this is particularized. . . .

"[The Court Officer]: . . . I think it's going to be for the jury to sort it out. If three of them believe oral sex happened and three of them believe vaginal sex

happened by the [petitioner] as principal under count seven, then they find him guilty of count seven."

After the colloquy on unanimity, "the trial court solicited additional suggestions from the parties with regards to the jury charge. When the state responded that nothing else was required, the trial court explicitly asked defense counsel whether he had any further changes. Defense counsel responded that his 'only request' related to a conspiracy charge under *Pinkerton* liability.[3] After the trial court addressed that concern, it again directly asked defense counsel, 'Anything else?' to which defense counsel responded, 'No.' . . . After the parties reviewed [a copy of] the revised instructions, the trial court again directly solicited comments from both parties. Defense counsel stated that he had received and reviewed the instructions and that they 'appear[ed] to be in order.' " (Footnotes altered.) Id., 446–47.

Thereafter, in its final charge as to count seven, the court instructed the jury that "the [petitioner] is charged solely as a principal." With respect to count eight, despite the language in that count of the amended information charging the petitioner only as an accessory, the court instructed the jury that the offense "can be proven by the state in any one of the following ways: that the [petitioner] committed the crime as a principal; that the [petitioner] was an accessory to the crime; or, third, that the [petitioner] is guilty by way of the *Pinkerton* theory of vicarious liability."[4] The court

[3] See *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 180, 90 L. Ed. 1489 (1946).

[4] In the petitioner's direct appeal, our Supreme Court commented on this aspect of the court's instructions as follows: "During the charging conference, the [petitioner], the state and the trial court discussed that, specifically as to count eight, the [petitioner] was charged and could be found liable as a principal, as an accessory, or under the *Pinkerton* doctrine of vicarious liability. . . . The trial court thus charged the jury in accordance with this discussion. This, however, was incorrect. Count eight of the information alleged *only* that the [petitioner] had acted as an accessory by aiding Mitchell

"instructed the jury that it did not have to be unanimous in deciding whether the [petitioner] was guilty as a principal or an accessory." Id., 447–48. In conjunction with the court's charge, a verdict form was submitted to the jury.

"At the end of its jury instructions, the trial court asked the parties whether either took exception to the charge, and neither party did. The jury ultimately acquitted the [petitioner] of count seven, which alleged sexual assault in the first degree as a principal, and convicted him of the remaining charges, including sexual assault in the first degree as charged in the eighth count." Id., 448. The verdict form indicated that, as to count eight, the petitioner was found "guilty by way of principal or accessory liability" as opposed to *Pinkerton* vicarious liability. He subsequently was sentenced to a total effective sentence of fifty-nine years imprisonment.

The petitioner appealed from the judgment of conviction. On direct appeal, he claimed "that the trial court improperly: (1) denied his motion to suppress a written confession that he had made after waiving his *Miranda*[5] rights; (2) failed to instruct the jurors that they had to agree unanimously on the factual basis [i.e., whether he acted as an accessory or as a principal] underlying the sexual assault charges against the [petitioner];[6] and

in sexually assaulting the victim. Accordingly, the trial court's jury instruction as to count eight was inconsistent with the crime charged in the information. Although [t]he trial court cannot by its instruction change the nature of the crime charged in the information . . . it is significant that neither the state nor the [petitioner] took exception to this instruction at trial, and that, on appeal, the [petitioner] has not challenged this specific aspect of the instruction. We therefore treat this claim as abandoned." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Hampton*, supra, 293 Conn. 446 n.9.

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

[6] With regard to this claim, the petitioner challenged the verdicts on both of the sexual assault charges, counts seven and eight. Because he was acquitted of the sexual assault charged in count seven of the information, however, our Supreme Court stated that he was not aggrieved by that

(3) failed to instruct the jurors adequately on the specific intent necessary to convict the [petitioner] as an accessory on the charges of attempt to commit murder, kidnapping in the first degree, assault in the first degree and sexual assault in the first degree." (Footnotes altered.) Id., 438. Our Supreme Court affirmed the judgment of conviction. In doing so, it specifically concluded that the petitioner had waived his second claim regarding nonunanimity as to count eight and, thus, declined to review it: "The record in the present case . . . demonstrates that defense counsel had been made aware of the issue regarding the unanimity charge not once, but twice, and in both instances, despite requests from the trial judge for any changes, additions or deletions, defense counsel stated that he had none, thus assenting to the charge that was given." Id., 450.

Subsequently, on November 19, 2015, the petitioner filed an amended petition for a writ of habeas corpus alleging ineffective assistance of trial counsel. The petitioner alleged that the performance of his trial counsel, Donald O'Brien, was constitutionally deficient because he failed to object to the jury instructions given by the court as to count eight of the amended information, thereby permitting the jury to reach a nonunanimous verdict on that count.[7] On March 29, 2016, the habeas court, *Sferrazza*, *J.*, held a trial in which it heard testimony from O'Brien and Dean Popkin, a Connecticut criminal defense attorney.

After trial, the habeas court denied the petition for a writ of habeas corpus. In its written memorandum of decision dated May 6, 2016, the court assumed,

verdict, and, thus, it reviewed this claim only as it applied to the petitioner's conviction on count eight. *State* v. *Hampton*, supra, 293 Conn. 444–45 n.7.

[7] The amended petition also included a second claim of ineffective assistance of trial counsel for "failure to impeach and/or cross-examine [the] victim with prior trial testimony." That claim, however, was withdrawn prior to the start of evidence at the habeas trial.

arguendo, that O'Brien had performed deficiently by failing to object to the court's error in instructing the jurors that they could find the petitioner guilty on count eight as a principal in light of the fact that the state had alleged only accessorial liability in that count of its amended information. The court concluded, however, that the petitioner had failed to establish prejudice, stating: "In order to return a not guilty verdict as a principal of the sexual assault charge alleged in count seven, the jury was clearly and properly instructed that the jury had to agree unanimously on that acquittal. By unanimously determining that the state had failed to prove the petitioner guilty as a principal, no juror logically could have then found him to be guilty of sexual assault as a principal in count eight. Such verdicts were mutually exclusive. The court draws the only reasonable conclusion that the jury must have unanimously found the petitioner guilty of sexual assault as an *accessory* to Mitchell's rape." (Emphasis in original.) This appeal followed.

As an initial matter, we set forth the applicable standard of review and principles of law. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . [T]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

"The petitioner's right to the effective assistance of counsel is assured by the sixth and fourteenth amendments to the federal constitution, and by article first, § 8, of the constitution of Connecticut." *Sanders* v.

Commissioner of Correction, 83 Conn. App. 543, 549, 851 A.2d 313, cert. denied, 271 Conn. 914, 859 A.2d 569 (2004). "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a [petitioner] must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment [to the United States constitution]. . . . To satisfy the prejudice prong, a [petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Citations omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [petitioner]." *Strickland* v. *Washington*, supra, 697.

In the present appeal, the precise nature of the petitioner's claim is somewhat unclear. In his brief, he appears to argue that his trial counsel's failure to object to the court's instruction on count eight was constitutionally deficient performance because he had not been charged as a principal in count eight of the amended information, yet the court nevertheless instructed the jury that it could find him guilty as a principal, as an accessory, or under the *Pinkerton* theory of vicarious liability. In light of the fact that (1) the habeas court assumed that the petitioner had met his burden to prove deficient performance, and (2) our Supreme Court, in the petitioner's direct appeal, indicated that the court

should not have instructed the jury on principal liability because it had not been pleaded in count eight of the information,[8] the question of whether counsel's performance was deficient is not truly in dispute.[9] Rather, the critical inquiry for this court is to focus on the precise harm that the petitioner asserts was created by this deficient performance and whether that harm is so significant that there is a reasonable probability that the outcome of the trial, with respect to count eight, would have been different.

[8] See footnote 4 of this opinion.

[9] It should be noted that the petitioner does not contend that his claim of ineffective assistance of trial counsel arose from O'Brien's failure to request a unanimity charge with respect to the underlying factual basis for count *seven*. More specifically, he does not claim that the possible lack of unanimity on count eight was due to the fact that the jurors should have been instructed that they could convict the petitioner of count seven only if they unanimously agreed that he personally committed a sexual assault against the victim by forcing her to perform fellatio *or* if they unanimously agreed that he personally committed the assault by forcing her to engage in vaginal intercourse.

Pursuant to *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), "[e]ven if the instructions at trial can be read to have sanctioned such a nonunanimous verdict . . . we will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 232, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014). Significantly, "case law provides that the alternative means of performing sexual intercourse are *not* conceptually distinct. See *State* v. *Anderson*, 211 Conn. 18, 35, 557 A.2d 917 (1989) ('[t]he several ways in which sexual intercourse may be committed under General Statutes § 53a-65 [2] are only one conceptual offense')." (Emphasis added.) *State* v. *Griffin*, 97 Conn. App. 169, 184 n.7, 903 A.2d 253, cert. denied, 280 Conn. 925, 908 A.2d 1088 (2006). Thus, this court held in *Griffin* that "the court's instruction that sexual intercourse included vaginal intercourse *or* cunnilingus did not constitute a nonunanimous instruction of two conceptually distinct alternatives." (Emphasis in original.) Id. Likewise, in the present case, the petitioner could not have prevailed on a claim that his counsel was deficient for failing to request a unanimity instruction as to whether the act of sexual intercourse underlying count seven was fellatio or vaginal intercourse, because the two acts are not two conceptually distinct alternatives for purposes of surmounting the first prong of *Famiglietti*.

In conducting this inquiry, we believe it is important, given that the alleged prejudice must flow from the precise claim of ineffective assistance being made, to note several points that are clear to us. First, the petitioner does not argue that he was prejudiced because the jury was permitted to consider a theory of liability of which he had not received notice.[10] In other words, he has not argued, in his attempt to establish prejudice, that had he known the state's true theory of liability for count eight, he would have defended the count differently, and that had he done so, there is a reasonable probability that he would have been acquitted of that count.

Second, in his attempt to establish that he was prejudiced by his trial counsel's deficient performance, the petitioner has not argued that the guilty verdict on count eight was factually and/or legally inconsistent with the verdict of acquittal on count seven. Even if his counsel's failure to object to the charge as given ultimately led to factually inconsistent verdicts on counts seven and eight, such a result, as a matter of law, would not constitute prejudice: "[I]t is well established that *factually* inconsistent verdicts are permissible. [When] the verdict could have been the result of compromise or mistake, we will not probe into the logic or reasoning of

[10] "[T]he United States Supreme Court has explained that [t]o uphold a conviction on a charge that was neither alleged in an [information] nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused. . . . Reviewing courts, therefore, cannot affirm a criminal conviction based on a theory of guilt that was never presented to the jury in the underlying trial. . . . To rule otherwise would permit trial by ambuscade. . . . Whether a defendant has received constitutionally sufficient notice of the charges of which he was convicted may be determined by a review of the relevant charging document, the theory on which the case was tried and submitted to the jury, and the trial court's jury instructions regarding the charges." (Citations omitted; internal quotation marks omitted.) *State* v. *King*, 321 Conn. 135, 148–50, 136 A.3d 1210 (2016).

the jury's deliberations or open the door to interminable speculation." (Emphasis in original; internal quotation marks omitted.) *State* v. *Nash*, 316 Conn. 651, 659, 114 A.3d 128 (2015).

If the petitioner had attempted to argue that the verdicts are *legally* inconsistent, he would have met a similar lack of success. Claims regarding legally inconsistent verdicts generally are divided into two categories. "The first category involves cases in which it is claimed that two *convictions* are inconsistent with each other as a matter of law or are based on a legal impossibility. . . . Such convictions . . . are reviewable . . . . The second category involves cases in which the defendant claims that one or more guilty verdicts must be vacated because there is an inconsistency between those guilty verdicts and a verdict of *acquittal* on one or more counts, or an acquittal of a codefendant. . . . It is well established that such inconsistent verdicts are not reviewable and the defendant is not entitled to relief . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Anderson*, 158 Conn. App. 315, 332–33, 118 A.3d 728, cert. granted on other grounds, 319 Conn. 908, 123 A.3d 437 (2015) (appeal withdrawn May 4, 2016). Thus, even if the petitioner had argued that he was prejudiced by legally inconsistent verdicts on counts seven and eight, this result would not constitute prejudice, as a matter of law, because it is not proper for an appellate court to compare a verdict of acquittal on one count with a verdict of guilt on another count for purposes of determining legal consistency.

This brings us then to the petitioner's actual argument regarding prejudice.[11] In terms of what we can divine

[11] We note that the petitioner does not argue that his counsel's deficient performance or the court's instructional error was structural in nature and that he, therefore, is excused from demonstrating prejudice under the sixth amendment to prevail on his claim. "Structural [error] cases defy analysis by harmless error standard because the entire conduct of the trial, from

from his brief, the petitioner appears to argue that the court's instruction that the petitioner could be found guilty as a principal on count eight was prejudicial because it potentially sanctioned a nonunanimous verdict by creating a scenario under which the jury could convict him of the charge in count eight without all of the jurors agreeing that the petitioner assisted Mitchell by holding a gun to the victim's head so that Mitchell could commit the sexual assault. In other words, the petitioner argues that some jurors may have convicted him on the basis that the petitioner had held a gun to the victim's head so that Mitchell could commit a sexual assault, while others voted to convict on the basis that the petitioner, as a principal, had compelled the victim to perform fellatio or that he had penetrated her vaginally.[12]

beginning to end, is obviously affected . . . . These cases contain a defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself . . . . Such errors infect the entire trial process . . . and necessarily render a trial fundamentally unfair . . . . Put another way, these errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally unfair." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 645, 153 A.3d 1264 (2017). Because the petitioner does not make this assertion in his brief or cite to any structural error cases, he has the burden of demonstrating that prejudice resulted from his trial counsel's deficient performance in failing to object to the court's instructions on count eight.

[12] Our Supreme Court expressly has held, as a general matter, that principal and accessorial liability are *not* conceptually distinct from each other, and, thus, a jury verdict on a particular count should be regarded as unanimous even if some jurors concluded that the defendant was an aider and abetter, while other jurors concluded that he was the principal. *State* v. *Smith*, 212 Conn. 593, 605, 563 A.2d 671 (1989). In the present case, however, the state did not allege the occurrence of merely *one* act of sexual assault for which it would have been proper for half the jurors to believe the petitioner was guilty under a theory of principal liability and half the jurors to believe he was guilty under a theory of accessorial liability; rather, it alleged the occurrence of *three* separate acts of sexual assault. The petitioner thus appears to argue that, given the instructions on count eight, the jury could have believed it proper for each juror to individually determine that any one of the three acts of sexual assault, two alleging principal liability and

As previously discussed, "[t]o satisfy the prejudice prong, a [petitioner] must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, supra, 286 Conn. 713. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Apodaca* v. *Commissioner of Correction*, 167 Conn. App. 530, 535, 146 A.3d 42 (2016). Given this standard for prejudice, we are not persuaded that there is a reasonable probability that some members of the jury could have convicted him as a principal on count eight and that others could have convicted him as an accessory on that same count. More specifically, we agree with the habeas court's assessment that the verdict of acquittal as to count seven leads us to conclude that there is not a reasonable probability that the verdict on count eight would have been different had the court not made the instructional mistake.

The habeas court ruled as follows in its memorandum of decision: "In order to return a not guilty verdict as a principal of the sexual assault charge alleged in count seven, the jury was clearly and properly instructed that [it] had to agree unanimously on that acquittal. By unanimously determining that the state had failed to prove the petitioner guilty as a principal, no juror could logically have then found him to be guilty of sexual assault as a principal in count eight. Such verdicts were mutually exclusive. The court draws the only reasonable conclusion that the jury must have unanimously found the petitioner guilty of sexual assault as an *accessory* to Mitchell's rape." (Emphasis in original.)

one alleging accessorial liability, was proven beyond a reasonable doubt, resulting in a nonunanimous guilty verdict.

First, the habeas court inartfully used the phrase "mutually exclusive" to describe the verdict of acquittal on count seven and the verdict of guilt on count eight. The term "mutually exclusive," as used in our case law, refers to two *convictions* that are inconsistent with each other as a matter of law or are based on a legal impossibility. See *State* v. *Nash*, supra, 316 Conn. 659. As previously discussed herein, such convictions are reviewable and cannot withstand a challenge if "the existence of the essential elements for one offense negates the existence of [one or more] essential elements for another offense of which the defendant also stands convicted." (Internal quotation marks omitted.) Id. The present case, however, does not involve a claim contesting two legally inconsistent convictions; accordingly, the habeas court's use of the term here does not fit. Nevertheless, we find the remainder of its reasoning persuasive.

In count seven, the petitioner was charged with first degree sexual assault *as a principal only*, and the court properly instructed the jury accordingly, expressly stating that, for purposes of this case, the jury should consider sexual intercourse to be vaginal intercourse or fellatio. Because we presume the jury properly followed the trial court's instructions in the absence of evidence to the contrary; *State* v. *Peeler*, 271 Conn. 338, 371, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); we assume that the jury did not limit its consideration of count seven to only one of the two possible acts of sexual assault allegedly perpetrated by the defendant as a principal. Rather, we presume that it considered *both* whether the petitioner principally compelled the victim to engage in vaginal intercourse with him *and* whether the petitioner principally compelled the victim to perform fellatio on him. Given that the jury acquitted the petitioner of count seven, we must, therefore, presume that it unanimously

concluded that the state failed to prove beyond a reasonable doubt either of the two sexual acts that the state alleged he committed as a principal.

Thus, if the jurors unanimously acquitted the petitioner of acting as the principal in committing the two separate acts of sexual assault alleged in count seven, this left only one act of sexual assault for them to consider in the context of count eight: vaginal penetration of the victim by Mitchell. Given this, and in light of the fact that the verdict form for count eight indicated that the petitioner was found guilty "as a principal or accessory," the most reasonable explanation for the verdict on count eight is that the jury found the petitioner guilty on a theory of accessorial liability for aiding Mitchell in sexually assaulting the victim.[13] The likelihood of this outcome becomes even greater considering the fact that the jury had before it both the amended information for count eight, which solely alleged that the petitioner "did intentionally aid James Mitchell" in sexually assaulting the victim, and the closing argument of the state, in which the prosecutor stated, "We're charging him [in count eight] . . . that he aided, that he helped Mr. Mitchell in engaging in sexual intercourse with [the victim]."[14]

Ultimately, the most that can be said of the petitioner's prejudice argument here is that it was merely *possi-*

[13] By so concluding, we do not mean to suggest or presume that the jury must have decided counts seven and eight in any particular order. The reality, however, is that, ultimately, the jury acquitted him of the two acts of sexual assault of which the state accused him as a principal, and found him guilty on count eight.

[14] Specifically, the prosecutor stated: "[L]et me go to count eight because we're going to talk about some of these things together. . . . We're charging him . . . that he aided, that he helped Mr. Mitchell in engaging in sexual intercourse with [the victim]. . . . The question for you is, looking at the facts here, did James Mitchell force [the victim] to engage in sexual intercourse when a shotgun was pointed at her and he told her to take off her clothes? . . . I submit to you that the [petitioner] had the gun when James Mitchell forced her to bend over and he placed his penis into her vagina . . . ."

ble that the court's improper instructions on count eight caused juror confusion as to whether some of the jurors could have decided that the state met its burden of proof with respect to one of the acts of sexual assault, while others could have decided that the state met its burden of proof with respect to another act of sexual assault. For the petitioner to prevail on the prejudice prong of his habeas claim of ineffective assistance of counsel, however, the high burden is on him to prove that there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the trial as to count eight would have been different. The petitioner has failed to show that his theory of juror nonunanimity was anything more than speculative and, thus, has not undermined confidence in the outcome. We, therefore, conclude that the habeas court did not improperly conclude that the petitioner's claim of ineffective assistance of trial counsel fails on the prejudice prong of the *Strickland* test. Accordingly, we affirm the judgment of the habeas court.

The judgment is affirmed.

In this opinion the other judges concurred.