STATE OF CONNECTICUT *v.* SHAKEE S. GALBERTH (AC 38633)

Sheldon, Beach and Mihalakos, Js.

Syllabus

The defendant appealed to this court following the trial court's denial of his motion to dismiss his violation of probation charge. In November, 2002, the defendant pleaded guilty to the sale of a narcotic substance, and was sentenced to fifteen years of imprisonment, execution suspended after six years, followed by three years of probation. In April, 2005, he was granted parole with a maximum release date in September, 2007, but, in April, 2006, while on parole, the defendant was arrested for additional narcotics offenses. He pleaded guilty to the 2006 charges, and was incarcerated from October, 2006, to July, 2012. In December, 2012, the defendant was again arrested and charged with four additional counts of the sale of a narcotic substance. In January, 2013, a warrant was issued for the defendant's arrest on the ground that he had violated his probation, and, the following month, he was arrested and charged with violation of probation. Subsequently, the defendant filed a motion to dismiss the violation of probation charge on the ground that he was not legally on probation in 2013 when the violation of probation warrant was executed, based on his arrest on the 2012 narcotics charges. The trial court denied the defendant's motion to dismiss, and after the defendant's plea of nolo contendere to the charge of violation of probation, this appeal followed. *Held*:

1. The defendant could not prevail on his claim that the trial court did not have subject matter jurisdiction over the probation violation proceeding because he was not on probation at the time the warrant for his arrest for violation of probation was executed or at the time of the subsequent hearing on his motion to dismiss: the court's jurisdiction over the probation revocation proceeding was derived from the defendant's original criminal proceeding in 2002, and the probationary period imposed as part of the 2002 sentence was at issue before the court, and therefore the trial court had jurisdiction over the defendant's subsequent violation of probation charge.

2. The defendant could not prevail on his claim that the trial court improperly denied his motion to dismiss the violation of probation charge because he had completed the three year probationary portion of his 2002 sentence prior to his arrest on the 2012 narcotics charges, which formed the basis of the arrest warrant for the violation of probation: pursuant to statute (§ 53a-31 [a]), a defendant cannot be released from imprisonment for the purposes of commencing his probationary period until he is no longer in the custody of the Commissioner of Correction, and a defendant on parole is not functionally released from imprisonment, and because the defendant here was in the continuous custody of the Commissioner of Correction for an extended period of time due to his incarceration for additional narcotics offenses committed in 2006 while he was on parole, the defendant did not commence his probation until he was released from custody in July, 2012, and, therefore, he did not complete the probationary portion of his 2002 sentence prior to January, 2013, when the arrest warrant for the violation of probation was issued.

Argued May 25—officially released August 29, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, where the court, *Cradle*, *J.*, denied the defendant's motion to dismiss; thereafter, the defendant was presented to the court on a conditional plea of nolo contendere; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed.*

Edward G. McAnaney, assigned counsel, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *Jonathan M. Sousa*, former special deputy assistant state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

MIHALAKOS, J. The defendant, Shakee S. Galberth, appeals following the trial court's denial of his motion to dismiss his violation of probation charge. On appeal,

the defendant claims that the trial court (1) did not have subject matter jurisdiction over the probation violation proceeding, and (2) improperly denied his motion to dismiss because his probationary period had expired. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our review. On November 20, 2002, the defendant pleaded guilty to three counts of the sale of a narcotic substance in violation of General Statutes § 21a-277 (a)[1] and was sentenced to fifteen years of imprisonment, execution suspended after six years, followed by three years of probation (2002 sentence). On April 29, 2005, he was granted parole with a maximum release date of September 7, 2007.[2] On April 18, 2006, while on parole, the defendant was arrested for several more narcotics offenses (2006 charges). He pleaded guilty to the 2006 charges and was sentenced to an additional eighty-one months of incarceration, to run concurrently with the remainder of his 2002 sentence. His probationary period from the 2002 sentence was not addressed by the court. He was incarcerated from October 2, 2006, to July 20, 2012. On July 24, 2012, he signed the document containing the conditions of his probation, and his probationary period began. Subsequently, on December 7, 2012, while on probation, the defendant was arrested and charged with four counts of the sale of a narcotic substance (2012 charges). On

[1] General Statutes § 21a-277 (a) provides in relevant part: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance . . . shall be imprisoned not more than fifteen years . . . ."

[2] The parties stipulated to a maximum release date of September 7, 2007, taking into account the sentence credit that the defendant received for time served while on bond and awaiting disposition of the 2002 case.

January 29, 2013, the Office of Adult Probation, pursuant to General Statutes § 53a-32,[3] obtained a warrant for the defendant's arrest on the ground that he had violated his probation. Thereafter, the defendant was arrested and charged with violating his probation.

The defendant was arraigned on the December, 2012 charges on February 6, 2013, and on the violation of probation charge on February 7, 2013. At his arraignment on the violation of probation charge, a question arose between the defendant and the state about whether the defendant's probation under the 2002 sentence had terminated prior to his arrest on the 2012 charges. Thereafter, the defendant filed a motion to dismiss the violation of probation charge on the ground that he was not legally on probation at the time of the execution of the violation of probation warrant on January 29, 2013, which was based on the defendant's arrest on the 2012 narcotics charges. The defendant did not challenge the trial court's subject matter jurisdiction at that time, and the trial court did not rule on jurisdictional matters. Arguments were heard on November 4, 2013, and the trial court denied the motion to dismiss in a written memorandum of decision. Subsequently, the defendant entered a conditional plea of nolo contendere on the violation of probation charge, reserving his right to appeal from the denial of his motion to dismiss. Upon agreement between the defendant and the state that he would serve only one half of his remaining nine years, the defendant was sentenced to four and one-half years of imprisonment on July 3, 2014, to be served concurrently with the sentence imposed for his 2012 narcotics charges. This appeal followed. Additional facts will be set forth as necessary.

[3] General Statutes § 53a-32 (a) provides in relevant part: "At any time during the period of probation . . . the court or any judge thereof may issue a warrant for the arrest of a defendant for violation of any of the conditions of probation . . . ."

I

The defendant first claims that the trial court did not have subject matter jurisdiction over the probation violation proceeding because he was not on probation at the time the warrant for his arrest for violation of probation was executed or at the time of the hearing on his motion to dismiss. Specifically, he argues that his probationary period concluded no later than November 19, 2011, and therefore he was not on probation at the time of the 2012 narcotics charges, which formed the basis of his violation of probation. Accordingly, he argues, the court lacked subject matter jurisdiction over the probation violation proceeding. We disagree.

We first set forth our standard of review. "[B]ecause [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary." (Internal quotation marks omitted.) *Arriaga* v. *Commissioner of Correction*, 120 Conn. App. 258, 261, 990 A.2d 910 (2010), appeal dismissed, 303 Conn. 698, 36 A.3d 224 (2012). "Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 727–28, 724 A.2d 1084 (1999).

"Article fifth, § 1 of the Connecticut constitution proclaims that '[t]he powers and jurisdiction of the courts shall be defined by law' "; *State* v. *Carey*, 222 Conn.

299, 305, 610 A.2d 1147 (1992); and General Statutes § 51-164s provides in relevant part that "[t]he Superior Court shall be the sole court of original jurisdiction for all causes of action, except such actions over which the courts of probate have original jurisdiction, as provided by statute. . . ." "Because [r]evocation is a continuing consequence of the original conviction from which probation was granted . . . and the inherent authority to convict and sentence a defendant flows from the authority to adjudicate a criminal cause of action, the subject matter jurisdiction over a probation revocation proceeding derives from the original presentment of the information." (Citation omitted; internal quotation marks omitted.) Id., 306.

In the present case, the trial court's subject matter jurisdiction derived from the defendant's original criminal proceeding in 2002, in which he was convicted of the sale of narcotics. As part of his 2002 sentence, a probationary period was imposed, and it is this probationary period that is at issue. Therefore, the trial court maintained subject matter jurisdiction over the defendant's subsequent violation of probation charge.

II

The defendant next claims that the trial court improperly denied his motion to dismiss the violation of probation charge because his probationary period had expired. Specifically, the defendant argues that he had completed the probationary portion of his 2002 sentence prior to his arrest on the 2012 charges, which formed the basis of the arrest warrant for the violation of probation, because his probation commenced following his maximum release date of September 7, 2007, as stipulated by the parties and after he was physically released from prison, and terminated three years later, on September 7, 2010. The state argues that, because the defendant was charged in 2006 while on parole

for the 2002 sentence, the start of his probation was delayed. Specifically, the state claims that the defendant's probationary period was delayed until he was released from incarceration on July 20, 2012. The trial court found that the defendant began his probation on the 2002 sentence after he was released from custody on July 20, 2012. We agree with the trial court.

At the outset, we must distinguish between the effects of parole and probation on the status of the defendant. Pursuant to General Statutes § 54-125a (a),[4] a defendant who received a definite sentence or total effective sentence of more than two years may be approved to be released on parole at the discretion of the Board of Pardons and Paroles to serve out the remainder of his custodial sentence in the community. If released on parole, the defendant is not considered released from custody or imprisonment. Section 54-125a (g) indicates that "[a]ny person released on parole under this section *shall remain in the custody of the Commissioner of Correction* and be subject to supervision by personnel of the Department of Correction during such person's period of parole." (Emphasis added.)

"The rights of an individual on [parole] are unique in that they lie somewhere between those of a [probationer] and those of an incarcerated inmate . . . . [S]upervision of the [parolee] continues to be vested in the [D]epartment of [C]orrection, as it is for someone who is incarcerated. . . . Conversely, a probationer is subject to judicial control and the court has the freedom

[4] General Statutes § 54-125a (a) provides in relevant part: "A person convicted of one or more crimes who . . . received a definite sentence or total effective sentence of more than two years, and who has been confined under such sentence or sentences for not less than one-half of the total effective sentence . . . may be allowed to go at large on parole . . . if (A) it appears from all available information . . . that there is a reasonable probability that such inmate will live and remain at liberty without violating the law, and (B) such release is not incompatible with the welfare of society."

to modify or enlarge the conditions of probation if necessary. . . . Clearly the situations of a prisoner on [parole] and a person on probation are different. The legislature has set out separate schemes of treatment with different consequences of not complying with the established conditions. It is in keeping with these schemes that a violation of probation cannot occur until the probationary period has begun." (Citations omitted; internal quotation marks omitted.) *State* v. *Deptula*, 34 Conn. App. 1, 10, 639 A.2d 1049 (1994). In the present case, when the defendant was physically released from prison in 2005, he was on parole. Therefore, he was still under the custody of the Commissioner of Correction at the time of the 2006 charges. Consequently, his probationary period did not begin until he was released from the custody of the Commissioner of Correction on July 20, 2012.

Having resolved the distinctions between probation and parole, we now set forth our standard of review. "A trial court may continue or revoke the sentence of probation or conditional discharge or modify or enlarge the conditions, and, if such sentence is revoked, require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this determination, the trial court is vested with broad discretion. . . . [H]owever, an issue of law must be determined before any question of discretion is reached. The court's legal conclusion that the defendant was subject to a charge of violation of probation is subject to our plenary review." (Internal quotation marks omitted.) *State* v. *Outlaw*, 60 Conn. App. 515, 522, 760 A.2d 140 (2000), aff'd, 256 Conn. 408, 772 A.2d 1122 (2001).

Pursuant to General Statutes § 53a-31 (a), "[a] period of probation or conditional discharge commences on

the day it is imposed, unless the defendant is imprisoned, in which case it commences on the day the defendant is *released* from such imprisonment."[5] (Emphasis added.) As previously determined by this court, "the term release as used in . . . § 53a-31 includes physical release from custody . . . and . . . probation commences by operation of law on the date of the actual release from imprisonment." (Internal quotation marks omitted.) *State* v. *Outlaw*, supra, 60 Conn. App. 521. "Although probation may continue during a period of incarceration, it does not commence pursuant to § 53a-31 (a) unless the defendant is released from imprisonment." Id., 523–24.[6]

Our holding in *Outlaw* is controlling in the present case. In *Outlaw*, the defendant was sentenced to a period of twenty years of incarceration, execution suspended after ten years, followed by three years of probation. Id., 517. The defendant was continuously incarcerated from July 9, 1985, to August 6, 1996. Id., 518. During his incarceration he was convicted of three additional offenses for which "unrelated consecutive

[5] The defendant's reliance on § 53a-31 (b) is misplaced. General Statutes § 53a-31 (b) provides in relevant part: "The issuance of a warrant or notice to appear . . . for violation pursuant to section 53a-32 shall interrupt the period of the sentence until a final determination as to the violation has been made by the court." The defendant claims that the 2006 arrest did not toll the running of his period of probation. This court has held that "[p]ursuant to . . . § 53a-31 (b), the running of the probationary period is tolled where the revocation is commenced pursuant to the provisions of . . . § 53a-32." (Emphasis omitted.) *State* v. *Egan*, 9 Conn. App. 59, 73, 514 A.2d 394, cert. denied, 201 Conn. 811, 516 A.2d 886 (1986). In the present case, the issue is not whether the defendant's probationary period was tolled by his 2006 arrest, but rather whether the probationary period began to run in the first place. Because the defendant's probationary period did not commence until he was released from imprisonment in 2012, § 53a-31 (b) is inapplicable.

[6] See *State* v. *Strickland*, 39 Conn. App. 722, 727, 667 A.2d 1282 (1995) (holding that it was possible for defendant to be concurrently in custody and on probation as result of separate convictions), cert. denied, 235 Conn. 941, 669 A.2d 577 (1996). Those facts, however, are not present in this case.

sentences were imposed on [him] before he completed the incarceration portion of his [first] sentence." (Emphasis omitted.) Id., 518, 523.[7] His probation would have begun on February 3, 1995, but he was incarcerated until August 6, 1996, on the additional offenses. Id., 518, 520 and n.7. Because the defendant in *Outlaw* was not released from custody until August 6, 1996, after all his sentences had been served, this court held that the defendant did not begin his probationary period for the 1985 sentence until he was released from incarceration in 1996. Id., 523–24.

Similarly, in the present case, the defendant was continuously in the custody of the Commissioner of Correction, whether incarcerated or on parole, until his release in 2012. He was granted parole on April 29, 2005, and would have remained in the custody of the Commissioner of Correction while on parole until his maximum release date of September 7, 2007. Had he successfully completed his parole, the defendant would have then begun his three years of probation on September 7, 2007. His arrest in 2006, however, interrupted his parole because he was subsequently convicted and incarcerated on the 2006 charges. Although the defendant was no longer physically incarcerated beginning on April 29, 2005, he was not released from the custody of the

[7] It is not pertinent for the purposes of this analysis that the defendant's 2006 sentence ran concurrent to his 2002 sentence, as opposed to running consecutively as in the *Outlaw* case. This court's analyses in *Outlaw* and *McFarland* indicate that whether the defendant is in the custody of the Commissioner of Correction is the key consideration in determining whether the defendant has been released for the purposes of § 53a-31 (a). See *State* v. *Outlaw*, supra, 60 Conn. App. 523 ("[t]he [*McFarland*] decision's rationale is that the defendant is not in the custody of the commissioner of correction under either circumstance"); see also *State* v. *McFarland*, 36 Conn. App. 440, 448, 651 A.2d 285 (1994) ("[w]e hold that the term release as used in . . . § 53a-31 includes physical release from custody . . . and that probation commences by operation of law on the date of the actual release from imprisonment"), cert. denied, 232 Conn. 916, 655 A.2d 259 (1995).

Commissioner of Correction, and, therefore, his probation did not commence. To hold that the defendant could serve the entirety of his probationary period while incarcerated would lead to results that would undermine the purposes of and distinctions between the probation and parole statuses.[8]

Because a defendant cannot be released from imprisonment for the purposes of commencing his probationary period under § 53a-31 (a) until he is no longer in the custody of the Commissioner of Correction, and our case law has determined that one on parole has not functionally been "released from imprisonment," we conclude that the defendant did not commence his probation until he was released from custody on July 20, 2012. Accordingly, the trial court properly determined that the defendant was on probation at the time that the arrest warrant for the violation of probation was issued on January 29, 2013, and properly denied the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] See *State* v. *McFarland*, 36 Conn. App. 440, 446, 651 A.2d 285 (1994) ("Although penal statutes such as § 53a-31 et seq. are to be strictly construed in favor of the accused, such construction should not exclude common sense so that absurdity results and the evident design of the legislature is frustrated. . . . If two constructions of a statute are possible, we will adopt the one that makes the statute effective and workable, not the one leading to difficult and bizarre results." [Citation omitted.]), cert. denied, 232 Conn. 916, 655 A.2d 259 (1995).

ROSE B.* *v.* PRINCESS DICKSON DAWSON
(AC 39695)

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

Syllabus

The defendant appealed to this court from the judgment of the trial court granting the plaintiff's application for a civil protection order. The plaintiff had filed the application, pursuant to statute (§ 46b-16a), against the defendant, a former friend, claiming that she had been the victim of stalking by the defendant and that she feared for her safety and well-being. *Held*:

1. The defendant could not prevail on her claim that the trial court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief; because the record did not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision as required by the rules of practice (§ 64-1 [a]), and the defendant merely included a copy of three pages of the trial transcript that was not signed by the court, which did not reveal the factual or legal bases for the court's decision, this court's review of the record did not afford it a basis on which to conclude that errors were made, and this court would not speculate with regard to the rationale of the trial court's decision nor presume that the court acted erroneously.
2. The trial court did not abuse its discretion in denying the defendant's request for reconsideration, in which she alleged that because the application filed by the plaintiff did not include dates, she lacked adequate notice as to the specific facts that formed the basis for the plaintiff's application and was unduly surprised at the hearing by the plaintiff's version of the events; the defendant did not raise any issue with respect to a lack of specificity in the plaintiff's application prior to the date of the full hearing, during the presentation of evidence at the hearing, or after the court heard the evidence but prior to the time that it rendered its decision in this matter, and because the defendant did not assert that she was prejudiced by the lack of specificity in the plaintiff's application until after the court announced its ruling, which was adverse to her, the trial court properly found the defendant's expressed concern to be untimely.

Argued May 31—officially released August 29, 2017

* In accordance with our policy of protecting the privacy interest of the applicant for a protective order, we decline to identify the applicant or others through whom the applicant's identity may be ascertained.

Procedural History

Application for civil order of protection, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kamp*, *J.*, granted the application; thereafter, following a hearing, the court, *Hon. Edward F. Stodolink*, judge trial referee, continued the order of protection, and the defendant appealed to this court. *Affirmed.*

Robert Berke, for the appellant (defendant).

Opinion

KELLER, J. The defendant, Princess Dickson Dawson, appeals from the judgment of the trial court granting the application for a civil protection order filed by the plaintiff, Rose B.[1] The defendant claims (1) that the court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief[2] and (2) the court improperly denied the defendant's "request for a continuance and reconsideration." We affirm the judgment of the trial court.

The record reveals the following facts. On September 27, 2016, the plaintiff, pursuant to General Statutes § 46b-16a, filed an application for an order of civil protection against the defendant, who is described in the application as the plaintiff's "former friend," a person whom she has known for more than fifteen years. In her application, the plaintiff alleged in relevant part that she had been the victim of stalking by the defendant and that she feared for her "safety [and] well-being." She referred to three incidents involving her and the

[1] The plaintiff did not file a brief in connection with this appeal. We consider the appeal on the basis of the defendant's brief and the record.

[2] We observe that the defendant sets forth three claims in her brief. We deem the first two of those claims to be materially indistinguishable and, therefore, consider them together.

defendant. One incident took place outside of her place of employment, a second incident took place at a Walmart store in Stratford, and a third incident took place at a courthouse. The plaintiff stated that, during the incident at Walmart, the defendant and the defendant's daughter "followed [her] into every aisle." The plaintiff requested that the court order that the defendant (1) not assault, threaten, abuse, harass, follow, interfere with, or stalk her; (2) stay away from her home; (3) not contact her in any manner; and (4) stay 100 yards away from her. The court, *Kamp, J.*, granted the application and issued an ex parte civil protection order.

The court, *Hon. Edward F. Stodolink*, judge trial referee, held a hearing on the application on October 6, 2016. At the hearing, the court considered the application brought by the plaintiff against the defendant as well as a separate application brought by the plaintiff against the defendant's daughter.[3] The plaintiff testified with respect to three separate incidents. The first was on May 10, 2016, at the Stratford Walmart store; the second was on June 25, 2016, at a public park in Bridgeport; the third was on September 26, 2016, at a courthouse in Bridgeport. The court also heard testimony from the defendant, the defendant's daughter, and Sylveri Gonzalez, a victim's advocate. At the conclusion of the hearing, the court granted the plaintiff's application, with the conditions sought by the plaintiff to remain in effect until October 6, 2017. The court denied the defendant's oral motion, raised immediately after the court announced its ruling, to reconsider its decision. This appeal followed.

I

First, the defendant, interpreting the evidence in the light most favorable to the nonmovant, argues that the

[3] The court denied the application brought against the defendant's daughter. The court's resolution of that matter is not a subject of the present appeal.

court abused its discretion in granting the application because the plaintiff did not present sufficient evidence to warrant such relief. We disagree.

In the appendix to her brief, the defendant has included a copy of what she describes as the "Trial Court's Decision," but it is not in the proper form. The "decision" consists of three pages of the trial transcript. These pages consist of a colloquy between the court, the defendant's counsel, the defendant, and the plaintiff. The transcript is not signed by the trial court. A signed copy of a memorandum of the court's decision does not appear in the court file.

Because the court's judgment in the plaintiff's favor was a final judgment in this matter, the court was obligated under Practice Book § 64-1 (a) "[to] state its decision either orally or in writing . . . . The court's decision shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor. If oral, the decision shall be recorded by a court reporter, and, if there is an appeal, the trial court shall create a memorandum of decision for use in the appeal by ordering a transcript of the portion of the proceedings in which it stated its oral decision. The transcript of the decision shall be signed by the trial judge and filed with the clerk of the trial court." Pursuant to § 64-1 (b), "[i]f the trial judge fails to file a memorandum of decision or sign a transcript of the oral decision in any case covered by subsection (a), the appellant may file with the appellate clerk a notice that the decision has not been filed in compliance with subsection (a). The notice shall specify the trial judge involved and the date of the ruling for which no memorandum of decision was filed. The appellate clerk shall promptly notify the trial judge of the filing of the appeal and the notice. The trial court shall thereafter comply with subsection (a)." The court file reflects that the defendant, who bears the burden of perfecting the

record for presentation on appeal; Practice Book §§ 60-5, 61-10 (a); did not file a motion pursuant to § 64-1 (b) with the appellate clerk. Thus, we are unable readily to identify the decision from which the defendant now appeals.

"When the record does not contain either a memorandum of decision or a transcribed copy of an oral decision signed by the trial court stating the reasons for its decision, this court frequently has declined to review the claims on appeal because the appellant has failed to provide the court with an adequate record for review. . . . Moreover, [t]he requirements of Practice Book § 64-1 are not met by simply filing with the appellate clerk a transcript of the entire trial court proceedings. . . . Despite an appellant's failure to satisfy the requirements of . . . § 64-1, this court has, on occasion, reviewed claims of error in light of an unsigned transcript as long as the transcript contains a sufficiently detailed and concise statement of the trial court's findings." (Citations omitted; internal quotation marks omitted.) *Stechel* v. *Foster*, 125 Conn. App. 441, 445, 8 A.3d 545 (2010), cert. denied, 300 Conn. 904, 12 A.3d 572 (2011).

As stated previously in our discussion, the defendant has drawn our attention to the pages of the trial court transcript in which the court stated that it granted the relief sought in the plaintiff's application. The unsigned transcript, however, does not reveal a sufficiently detailed and concise statement of the court's findings. With respect to its decision to grant the relief sought in the plaintiff's application, the court merely stated: "As to [the defendant], I will grant the application."

A careful review of the defendant's arguments reflects her belief that the court committed errors of law or fact in exercising its discretion to grant the application. Because the record does not reveal the

factual or legal bases for the court's decision, our careful review of the record does not afford us a basis on which to conclude that such errors were made. See *Ellen S.* v. *Katlyn F.*, 175 Conn. App. 559, 565, A.3d (2017), and cases cited therein. This court will neither speculate with regard to the rationale underlying the court's decision nor, in the absence of a record that demonstrates that error exists, presume that the court acted erroneously. See, e.g., *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017); *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 382, 140 A.3d 1004 (2016). Accordingly, we reject this claim.

II

Next, the defendant claims that the court "erred in denying [her] request for a continuance and reconsideration." The defendant argues that the court's ruling was improper because "[t]he application [filed by the plaintiff] did not include dates and therefore did not provide [the defendant] with adequate notice as to the specific facts which form the basis of the application." She argues that, at the time of the hearing, she was unduly surprised by the plaintiff's version of the events. We disagree with the defendant that the court's ruling reflected an abuse of discretion.

With respect to the motion for reconsideration,[4] the defendant refers us to the trial transcript, which reflects that, immediately after the court stated that it had granted the plaintiff's application, the defendant's counsel stated: "In regard to [the defendant], you know, what sometimes is complicated about these is that sometimes the applications are not entirely complete and don't

[4] Although the defendant claims that the court denied a request for a continuance and reconsideration, neither the court file nor the transcript of the proceedings filed by the defendant reflect that the defendant explicitly requested a continuance. The defendant is not entitled to relief in connection with a request for a continuance that was neither raised before nor ruled on by the court.

have all the dates. Now that we are on notice of the dates, would the court . . . consider a motion to reconsider so [that] we can have the opportunity to supply for lack of a better word an alibi regarding the dates that were alleged?" The court replied: "No, because the hearing was set by Judge Kamp some time ago and it was going to go forward today." The defendant's counsel replied: "The only problem is we don't know based on the complaint what the dates were in regards to the complaints." The court stated: "I'll deny your request."

As the defendant correctly observes, the court's denial of the oral motion for reconsideration is entitled to deference by this court. "The granting of a motion for reconsideration . . . is within the sound discretion of the court. The standard of review regarding challenges to a court's ruling on a motion for reconsideration is abuse of discretion. As with any discretionary action of the trial court . . . the ultimate [question for appellate review] is whether the trial court could have reasonably concluded as it did." (Internal quotation marks omitted.) *Shore* v. *Haverson Architecture & Design, P.C.*, 92 Conn. App. 469, 479, 886 A.2d 837 (2005), cert. denied, 277 Conn. 907, 894 A.2d 988 (2006).

From the court's response to the defendant's motion, it appears that the court viewed the defendant's expressed concern to be untimely. The court observed that the matter was scheduled for a hearing by Judge Kamp when he granted the plaintiff's ex parte application for an order of civil protection. Judge Kamp's ruling occurred on September 27, 2016, nine days before the full hearing, which took place on October 6, 2016. The defendant did not raise any issue with respect to a lack of specificity in the plaintiff's application prior to the date of the full hearing, during the presentation of evidence at the hearing, or after the court heard the evidence but prior to the time that it rendered its decision in this matter. Instead, only after the court announced

its ruling, which was adverse to the defendant, did the defendant's counsel for the first time assert that the defendant was prejudiced by a lack of specificity in the plaintiffs application. In these circumstances, we are not persuaded that the court's decision reflects an abuse of discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

GAYLORD SALTERS *v.* COMMISSIONER OF CORRECTION (AC 38371)

Lavine, Mullins and Bear, Js.

Syllabus

The petitioner, who had been convicted of various crimes in connection with a gang related shooting, filed a second petition for a writ of habeas corpus, claiming, inter alia, that the counsel who represented him in connection with his first habeas petition provided ineffective assistance in failing to raise claims that the petitioner's criminal trial counsel was ineffective for not objecting to erroneous jury instructions or requesting an evidentiary hearing pursuant to *Brady* v. *Maryland* (373 U.S. 83), which the petitioner claimed would have disclosed material, exculpatory impeachment evidence. He also alleged that his first habeas counsel was ineffective for having failed to raise claims that the petitioner's appellate counsel on direct appeal was ineffective for having failed to raise the *Brady* violation and a claim of prosecutorial impropriety. The habeas court rendered judgment denying the second habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The record was inadequate to review the petitioner's claim that the habeas court erred in failing to apply the strict standard of materiality to his *Brady* claims, in which he alleged that the prosecutor knowingly relied on false testimony; although the amended habeas petition included factual allegations that the prosecution knowingly relied on false testimony, the habeas court's memorandum of decision was devoid of any factual findings or legal analysis involving the allegations of false testimony, and this court would not address a claim that was not decided by the habeas court.
2. The petitioner could not prevail on his claim that the habeas court erred in denying his claim that his first habeas counsel was ineffective for

having failed to raise a claim that the petitioner's trial counsel provided ineffective assistance by failing to object to certain jury instructions on intent, which included the full statutory definition for specific and general intent crimes, even though the petitioner had been charged with specific intent crimes only; although it was improper for the trial court to include the full statutory definition of intent in its charge to the jury, it was not reasonably possible that the jury was misled and the petitioner was not harmed thereby, as the trial court, in its instructions on the intent required for the crimes charged, repeatedly referred to the proper specific intent required for the commission of those crimes so as to mitigate any harm to the petitioner, whereas it gave the erroneous instruction once.

3. The habeas court's determination that appellate counsel made a reasonable strategic decision to forgo on direct appeal a claim of prosecutorial impropriety was supported by the record, the evidence having shown that counsel decided to forgo the claim because she considered it to be meritless, and, therefore, because appellate counsel was not deficient for having failed to bring such a claim, a claim of ineffective assistance of first habeas counsel for failing to claim that appellate counsel was ineffective on that ground could not stand; moreover, although certain testimony by a state's witness could have indicated that he was pressured by the police to make a statement, the prosecutor's statements to the jury that the witness was not told to identify the petitioner as the driver of the vehicle from which gunshots were fired and was not directed what to say in his statement to the police were reasonable characterizations of the evidence and were not improper.

Argued April 11—officially released August 29, 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, *Cobb*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Arthur L. Ledford, assigned counsel, for the appellant (petitioner).

Rita M. Shair, senior assistant state's attorney, with whom were *Patrick J. Griffin*, state's attorney, and, on the brief, *Adrienne Maciulewski*, assistant state's attorney, for the appellee (respondent).

Opinion

BEAR, J. The petitioner, Gaylord Salters, 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 (1) failed to apply the strict standard of materiality to his claim of a *Brady* violation,[2] which included factual allegations that the prosecution knowingly relied on false testimony; (2) denied his claim of ineffective assistance by his prior habeas trial counsel (habeas counsel) for failing to raise a claim that the petitioner's criminal trial counsel (trial counsel) was ineffective for failing to raise a claim of instructional error;[3] (3) failed to apply the "findings" that this court made in his appeal from the judgment in his first habeas case; and (4) found that the decision of his appellate counsel on direct appeal (appellate counsel) to forgo raising a prosecutorial impropriety claim was a reasonable strategic decision. We affirm the judgment of the habeas court.

As this court previously stated, the jury reasonably could have found the following facts in the petitioner's criminal trial. "On November 24, 1996, the [petitioner] participated in a gang related shooting in New Haven. The [petitioner], a member of the Island Brothers street

[1] The habeas court granted the petitioner certification to appeal. See General Statutes § 52-470.

[2] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1986).

[3] As stated exactly by the petitioner, the second issue he raises on appeal asks "whether the habeas court erred when it failed to consider the trial court's jury instruction defining 'acting intentionally,' which included the definition for specific and general intent . . . ." On the basis of our reading of the petitioner's arguments in support of this claim, we understand his claim to be that the habeas court improperly denied his claim of ineffective assistance of habeas counsel for failing to raise a claim that his trial counsel was ineffective for failing to raise a claim of instructional error when the habeas court failed to adequately address the legal ramifications of the trial court's reading of the statutory definition of "acting intentionally."

gang, drove behind an automobile being driven by Daniel Kelley. Either the [petitioner] or an accomplice riding in his automobile fired on Kelley's automobile. Kelley sustained a gunshot wound to his shoulder and lost control of his automobile, causing it to crash into two vehicles parked nearby. Kelley's passenger, Kendall Turner, a member of the Ghetto Boys street gang, sustained a gunshot wound to his elbow. The Island Brothers and the Ghetto Boys, both of which were involved in illegal activity, had a hostile relationship marked by gun violence between rival gang members." *State* v. *Salters*, 89 Conn. App. 221, 222–23, 872 A.2d 933, cert. denied, 274 Conn. 914, 879 A.2d 893 (2005).

The following factual and procedural background is relevant to our resolution of the petitioner's appeal. Following a jury trial, the petitioner was convicted of two counts of assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and one count of conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-48 (a). Id., 222. The petitioner directly appealed to this court, claiming that the trial court violated his right to present a defense by precluding him from presenting testimony from an alibi witness at trial. Id. This court affirmed his conviction. Id., 236.

In 2006, the petitioner filed his first petition for a writ of habeas corpus, which he subsequently amended. In his second amended petition, he claimed that he was denied due process because the prosecutor withheld material, exculpatory impeachment information, which constituted a *Brady* violation, in that the prosecutor failed to provide such information pertaining to Kendall Turner, a key witness for the state. *Salters* v. *Commissioner of Correction*, 141 Conn. App. 81, 83–84, 60 A.3d 1004, cert. denied, 308 Conn. 932, 64 A.3d 330 (2013). He also alleged ineffective assistance of counsel

because his trial counsel failed (1) to sufficiently investigate, discover, and present to the jury information regarding Turner's statement to the police and (2) to conduct sufficient discovery.[4] Id., 84. After conducting a habeas trial, the court, *Fuger*, *J.*, rendered judgment denying the petition. Id. The habeas court determined that defense counsel's testimony was more credible than the petitioner's testimony, that defense counsel adequately investigated Turner's criminal history prior to trial, and that the prosecutor disclosed all of the information he had pertaining to Turner. Id. The petitioner subsequently appealed to this court.

On appeal, this court concluded that the habeas court did not err in rejecting the petitioner's claim of ineffective assistance of counsel. Id., 86. Additionally, this court held that the petitioner's *Brady* claim was procedurally defaulted because, at the time of trial and his direct appeal, he knew of the existence of the records that he claimed in his habeas petition were unlawfully withheld, and he could have raised the alleged *Brady* violation at trial by requesting an evidentiary hearing on the potential *Brady* evidence or on direct appeal by raising a *Brady* claim. Id., 89–90. Consequently, this court affirmed the habeas court's judgment denying the petition; id., 91; and our Supreme Court denied certification to appeal. *Salters* v. *Commissioner of Correction*, 308 Conn. 932, 64 A.2d 330 (2013).

On June 2, 2010, the then self-represented petitioner filed a second petition for a writ of habeas corpus, which is the subject of the present appeal. The habeas court appointed counsel for him. In his fifth amended petition, the petitioner set forth seventeen counts, four of which are relevant to this appeal. In count one, the

[4] The habeas court determined that the petitioner had abandoned an additional claim of ineffective assistance of counsel for the alleged failure to advise the petitioner of his right to apply for sentence review sufficiently. *Salters* v. *Commissioner of Correction*, supra, 141 Conn. App. 84 n.1.

petitioner asserted that his habeas counsel provided ineffective assistance by failing to allege that his trial counsel provided ineffective assistance by failing to request an evidentiary hearing, pursuant to *Brady*, which would have revealed material, exculpatory impeachment evidence. Additionally, in count fourteen, the petitioner claimed that his habeas counsel provided ineffective assistance by failing to allege that trial counsel provided ineffective assistance when he failed to object to erroneous jury instructions, which prejudiced the petitioner's case. In count six, the petitioner asserted that his habeas counsel provided ineffective assistance by failing to allege that appellate counsel provided ineffective assistance by failing to "raise the *Brady* violation . . . ." Additionally, in count seven, the petitioner claimed that his habeas counsel provided ineffective assistance by failing to allege that his appellate counsel provided ineffective assistance by failing to raise a claim of prosecutorial impropriety because the prosecutor misstated evidence during closing arguments.

On July 22, 2015, the habeas court, *Cobb*, *J.*, rendered judgment denying the petition. As to count one, the court found that the petitioner had failed to establish prejudice by proving that there was a reasonable probability that the result in his criminal trial would have been different. The court determined that further impeachment of Turner would not have added significantly to his cross-examination. On count fourteen, the court found that the jury instruction was appropriate and, therefore, the petitioner had failed to prove that his trial counsel's or his habeas counsel's performance was deficient or that he was prejudiced. As to count six, the court found that there was an inadequate record on direct appeal to raise a previously unraised *Brady* claim to satisfy *Golding* review.[5] Additionally, the court

[5] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).

had already found that the petitioner failed to prove prejudice regarding the claimed *Brady* violation and that appellate counsel's decision to forgo such a claim was a strategic decision. Accordingly, the court denied this claim as to appellate counsel. Finally, on count seven, the court found that there was no evidence that appellate counsel could have satisfied the requirements of *Golding* to prevail on a previously unraised claim of prosecutorial impropriety.[6] Additionally, the habeas court found that appellate counsel's decision to forgo this claim, which she considered weak, was a reasonable strategic decision and that the petitioner failed to establish that he would have prevailed on such a claim. Consequently, the court denied the petition for a writ of habeas corpus. Thereafter, the habeas court granted the petitioner certification to appeal, and this appeal followed.

"We begin with the applicable standard of review and the law governing ineffective assistance of counsel claims. The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . 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).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both

[6] Prosecutorial impropriety claims are not subject to analysis pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *State* v. *Fauci*, 282 Conn. 23, 34, 917 A.2d 978 (2007).

a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Citation omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 668–69, 159 A.3d 1112 (2017).

"[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . . Therefore, as explained by our Supreme Court in *Lozada* v. *Warden*, 223 Conn. 834, 613 A.2d 818 (1992), a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy *Strickland* twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective. . . . We have characterized this burden as presenting a herculean task . . . ." (Citations omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015).

Our standard of review for claims of ineffective assistance of appellate counsel is similar. "In regard to the

second prong [of *Strickland*], our Supreme Court distinguished the standards of review for claims of ineffective trial counsel and ineffective appellate counsel. . . . For claims of ineffective appellate counsel, the second prong considers whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed in his direct appeal, i.e., reversal of his conviction or granting of a new trial. . . . This requires the reviewing court to [analyze] the merits of the underlying claimed error in accordance with the appropriate appellate standard for measuring harm." (Citations omitted; internal quotation marks omitted.) *Moore* v. *Commissioner of Correction*, 119 Conn. App. 530, 535, 988 A.2d 881, cert. denied, 296 Conn. 902, 991 A.2d 1103 (2010).

I

The petitioner claims that the habeas court erred in failing to apply the "strict standard of materiality"[7] to his

[7] Such a standard would be more advantageous to the petitioner. "In a classic *Brady* case, involving the state's inadvertent failure to disclose favorable evidence, the evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. [The] touchstone of materiality [under *United States* v. *Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)] is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. . . .

"When, however, a prosecutor obtains a conviction with evidence that he or she knows or should know to be false, the materiality standard is significantly more favorable to the defendant. [A] conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . This standard . . . applies whether the state solicited the false testimony or allowed it to go uncorrected . . . and is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt. . . . This strict standard of materiality

Brady claims in which he alleged that the prosecution knowingly relied on false testimony. We do not review this claim because the petitioner has failed to provide this court with an adequate record for review.

Although the petitioner's fifth amended petition included factual allegations that the prosecution knowingly relied on false testimony, the habeas court's memorandum of decision is devoid of any factual findings or legal analysis involving the false testimony allegations raised by the petitioner. "It is fundamental that claims of error must be distinctly raised and decided in the [habeas] court before they are reviewed on appeal. As a result, Connecticut appellate courts will not address issues not decided by the [habeas] court." (Internal quotation marks omitted.) *Bozelko* v. *Commissioner of Correction*, 162 Conn. App. 716, 717 n.1, 133 A.3d 185, cert. denied, 320 Conn. 926, 133 A.3d 458 (2016); see also *Crest Pontiac Cadillac, Inc.* v. *Hadley*, 239 Conn. 437, 444 n.10, 685 A.2d 670 (1996) (claims "neither addressed nor decided" by trial court not properly before appellate tribunal). "It is the responsibility of the appellant to provide an adequate record for review . . . ." Practice Book § 60-5. Accordingly, we cannot and do not address the petitioner's claim that the court applied the wrong standard of materiality to his *Brady* claims.[8]

is appropriate in such cases not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. . . . In light of this corrupting effect, and because the state's use of false testimony is fundamentally unfair, prejudice sufficient to satisfy the materiality standard is readily shown . . . such that reversal is virtually automatic . . . unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury." (Citations omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370–73, 71 A.3d 512 (2013).

[8] As to his claim on appeal that the habeas court erred in failing to apply the "findings" of this court in *Salters* v. *Commissioner of Correction*, supra, 89 Conn. App. 221, to his claim that habeas counsel was ineffective for having failed to allege that appellate counsel was ineffective for failing to

II

The petitioner claims that the habeas court erred in denying his assertion that his habeas counsel was ineffective in failing to raise a claim that trial counsel was ineffective for failing to object to the jury instructions because they contained errors that made it easier for the jury to find him guilty. Specifically, the petitioner argues that the trial court's charge to the jury included the full statutory definition of "acting intentionally," which included the definitions for both specific and general intent. As the petitioner was charged only with specific intent crimes—two counts of assault in the first degree and one count of conspiracy to commit assault in the first degree—he argues that the jury was allowed to find him guilty of specific intent crimes while utilizing the lower standard of general intent. Because this improper definition was repeatedly referred to throughout the jury charge, the petitioner argues that the jury was misled. We agree that it was improper for the trial court to have included the full statutory definition of intent but conclude that the petitioner was not harmed thereby or by habeas counsel's failure to raise that claim in the petitioner's first habeas proceeding.

The following additional facts are relevant to the resolution of this claim. The trial court instructed the jury as follows: "Section 53a-59 (a) (5) of the Connecticut General Statutes provides that a person is guilty of assault in the first degree when: With intent to cause physical injury to another person, he causes such injury to such person by means of the discharge of a firearm. . . .

bring a *Brady* claim, the petitioner acknowledges that that claim is dependent on a favorable determination by this court on his materiality claim. Because we conclude that he has not provided an adequate record to review his materiality claim and the habeas court otherwise concluded that his *Brady* claims were immaterial, we do not address his third claim on appeal.

"For you to find the [petitioner] guilty of this charge, the state must prove each of the following elements beyond a reasonable doubt: (1) that the [petitioner] intended to cause physical injury to another person; (2) that the [petitioner] caused physical injury to that person; and (3) that he caused that injury by means of the discharge of a firearm.

"The state must first prove beyond a reasonable doubt that the [petitioner] intended to cause physical injury to another person. What the [petitioner] intended is a question of fact for you to determine.

"Our statutes provide that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

After setting forth the trial court's instruction on the elements of assault in the first degree and comparing it to the model jury instruction on the same charge, the habeas court found that the trial court's instruction was appropriate. The court therefore concluded that the petitioner had failed to meet his burden of proving that trial counsel's or habeas counsel's performance was deficient or that he was prejudiced by any deficient performance.

The standard of review for claims of instructional impropriety is well established. "[I]ndividual jury instructions should not be judged in artificial isolation, but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper

verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 784, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015). "An improper instruction on an element of an offense . . . is of a constitutional dimension." (Internal quotation marks omitted.) *State* v. *Flores*, 301 Conn. 77, 83, 17 A.3d 1025 (2011). "Finally, because a challenge to the validity of a jury instruction presents a question of law, we exercise plenary review." *State* v. *Jones*, 320 Conn. 22, 53, 128 A.3d 431 (2015).

"It has become axiomatic, through decisional law, that it is improper for a court to refer in its instruction to the entire definitional language of [General Statutes] § 53a-3 (11), including the [general] intent to engage in conduct, when the charge relates to a crime requiring only the [specific] intent to cause a [precise] result." (Internal quotation marks omitted.) *Barlow* v. *Commissioner of Correction*, 131 Conn. App. 90, 95 n.2, 26 A.3d 123, cert. denied, 302 Conn. 937, 28 A.3d 989 (2011). "Although [our appellate courts] have stated that [i]t is improper for the trial court to read an entire statute to a jury when the pleadings or the evidence support a violation of only a portion of the statute . . . that is not dispositive. We must determine whether it is reasonably possible that the jury was misled by the trial court's instructions." (Citation omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 474, 797 A.2d 1101 (2002). Our appellate courts consistently have held that the risk of juror confusion from an

improper intent instruction has been "eliminated by the trial court's numerous proper instructions on the elements of [the charged offense]." (Internal quotation marks omitted.) Id., 475; see also, e.g., *State* v. *Montanez*, 277 Conn. 735, 745–47, 894 A.2d 928 (2006) (holding no reasonable possibility jury misled by general instruction or reference to principle of general intent eleven times because trial court repeatedly gave clear instructions on specific intent required for manslaughter); *State* v. *Austin*, 244 Conn. 226, 236–37, 710 A.2d 732 (1998) (any possible risk of jury confusion over intent element eliminated by numerous proper instructions on elements of murder and because trial court distinguished intent required for manslaughter and murder); *State* v. *Prioleau*, 235 Conn. 274, 321–22, 664 A.2d 743 (1995) (holding not reasonable to believe jury misled by single use of instruction on general intent that contained entire statutory definition of intent when trial court repeatedly instructed jury on specific intent required for murder); but see *State* v. *Sivak*, 84 Conn. App. 105, 112–13, 852 A.2d 812 (holding that jury in assault case misled by improper intent instruction that included statutory definition of intentionally and focused on intended conduct rather than intended result because key issue was whether defendant intended to cause serious physical injury where defendant claimed self-defense and both victim and defendant were intoxicated), cert. denied, 271 Conn. 916, 859 A.2d 573 (2004); *State* v. *Lopes*, 78 Conn. App. 264, 271–72, 826 A.2d 1238 (holding reasonably possible that jury misled because general intent instruction given with definition of murder and this court did not observe numerous proper intent instructions), cert. denied, 266 Conn. 902, 832 A.2d 66 (2003).

"Assault in the first degree is a specific intent crime. It requires that the criminal actor possess the specific

intent to cause serious physical injury to another person." (Internal quotation marks omitted.) *State* v. *Sivak*, supra, 84 Conn. App. 110. "Conspiracy . . . is a specific intent crime, with the intent divided into two elements: [1] the intent to agree or conspire and [2] the intent to commit the offense which is the object of the conspiracy." (Internal quotation marks omitted.) *State* v. *Pond*, 315 Conn. 451, 467–68, 108 A.3d 1083 (2015).

The trial court in the present case instructed the jury on the entire statutory definition of intentionally under § 53a-3 (11).[9] The court referred the jury to that definition once. By quoting the definition of "intentionally" contained in § 53a-3 (11), the court gave instructions on both general intent—the intent to engage in conduct—and specific intent—causing a desired result. The court, thus, improperly provided a general intent instruction when the only crimes with which the petitioner was charged were specific intent crimes.

Nonetheless, we conclude that, despite the trial court's having improperly given the general intent instruction, it is not reasonably possible that the jury was misled. In defining assault in the first degree as to count one, the trial court referred to the specific intent required by the first element. The trial court explained that to be guilty of assault in the first degree as an accessory, the petitioner must have had the same criminal intent required for assault in the first degree—intent to cause physical injury. Additionally, the court instructed that to be found guilty as an accessory, the petitioner must have intended to aid in the commission of assault in the first degree.

[9] Compare the trial court's instruction to General Statutes § 53a-3, which provides in relevant part: "Except where different meanings are expressly specified, the following terms have the following meanings when used in this title . . . (11) A person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct . . . ."

In defining assault in the first degree in the second count, the trial court referred the jury to the elements of that crime and instructed that the state must have proven all of the elements of the crime beyond a reasonable doubt. The first element of assault in the first degree, as explained to the jury, includes the intent to cause physical injury—specific intent.

In defining conspiracy to commit assault in the first degree, the trial court explained that the state needed to prove beyond a reasonable doubt that the petitioner agreed with one or more persons to engage in conduct constituting a crime. In explaining this first element of conspiracy, the trial court referred the jury to the elements of assault in the first degree. When the trial court instructed the jury on the third element of conspiracy—intent on the part of the petitioner that conduct constituting the crime be performed—the trial court explained that the state must have proven that "the [petitioner] had the specific intent to violate the law when he entered into the agreement to engage in conduct constituting a crime." At this point, however, the trial court referred the jury to its previous instruction "on the law pertaining to intent in [its] instructions on the first count."

We conclude that this case is akin to those in which our courts have determined that repeated proper instructions mitigated any harm caused by the improper general intent instruction, such that it is not reasonable to conclude that the jury was misled. In its instructions on the intent required for accessory to assault in the first degree, the trial court at least thirteen times referred to the specific intent required for assault and accessorial liability. The trial court referred the jury to its instruction on the elements of assault in the first degree, which included the specific intent to cause physical injury, five times in its instruction on the second count of assault in the first degree. In instructing the jury on

conspiracy to commit assault in the first degree, the court at least four times explained that the jury must find that the petitioner had the specific intent to participate in a conspiracy and, by reference to the elements of assault in the first degree, the specific intent to commit assault in the first degree.

The trial court's jury instruction included more than twenty references to the specific intent required for the crimes charged in contrast with two improper uses of a general intent instruction. Although the number of proper intent instructions given alone is not the measure of whether an improper intent instruction has been sufficiently ameliorated; *State* v. *Montanez*, supra, 277 Conn. 746 ("A quantitative 'litmus test' measuring how frequently a trial court gives an irrelevant instruction is . . . insufficient to establish an instruction's tendency to mislead the jury. The tendency of an irrelevant instruction to mislead the jury instead must be considered in the context of the whole charge."); in the context of the whole charge, we are not convinced that it is reasonably possible that the court's improper reading and reference to the full statutory language of general and specific intent misled the jury.

The petitioner analogizes this case to *State* v. *DeBarros*, 58 Conn. App. 673, 755 A.2d 303, cert. denied, 254 Conn. 931, 761 A.2d 756 (2000), in which this court held that it was reasonably possible that the jury was misled when the trial court gave the same improper intent instruction ten times. Id., 682–83. After reading the definition of murder to jury, the trial court in *DeBarros* instructed: "There are two elements that the state has to prove to you beyond a reasonable doubt. The first is that the defendant had the intent to cause the death of another person, [the victim]. Second . . . I'll now go through these two elements with you one by one and explain them to you in a little more detail. The first element is that the defendant had the intent

to cause the death of another person. Our statutes and law [are] that a person acts intentionally with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. Intentional conduct is purposeful conduct, rather than conduct that is accidental or inadvertent." (Emphasis omitted; internal quotation marks omitted.) Id., 683–84.

This court concluded, "[t]he order in which the instruction was read likely misled the jury to believe that to intend to cause the death of another person means either to intend to cause the death of that person or to intend to engage in conduct that causes the death of that person. Similarly, when the court referred to the improper instruction as it charged the jury on attempt to commit murder and assault in the first degree with a firearm, the jury was also likely misled in the same manner." Id., 684.

Although the order of the improper intent instruction in *DeBarros* is similar to the present case, this court's determination in *DeBarros* is otherwise distinguishable. First, the trial court in *DeBarros* repeated the erroneous instruction when it instructed the jury on assault in the first degree and attempted murder. See id., 681–82 n.14 and 684. In the present case, the trial court repeatedly instructed the jury that it must find that the petitioner had the requisite specific intent, and the court's references to its prior instructions were to the elements of assault in the first degree, which included the required specific intent. Second, in *DeBarros* the trial court gave the erroneous instruction ten times, and this court determined that those improper instructions were too numerous to be rectified by the court's proper instructions. Id., 683. In the present case, the court gave the erroneous instruction once and only once referred to it, whereas it gave or referenced proper specific intent

instructions on more than twenty occasions. Accordingly, the habeas court properly denied the erroneous jury instruction claim set forth in count fourteen of the petition because the petitioner failed to demonstrate that he was prejudiced by any alleged deficient performance of his trial counsel or habeas counsel.

III

The petitioner also claims that the habeas court improperly found that appellate counsel's decision to forgo a claim of prosecutorial impropriety on direct appeal was a reasonable strategic decision. The petitioner argues that the prosecutor's arguments in summation misrepresented the evidence presented at trial. He asserts that Turner testified that detectives pressured him to identify the petitioner as the driver of the car at the shooting scene. Consequently, the petitioner maintains that the prosecutor mischaracterized the facts in evidence when he argued that there was no evidence that the police pressured Turner into identifying the petitioner. We disagree with the petitioner's characterization of both Turner's testimony and the prosecutor's argument.

The following additional facts and procedural history are relevant to the resolution of this claim. The habeas court found that "[i]n late [1996],[10] the petitioner was arrested and charged with a gang related drive-by shooting that occurred on November 24, [1996].[11] Immediately after the shooting, while he was in the hospital, one of the victims, a member of the rival gang that was in the other vehicle, Kendall Turner, identified the petitioner as the shooter and was a key state's witness at the

[10] The habeas court's memorandum of decision states that the petitioner was arrested and that the crime occurred in 2006, but this is a typographical error, as all of the evidence, and the habeas court's other recitations of facts, indicate that these events occurred in 1996.

[11] See footnote 10 of this opinion.

criminal trial. . . . Due to [a] delay, the trial was not held in this case until December, 2002, six years after the shooting and the petitioner's arrest. Sometime prior to trial, Turner recanted his identification of the petitioner. The state then used his original statement at trial, under the *Whelan* doctrine."[12] (Footnotes added.)

The petitioner presented evidence to the habeas court that at his criminal trial, Turner testified as follows. After being shot, he and Kelley exited the car and proceeded on foot to the home of Turner's aunt. Law enforcement officers arrived at his aunt's home shortly thereafter, and he informed an officer who questioned him that there were three or four African-American males in a Sentra from which the shots were fired, but he did not know any of them and was unable to describe them further. An ambulance was summoned and, as he was being placed into the ambulance, Turner spoke with another law enforcement officer, Detective William Piascyk.

Turner's testimony on cross-examination by trial counsel continued as follows:

"Q. And you told Detective Piascyk that the shots that came from the [Sentra], four-door hardtop, which you believe was dark green; isn't that right?

"A. It's probably—

"Q. But you were not able to tell Detective Piascyk, and, in fact, you did not give Detective Piascyk the names of anybody who had been involved in shooting you; isn't that right?

"A. Yes.

"Q. And that's because you didn't know; isn't that right?

[12] See *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

"A. Yes.

"Q. But later at the hospital, these two detectives came and showed you these pictures and, at that point, you gave this witness statement; isn't that right, the taped statement? Isn't that right?

"A. Yes.

"Q. And as we all know, at that time you claimed that [the petitioner] was the driver of that car?

"A. Yes.

"Q. But that wasn't the truth, was it?

"A. No.

"Q. So, why did you say that about him?

"A. Pressuring me.

"Q. Pressure?

"A. Yeah.

"Q. From whom?

"A. All of them, detectives.

"Q. And was that Detective Trocchio?

"A. I don't even know their name.

"Q. You don't know his name?

"A. I don't know none of them.

"Q. Because, in fact, you had known [the petitioner] most of your life; isn't that right?

"A. Yes.

"Q. You knew him when you were kids?

"A. Yes.

"Q. You recognized him any time you saw him. And in fact, if [the petitioner] was driving the car, you would

have—and you'd seen him, you would have known who it was; isn't that right?

"A. Yes."

During the rebuttal portion of his closing argument, the prosecutor stated: "You heard about why don't you speculate that the police are somehow *feeding information* to . . . Turner. Is there any shred of evidence, any shred of evidence in this case that anything like that ever happened? No, there is not. And if there isn't any evidence on it, you can't conclude that it had been. Even . . . Turner, who you will have [to] agree was pretty much willing to agree with anything [trial counsel] said yesterday, not only wasn't asked but certainly never said, oh, yeah, I named [the petitioner] *because the police told me to*. Not once. There is no evidence of that, and you can't conclude that it exists when there is no evidence. . . .

"And the evidence, as I would say, does not include any suggestions, any suggestions even from the cooperative Mr. Turner, that the police *told him to say anything*. His response to, why did you say that, when he claimed to be making up the name was, I can't tell you that.

***

"And all of the suggestions that somebody planted this material in his head are contradicted by the evidence that's admitted in this case. What was the reason that Mr. Turner would falsely identify [the petitioner]? There isn't any. There is nothing in this case to suggest that he would falsely identify someone."[13] (Emphasis added.)

[13] Even if we assume that the prosecutor's argument was an incorrect characterization of Turner's testimony, because Turner testified that he was "pressured," the petitioner has not demonstrated that the statement, considered in the full context of a closing argument, is of the type or level of prosecutorial impropriety that has been determined to deprive a defendant of his due process right to a fair trial. See *State* v. *Orellana*, 89 Conn. App. 71, 106, 872 A.2d 506, cert. denied, 274 Conn. 910, 876 A.2d 1202 (2005); see

Trial counsel did not object to the prosecutor's statements at trial. When asked about claims that she could have brought but did not raise on appeal, appellate counsel testified at the habeas trial in the present case that she thought that the prosecutor's closing argument was improper but that she thought it was a weak claim of prosecutorial impropriety.

The habeas court's denial of the petitioner's claim that appellate counsel was deficient in failing to raise a claim of prosecutorial impropriety rested on three grounds. First, the court found that there was no evidence that if appellate counsel had raised the prosecutorial impropriety claim she would have or could have met the standards required under *Golding* for review of such an unpreserved claim.[14] Second, the court determined that appellate counsel made a reasonable strategic decision to forgo the claim because she considered it weak. Third, the court determined that the petitioner had failed to establish that there was a reasonable probability that he would have prevailed on appeal.

"On appeal, the petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound [appellate] strategy."

also *State* v. *Maguire*, 310 Conn. 535, 552, 78 A.3d 828 (2013) ("[w]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived [him] of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper" [internal quotation marks omitted]). Additionally, the prosecutor made this argument in response to suggestions by trial counsel that the police told Turner to identify the petitioner. "[T]here is ample room, in the heat of argument, for the prosecutor to challenge vigorously the arguments made by defense counsel." (Internal quotation marks omitted.) *State* v. *Maner*, 147 Conn. App. 761, 789, 83 A.3d 1182, cert. denied, 311 Conn. 935, 88 A.3d 550 (2014).

[14] Prosecutorial impropriety claims are not subject to analysis pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). *State* v. *Fauci*, 282 Conn. 23, 34, 917 A.2d 978 (2007). Although the habeas court based its conclusion in part on this determination, this does not affect our conclusion that the habeas court properly denied this claim for the reasons we discuss.

(Internal quotation marks omitted.) *Otto* v. *Commissioner of Correction*, 161 Conn. App. 210, 226, 136 A.3d 14 (2015), cert. denied, 321 Conn. 904, 138 A.3d 281 (2016); see also *Alterisi* v. *Commissioner of Correction*, 145 Conn. App. 218, 227, 77 A.3d 748 (tactical decision of appellate counsel not to raise particular claim ordinarily matter of appellate tactics and not evidence of incompetency), cert. denied, 310 Conn. 933, 78 A.3d 859 (2013). "Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned errors increases. Multiplicity hints at a lack of confidence in any one [issue] . . . . [M]ultiplying assignments of error will dilute and weaken a good case and will not save a bad one." (Internal quotation marks omitted.) *Synakorn* v. *Commissioner of Correction*, 124 Conn. App. 768, 775, 6 A.3d 819 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1004 (2011).

"[T]he defendant's failure to object at trial to each of the occurrences that he now raises as instances of prosecutorial impropriety, though relevant to our inquiry, is not fatal to review of his claims. . . . This does not mean, however, that the absence of an objection at trial does not play a significant role in the determination of whether the challenged statements were, in fact, improper. . . . To the contrary, we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was [improper] in light of the record of the case at the time." (Internal quotation marks omitted.) *State* v. *Barry A.*, 145 Conn. App. 582, 597, 76 A.3d 211, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013).

In the present case, we disagree with the petitioner's characterization of both Turner's testimony and the

prosecutor's statements to the jury. Although Turner's testimony may have indicated that law enforcement officers pressured him to make a statement, it did not indicate that they were feeding him information. His testimony suggested that law enforcement officers were trying to persuade him to give a statement, but Turner did not testify that the police told him *what* to say. His testimony indicated that law enforcement officers presented him with a photographic array and that he identified the petitioner from it. It was, therefore, a reasonable characterization of the evidence, his testimony included, that he was not told to identify the petitioner or that he was fed information.

The evidence, thus, supports the habeas court's conclusion that appellate counsel made a reasonable strategic decision in choosing to forgo a meritless or weak claim of prosecutorial impropriety. Appellate counsel's performance, therefore, was not deficient for having failed to bring such a claim. Accordingly, a claim of ineffective assistance of habeas counsel for failing to claim that appellate counsel was ineffective on this ground cannot stand.

The judgment is affirmed.

In this opinion the other judges concurred.

ANDRES R. SOSA *v.* COMMISSIONER OF CORRECTION ET AL.
(AC 38585)

Sheldon, Mullins and Sullivan, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendants, employees of the Department of Correction, including the Commissioner of Correction, claiming that the defendants wrongly revoked his visitation privileges in violation of his constitutional rights. The trial court granted the defendants' motion to dismiss as to all claims

for monetary damages as to all of the defendants in their official and individual capacities on the basis of sovereign immunity, and it dismissed all of the plaintiff's claims for injunctive and declaratory relief against the defendants in their individual capacities due to insufficient service of process. The court denied the motion to dismiss the plaintiff's claims for prospective declaratory and injunctive relief against the defendants in their official capacities. From the judgment of dismissal, the plaintiff appealed to this court. *Held*:

1. Because the trial court denied the defendants' motion to dismiss the plaintiff's claims for declaratory and injunctive relief against the defendants in their official capacities, those claims remained pending, and, therefore, the court did not render a final judgment disposing of all causes of action against the defendants in their official capacities; accordingly, because there was no final judgment as to all of the plaintiff's claims against the defendants in their official capacities, this court lacked jurisdiction over the plaintiff's appeal from the dismissal of his claims for monetary damages against the defendants in their official capacities.
2. The plaintiff could not prevail on his claim that the trial court improperly dismissed his claims for monetary, declaratory and injunctive relief against the defendants in their individual capacities, which was based on his claim that the court improperly dismissed those claims for insufficient service of process and determined that those claims were barred by qualified immunity; the plaintiff's challenge to the court's qualified immunity determination was inadequately briefed and, thus, was not reviewable, and where, as here, the defendants were served at the Office of the Attorney General, not at their usual places of abode, they were properly served in their official capacities only and, therefore, the trial court properly dismissed all of the plaintiff's claims against the defendants in their individual capacities for lack of personal jurisdiction.

Argued May 30—officially released August 29, 2017

Procedural History

Action, inter alia, to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Gleeson, J.*, granted in part the defendants' motion to dismiss, from which the plaintiff appealed to this court. *Appeal dismissed in part; affirmed.*

Andres R. Sosa, self-represented, the appellant (plaintiff).

Robert S. Dearington, assistant attorney general, with whom, on the brief, was *George Jepsen*, attorney general, for the appellees (defendants).

Opinion

PER CURIAM. The self-represented, incarcerated plaintiff, Andres R. Sosa, brought this action for monetary damages and declaratory and injunctive relief, pursuant to 42 U.S.C. § 1983, against employees of the Department of Correction, including Commissioner of Correction Scott Semple, Warden Carol Chapdelaine, and District Administrator Angel Quiros, individually and in their official capacities. The plaintiff claimed that the defendants wrongly revoked his visitation privileges in violation of his rights under the first and fourteenth amendments to the United States constitution. The trial court granted in part and denied in part a motion to dismiss filed by the defendants. The court granted the motion to dismiss as to all claims for monetary damages as to all of the defendants in their official and individual capacities. The court also granted the motion to dismiss the plaintiff's claims for injunctive and declaratory relief against the defendants in their individual capacities, but denied the motion to dismiss his claims for prospective declarative and injunctive relief against the defendants in their official capacities. The plaintiff appeals from the judgment of dismissal of all of his claims against the defendants in their individual capacities and his claim for monetary damages in their official capacities. Because there is no final judgment as to the plaintiff's claims against the defendants in their official capacities, we dismiss the plaintiff's appeal from the judgment of the trial court dismissing his claim for monetary damages against the defendants in their official capacities. We affirm the judgment of the trial court dismissing all of the claims against the defendants in their individual capacities.

The trial court set forth the following relevant procedural history. "The action primarily concerns the constitutionality of a portion of Department of Correction administrative directive § 10.6 prohibiting prisoners from receiving contact visits for a two year period for each individual class A or B disciplinary report.

"On December 5, 2014, the plaintiff filed a complaint, dated November 18, 2014, against the defendants. The plaintiff alleges that, on August 9, 2014, he was given a class A disciplinary report for masturbating inside his own cell. The plaintiff alleges that he was issued several sanctions, including an automatic two year loss of contact visits, pursuant to administrative directive § 10.6. The plaintiff claims that the two year restriction on contact visits is not a permissible penalty under administrative directive § 9.5.

"The plaintiff further alleges that during his seventeen years of incarceration, he has been deprived of physical contact with family and friends for a period of twelve or more years, and was not provided with a due process hearing in which to appeal the denial of his contact visits. The plaintiff claims that this fact show[s] that the defendants have created an unconstitutional 'custom policy.'

"The plaintiff alleges that the only notice provided by the defendants was in 2001, and the notice stated that the plaintiff will be deprived of contact visits for (1) intoxication, (2) assault, (3) refusal to give urine specimen, (4) visiting room misconduct, and (5) contraband. The plaintiff states that the only listed violation that he is actually guilty of was fighting in 2001.

"On March 12, 2015, the defendants filed a motion to dismiss the entire action. On April 22, 2015, the plaintiff filed an objection to the motion. The matter was heard at short calendar on June 22, 2015." (Footnotes omitted.)

By way of memorandum of decision filed on October 8, 2015, the trial court granted in part and denied in part the defendants' motion to dismiss. The court granted the motion to dismiss as to all claims for monetary damages as to all of the defendants in their official capacities on the basis of sovereign immunity. The court granted the defendants' motion to dismiss the plaintiff's claims against the defendants in their individual capacities on the basis of qualified immunity because none of the plaintiff's claims invoked a protected liberty interest in contact visitation, which has been held to be a privilege rather than an entitlement. The court also determined that the plaintiff had not properly served his action upon the defendants in their individual capacities and thus that it lacked personal jurisdiction over all of his claims against the defendants in their individual capacities. Accordingly, the court dismissed all of the plaintiff's individual capacity claims on the basis of insufficiency of service of process. This appeal followed.

"A motion to dismiss . . . properly attacks the jurisdiction of the court . . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to grant] . . . the motion to dismiss will be de novo." (Citation omitted; internal quotation marks omitted.) *State* v. *Courchesne*, 296 Conn. 622, 668, 998 A.2d 1 (2010).

The plaintiff first challenges the trial court's judgment dismissing its claims against the defendants for monetary damages on the basis of sovereign immunity. In ruling on the motion to dismiss, the trial court denied the motion as to the plaintiff's claims for declaratory and injunctive relief, granting the motion only as to monetary damages. The statutory right to appeal is limited to appeals by parties aggrieved by final judgments.

General Statutes § 52-263; *State* v. *Curcio*, 191 Conn. 27, 30, 463 A.2d 566 (1983).[1] Practice Book § 61-3 provides in relevant part that a judgment that does not fully dispose of a complaint is a final judgment only if it "disposes of all causes of action in [the] complaint . . . brought by or against a particular party or parties. . . ." Because the court denied the motion to dismiss the plaintiff's claims for declaratory and injunctive relief, those claims remain pending, and thus the court did not render a final judgment disposing of all causes of action brought against the defendants in their official capacities. Because there is no final judgment as to all of the plaintiff's claims against the defendants in their official capacities, this court lacks jurisdiction over the plaintiff's appeal from the judgment of dismissal of his claim for monetary damages.

The plaintiff also claims that the trial court erred in dismissing his claims for monetary, declaratory and injunctive relief against the defendants in their individual capacities. The plaintiff first challenges the court's determination that his claims against the defendants in their individual capacities were barred by qualified immunity. The court based its qualified immunity determination on the ground that the plaintiff had no constitutional liberty interest in visitation. Purporting to challenge that determination, the plaintiff argued: "The [defendants'] conduct did violate clearly . . . constitutional rights in which a reasonable person would have know[n], making the defendants not entitle[d] to qualified immunity." Other than an additional bald statement that his "interest in having contact visits is among the interest[s] protected by the fourteenth amendment's

[1] Prior to oral argument before this court, we ordered the parties "to be prepared to address at oral argument whether the portion of the appeal that challenges the dismissal of the claim for money damages asserted against the defendants in their official capacities should not be dismissed for lack of a final judgment because the court did not dispose of all causes of action asserted against the defendants in their official capacities."

due process clause," the plaintiff provides no additional factual or legal analysis in support of his challenge to the trial court's thorough and amply supported ruling. We conclude that the plaintiff's challenge to the court's qualified immunity determination is inadequately briefed, and thus we decline to address it. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016).

Finally, the plaintiff challenges the trial court's finding of insufficiency of service of process on the defendants in their individual capacities, and its resulting judgment dismissing his claims against the defendants in their individual capacities. "[T]he Superior Court . . . may exercise jurisdiction over a person only if that person has been properly served with process, has consented to the jurisdiction of the court or has waived any objection to the court's exercise of personal jurisdiction. . . . [S]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of [personal] jurisdiction over that party." (Citation omitted; internal quotation marks omitted.) *Matthews* v. *SBA, Inc.*, 149 Conn. App. 513, 529–30, 89 A.3d 938, cert. denied, 312 Conn. 917, 94 A.3d 642 (2014). Pursuant to General Statutes § 52-57 (a),[2] a defendant in any civil action must be served in hand or at his usual place of abode. This requirement includes civil suits brought against state defendants who are sued in their individual capacities. See *Edelman* v. *Page*, 123 Conn. App. 233, 243, 1 A.3d 1188, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010).

Thus, a plaintiff who serves a state defendant pursuant to General Statutes § 52-64 (a)[3] by leaving a copy

[2] General Statutes § 52-57 (a) provides: "Except as otherwise provided, process in any civil action shall be served by leaving a true and attested copy of it, including the declaration or complaint, with the defendant, or at his usual place of abode, in this state."

[3] General Statutes § 52-64 (a) provides: "Service of civil process in any civil action or proceeding maintainable against or in any appeal authorized from the actions of, or service of any foreign attachment or garnishment authorized against, the state or against any institution, board, commission,

of the process at the Office of the Attorney General has properly served the defendant only in his or her official capacity and has failed to properly serve the defendant in his or her individual capacity. See id.

Here, the defendants were served at the Office of the Attorney General, not at their usual places of abode, and they thus were properly served in their official capacities, not in their individual capacities. Accordingly, we conclude that the court properly dismissed all of the plaintiff's claims against the defendants in their individual capacities for lack of personal jurisdiction.

The appeal from the judgment of dismissal of the plaintiff's claim against the defendants in their official capacities is dismissed. The judgment is affirmed in all other respects.

STATE OF CONNECTICUT *v.* SKENDER HALILI
(AC 39098)

Lavine, Keller and Prescott, Js.

Syllabus

Convicted of the crime of sexual assault in the fourth degree, the defendant appealed to this court. He claimed, inter alia, that certain of the trial court's evidentiary rulings violated his constitutional right to confront his accuser and to present a defense. *Held*:

1. The trial court did not abuse its discretion by precluding the defendant from cross-examining the complainant with respect to her mental state or psychiatric history, it properly having determined that the complainant's testimony that she had ingested some medication for anxiety that

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department or administrative tribunal thereof, or against any officer, servant, agent or employee of the state or of any such institution, board, commission, department or administrative tribunal, as the case may be, may be made by a proper officer (1) leaving a true and attested copy of the process, including the declaration or complaint, with the Attorney General at the office of the Attorney General in Hartford, or (2) sending a true and attested copy of the process, including the summons and complaint, by certified mail, return receipt requested, to the Attorney General at the office of the Attorney General in Hartford."

had been prescribed by a physician prior to her testimony in court was not a sufficient foundation for further inquiry, in the presence of the jury, into whether she was under the care of a psychiatrist: it was apparent that defense counsel, who based the inquiry on the complainant's demeanor while testifying, did not know or have a good faith belief that the complainant was under the care of a psychiatrist or that she had been diagnosed with a psychiatric condition that could affect her ability to perceive or recall the events at issue and to relate them to the jury accurately, and defense counsel's personal observations of the complainant were insufficient to support further inquiry; moreover, the court permitted defense counsel to ask the complainant whether she ingested any medication prior to going to court that day, the court sustained the state's objection to the cross-examination only with respect to defense counsel's inquiry as to whether the complainant's medication had been prescribed by a psychiatrist, and defense counsel did not ask the complainant whether she ingested any medication on or before the date of the incident at issue, whether it affected her ability to perceive the events at issue or impacted her ability to recall or narrate them, which might have provided a sufficient basis to warrant additional inquiry, and although the court heard argument with respect to the state's objection outside the presence of the jury where the possibility of questioning the complainant outside the jury's presence was raised, defense counsel never asked the court to conduct any such inquiry and never made an offer of proof on the issue.

2. The trial court violated the defendant's sixth amendment right to present a defense and to confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife, H: H's proffered testimony, which demonstrated that H had observed the complainant at the place of employment where H worked with her daughter and that the complainant had made statements to H referring to H's husband and to the sum of $40,000, when viewed in light of the circumstances revealed by the evidence as a whole, provided a reasonable basis for the jury to infer that the complainant attempted to solicit money from H, and although H's testimony lacked clarity and completeness in some respects, H was unwavering in her testimony that, during her brief encounter with the complainant, the complainant referred to her husband and to the sum of $40,000; moreover, H also testified to previous encounters with the complainant at H's place of employment in which the complainant behaved in a weird manner, and to having reported the complainant's prior conduct to the police, which supported an inference that the complainant's conduct was viewed to be legally questionable, the trial court was not entitled to exclude the evidence simply because it did not consider it to be persuasive, as the weight to be afforded the evidence is a question for the jury, the proffered testimony was relevant to an assessment of the complainant, the state's key witness, concerning the

events at issue, and the inference that the defendant wanted to invite the jury to draw from the evidence was not so unreasonable as to warrant its exclusion; accordingly, because the proffered testimony likely would have changed the outcome of the trial if the jury had credited the testimony and inferred that it was evidence that the complainant had solicited a bribe from a member of the defendant's family, the state could not demonstrate that the trial court's ruling was harmless beyond a reasonable doubt and a new trial was warranted.

3. This court declined to consider the merits of the defendant's claim that the trial court improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police, which was based on his claim, raised for the first time on appeal, that the court improperly failed to analyze the admissibility of the evidence under the constancy of accusation doctrine, the defendant having failed to raise that argument before the trial court at the time that he objected to the admissibility of the evidence on the ground of relevance.

Argued April 12—officially released August 29, 2017

Procedural History

Substitute information charging the defendant with the crime of sexual assault in the fourth degree, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the jury before *Hudock*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed; new trial.*

John R. Williams, for the appellant (defendant).

Lisa A. Riggione, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Nadia C. Prinz*, deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Skender Halili, appeals from the judgment of conviction, following a jury trial, of sexual assault in the fourth degree in violation of General Statutes § 53a-73a. The defendant claims that the trial court (1) violated his sixth amendment right to confront his accuser when it prohibited him from

cross-examining the complainant[1] with respect to her mental state or psychiatric history, (2) violated his sixth amendment right to present a defense and confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife, and (3) improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police. We agree with the defendant's second claim. Accordingly, we reverse the judgment of the trial court and remand the case to the court for a new trial.

At trial, the state presented evidence in support of the following alleged version of events. At times relevant, the defendant and the female complainant were neighbors in a New Canaan condominium complex. The defendant is an Albanian national who has a green card and speaks with an Albanian accent. On April 9, 2014, the complainant and her father were standing near the complainant's automobile in the parking lot of the complex while attempting to resolve a mechanical issue. On prior occasions, the complainant observed the defendant performing work on automobiles at the complex. The defendant approached the complainant and her father, stated that he was experienced in repairing automobiles, and offered to repair the automobile, even if this meant that he had to pay for the repairs himself.

After the complainant's father left the scene, the defendant accompanied the complainant as she took the automobile for a test drive so that the defendant could hear the sounds that the automobile made while it was being operated on the road. During the test drive, the complainant conversed with the defendant and "[f]or the most part" understood what he was saying

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual abuse, we decline to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

to her despite his accent. Following the test drive, which was uneventful, the defendant and the complainant agreed that, the following day, he would bring his automobile ramps to the complainant's residence so that he could further inspect her automobile.

Shortly before 10 a.m. on April 10, 2014, the defendant arrived at the complainant's residence and utilized the ramps to inspect her automobile. Thereafter, he entered the complainant's residence and washed his hands in the bathroom. The complainant took the defendant for another test drive in the automobile.

At the beginning of the test drive, the defendant offered the complainant a piece of chewing gum. When the complainant accepted, the defendant attempted to insert the gum into her mouth while she was operating the automobile. The complainant told him not to do so. The complainant testified that the defendant's "weirdness" continued to escalate during the remainder of the test drive. The defendant asked the complainant if she had a boyfriend, and she replied that she did. The complainant mentioned to the defendant that he was married, to which he replied, "that doesn't matter." While the complainant was driving on the Merritt Parkway, the defendant referred to the opera, "Madame Butterfly," unbuckled his safety belt, and opened the passenger door of the automobile while it was in motion. The defendant's sudden and unusual conduct frightened the complainant, and she was anxious to keep the automobile under control.

The defendant's actions became sexual in nature when he placed the open palm of his left hand on the complainant's right thigh while she continued to operate the automobile. The complainant asked the defendant repeatedly to remove his hand from her thigh. When he failed to comply, the complainant pushed his hand away. This initiated a physical struggle between

the complainant and the defendant. He quickly moved his hand between her legs and, with his extended fingers, began to exert pressure on the complainant's vagina over her clothing in what the complainant believed to be an effort to "stimulate" her. While the complainant continued to drive, she tried to prevent the defendant from touching her. At one point in time, the complainant used her elbow to strike the defendant's body and, in so doing, caused the automobile to shift out of gear. Meanwhile, the defendant was snickering and making moaning sounds. At another point in time, the defendant lifted himself off of the passenger seat in what the complainant believed to be an effort to crawl on top of her. The defendant also tried to lift the complainant's shirt; he exposed and touched her bare skin. Toward the end of the approximately twenty minute ordeal, the complainant told the defendant that he was "going to get in a lot of trouble . . . ."

The complainant became aware that her automobile was running low on gasoline, but she drove to the New Canaan police station. She parked in front of the station, turned off the ignition, took her keys with her, and went inside to seek assistance. Meanwhile, the defendant exited the automobile and left the scene.

The complainant met with Officer Thomas Patten of the New Canaan Police Department, who interviewed her briefly. He asked her to complete a statement and to return it to him the following morning. The complainant complied with this request. Later that day, Patten visited with the complainant at her residence. At the condominium complex, Patten also spoke with the defendant. During this initial encounter with the police, the defendant denied having had any interaction with the complainant that day.

On the following day, April 11, 2014, during a voluntary interview of the defendant at the New Canaan

police station, Patten informed the defendant that the police had surveillance footage of the police department on April 10, 2014. In response, the defendant admitted that he was with the complainant on April 10, 2014, that he had provided assistance to her with her automobile, and that he had gone for a drive with her. Although, in their prior interactions with the defendant, the police officers who were investigating the incident had not raised the subject of inappropriate touching in the automobile, the defendant volunteered that nothing had happened in the automobile. He stated: "I did not touch." During the interview, the defendant stated to Sergeant Peter Condos of the New Canaan Police Department that, the previous day, he lied about his not having been with the complainant because he was scared. Additionally, the defendant stated that the complainant had not made any advances of a sexual nature toward him. The defendant acknowledged to the police that, although he felt "ashamed," he did not know why the complainant ended the test drive at the police department on April 10, 2014.

The jury found the defendant guilty of sexual assault in the fourth degree. The court sentenced the defendant to a term of incarceration of one year, execution suspended after thirty days, followed by two years of probation.[2] Additional facts will be set forth as necessary in the context of the defendant's claims.

I

First, the defendant claims that the court violated his sixth amendment right to confront his accuser when it prohibited him from cross-examining the complainant

[2] Among the terms of probation were that the defendant (1) have no contact with the complainant or members of her family, (2) submit to sex offender and mental health treatment, (3) seek and maintain full-time employment, and (4) abide by a ten year standing criminal protective order.

with respect to her mental state or psychiatric history. We disagree.

The following additional facts are relevant to the present claim. During the state's direct examination of the complainant, she related her account of the events at issue. At the conclusion of her direct examination, the prosecutor asked the complainant about her emotional state while testifying. The complainant replied that she felt "[e]xtremely uncomfortable . . . [b]ecause this is not a place I want to be." During the defendant's cross-examination of the complainant, defense counsel asked the complainant, "have you taken any kind of medications prior to coming here to court today?" After the court overruled the state's objection to the inquiry, the complainant answered: "Yes."

The following examination of the complainant by defense counsel then transpired:

"Q. What have you taken?

"A. I took a—last night I took a—something for anxiety.

"Q. What type of medicine is that?

"A. I . . . don't know the name of it.

"Q. It's prescribed by your physician?

"A. Yes.

"Q. Is that physician a psychiatrist?"

At this point in the inquiry, the state objected on the ground of relevance. The court excused the jury and asked defense counsel to provide a good faith basis for his inquiry, and whether he was "on a fishing expedition . . . ."

Defense counsel explained: "I am basing [the inquiry] on the demeanor of the witness throughout her direct

examination, which, in my experience, is beyond odd and not characteristic of any kind of behavior I've ever seen from a witness testifying as to such matters before.

"I think . . . that my suspicions were borne out when it was confirmed that she is taking medication that relate[s] to mental state, and I . . . it's apparent that she is indeed under psychiatric care, and I think that it is increasingly apparent that she suffers from some type of psychiatric condition. I believe that that is a fair line of inquiry, given the nature of this case, the fact that this case relies entirely on the accuracy of her recollections.

"I think that these questions have a basis to be asked, as I've indicated. And certainly they go to her ability to perceive, to remember and to relate accurately and truthfully.

"Quite frankly, Your Honor, when you combine with the wild disparities in the various versions she's given in this case, which we'll get to in due course, I think there's [a] very serious question about whether she is fantasizing."

After remarking that it was not bothered by the fact that even "extreme" disparities may be reflected in the complainant's versions of events, the court observed that it was "looking for . . . her ability to tell the truth . . . ."

The prosecutor objected to the line of inquiry on the ground that it was based on defense counsel's admission that he merely had suspicions concerning the complainant's mental state—suspicions that were based only on his own evaluation of the witness' demeanor in court. Suspicions, the prosecutor argued, did not amount to a good faith basis to warrant the inquiry.

Defense counsel responded that the prosecutor had an affirmative obligation to inquire about and disclose

information about the complainant's prior psychiatric history, but that the prosecutor "has not indicated one way or the other in that respect." Thus, defense counsel suggested that the prosecutor may be withholding exculpatory information concerning the complainant.

The prosecutor replied in relevant part: "I did inquire of [the complainant] whether she had ever been diagnosed with any psychiatric conditions, and she indicated, no. She did indicate to me that she had a learning disability that she sometimes talked to a therapist about. She did not indicate to me at that time that she was taking any medications. And I don't know, we could question her further, although I don't think it's appropriate, but it sounds to me like anxiety medication taken on the night before a trial is not a consistently prescribed or consistently taken medicine, and she did not in fact take anything this morning, which was her first answer to counsel's question. The fact that she took an anxiety pill before this testimony last night, I might have taken an anxiety pill before the testimony last night. I didn't in this case, but I don't see that I have any duty to disclose that or even to ask her about that."[3]

The prosecutor went on to state that anxiety was not a mental illness, to which defense counsel stated that "it is one of the psychiatric conditions contained in the Diagnostic and Statistical Manual [of Mental Disorders]."

[3] Following the court's ruling, the prosecutor stated that, in light of the defendant's suggestion that a *Brady* type of violation had occurred; see *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); he wanted to put more representations on the record. The prosecutor stated: "I'd just like to indicate that I did ask the witness if she had ever been diagnosed with any psychiatric condition. She told me about the learning disability. We talked about what that meant for her. It in no way seemed exculpatory to me in any way. She indicated talking, processing information, telling stories, sometimes it was a little slower for her. And in my view, I did not think that rose to anything near a level . . . requiring disclosure . . . and that was . . . the extent of that conversation."

The court sustained the state's objection to the inquiry. The court stated: "Up to this point, I've listened to the testimony of the witness. . . . [S]he has indicated that she is not comfortable. . . . [W]ithout anything further, counsel, I'm going to sustain the objection. . . . [T]he state has, in good faith, made inquiry. There's been no effort by the defendant to delve further [into] the issue of her psychiatric issues, if any.

"As far as I know, she took a pill because she had to testify the next day, and that's where it's going to stay unless you can give me something firmer other than it's just confirmed your suspicions."

Thereafter, the court summoned the jury to the courtroom and stated that it had sustained the state's objection. Defense counsel resumed his examination of the complainant. Defense counsel asked the complainant about her testimony that the defendant opened the door to her automobile while the automobile was being operated at highway speed, that she exited the highway but got back on so that she could travel in the opposite direction, that she did not stop for gasoline or to seek assistance prior to driving to the police station, and that she seemingly had difficulty relating relevant facts to the police when she arrived at the police station.[4] Defense counsel also inquired about the fact that it took the complainant five hours to complete her three page written statement and that she was late for her appointment to meet with Patten on April 11, 2014. Additionally, defense counsel asked the complainant to explain why

[4] For example, the following examination of the complainant by defense counsel took place:

"Q. [W]hen you got to the police station, you had a lot of trouble answering the questions . . . that Officer Patten asked you, didn't you?

"A. I don't remember that.

"Q. Isn't it true that you couldn't give him a coherent story and that it was for that reason that he said, well, take this form home and write it out and bring it back later?

"A. Incorrect."

she failed to tell the police initially that the defendant had touched her vagina over her clothing. Defense counsel, however, did not inquire further into the complainant's psychiatric history or use of anxiety medication.

Before this court, the defendant argues that "[t]he court's complete prohibition, without even conducting the inquiry [into the complainant's use of anxiety medication] suggested by the prosecution, of any cross-examination of the complainant regarding her acknowledged, ongoing psychiatric condition, clearly violated [his] sixth amendment right of confrontation." The defendant argues that "the court flatly prohibited any inquiry whatsoever into an obvious issue in the case, which was crucial to the defense"—precluding even an inquiry outside of the presence of the jury—and that its ruling was so prejudicial as to warrant a new trial. The state counters these arguments by arguing that defense counsel, by failing to lay a proper foundation for the inquiry, failed to demonstrate that the inquiry was likely to yield relevant evidence. Thus, the state maintains, the court properly exercised its discretion to disallow the inquiry. Alternatively, the state argues that the defendant is unable to demonstrate that a constitutional violation exists because the defendant was afforded an ample opportunity to expose facts from which the jury could assess the reliability of the complainant's testimony, and any error by the court was harmless beyond a reasonable doubt.

"[T]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . . As an appropriate and potentially vital function of cross-examination, exposure of a witness' motive, interest, bias or prejudice may not be unduly restricted. . . . Compliance with

the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . . [P]reclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Only relevant evidence may be elicited through cross-examination. . . . The court determines whether the evidence sought on cross-examination is relevant by determining whether that evidence renders the existence of [other facts] either certain or more probable. . . . [Furthermore, the] trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. Every reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [Finally, the] proffering party bears the burden of establishing the relevance of the offered testimony. . . .

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . The constitutional standard is met when defense counsel is permitted to expose to the

jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . . Indeed, if testimony of a witness is to remain in the case as a basis for conviction, the defendant must be afforded a reasonable opportunity to reveal any infirmities that cast doubt on the reliability of that testimony. . . . The defendant's right to cross-examine a witness, however, is not absolute. . . . Therefore, a claim that the trial court unduly restricted cross-examination generally involves a two-pronged analysis: whether the aforementioned constitutional standard has been met, and, if so, whether the court nonetheless abused its discretion . . . ." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 510–12, 131 A.3d 1132 (2016).

"It is well established that [a] criminal defendant has a constitutional right to cross-examine the state's witnesses, which may include impeaching or discrediting them by attempting to reveal to the jury the witnesses' biases, prejudices or ulterior motives, or facts bearing on the witnesses' reliability, credibility, or sense of perception. . . . Thus, in some instances, otherwise privileged records . . . must give way to a criminal defendant's constitutional right to reveal to the jury facts about a witness' mental condition that may reasonably affect that witness' credibility." (Internal quotation marks omitted.) *State* v. *Santos*, 318 Conn. 412, 424, 121 A.3d 697 (2015); *State* v. *Slimskey*, 257 Conn. 842, 853–54, 779 A.2d 723 (2001) (same). Thus, a defendant has a constitutional right to attempt to cast doubt on a witness' testimony by demonstrating that his or her sense of perception or ability to recall material events is suspect. See *State* v. *Esposito*, 192 Conn. 166, 176, 471 A.2d 949 (1984) ("[t]he capacity of a witness to observe, recollect and narrate an occurrence is a proper subject of inquiry on cross-examination"); *State* v.

Grant, 89 Conn. App. 635, 641, 874 A.2d 330, cert. denied, 275 Conn. 903, 882 A.2d 678 (2005) (same).

"The proffering party bears the burden of establishing the relevance of the offered testimony. Unless a proper foundation is established, the evidence is irrelevant. . . . Relevance may be established in one of three ways. First, the proffering party can make an offer of proof. . . . Second, the record can itself be adequate to establish the relevance of the proffered testimony. . . . Third, the proffering party can establish a proper foundation for the testimony by stating a good faith belief that there is an adequate factual basis for his or her inquiry." (Citation omitted; internal quotation marks omitted.) *State* v. *Beliveau*, 237 Conn. 576, 586, 678 A.2d 924 (1996); see also *State* v. *Benedict*, 313 Conn. 494, 511, 98 A.3d 42 (2014) (same).

In evaluating a claim of this nature, "[w]e first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional claims necessarily fail. . . . If, however, we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . ." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011). In evaluating the severity of the limitations, if any, improperly imposed on the defendant's right to confront, and thus impeach, a witness, "[w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually

litigated at trial." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 320 Conn. 512. In conducting our analysis, we are mindful that "trial judges retain wide latitude insofar as the [c]onfrontation [c]lause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. . . . [W]e have upheld restrictions on the scope of cross-examination where the defendant's allegations of witness bias lack any apparent factual foundation and thus appear to be mere fishing expeditions." (Internal quotation marks omitted.) *State* v. *Jordan*, 305 Conn. 1, 28, 44 A.3d 794 (2012). We consider de novo whether a constitutional violation occurred. See, e.g., *State* v. *Annulli*, 309 Conn. 482, 492, 71 A.3d 530 (2013); *State* v. *Abernathy*, 72 Conn. App. 831, 837, 806 A.2d 1139, cert. denied, 262 Conn. 924, 814 A.2d 379 (2002).

The court's ruling does not reflect that it misunderstood the applicable legal principles. The court appears to have agreed with the prosecutor's arguments that the complainant's testimony—that in the hours prior to her appearance in court she ingested "something for anxiety" that had been prescribed by a physician—was not a sufficient foundation for a further inquiry in the presence of the jury into whether the complainant was under the care of a psychiatrist. We agree with the court's determination that the complainant's testimony constituted an insufficient foundation from which to pursue the line of inquiry.

In the present case, the complainant testified that, the night prior to her testimony, she ingested medication that had been prescribed for her by a physician to treat anxiety. Then, the state objected to defense counsel's inquiry as to whether the prescribing physician was *a psychiatrist*. The victim's testimony, without

more, did not provide a sufficient factual foundation for this further inquiry. During argument outside of the presence of the jury, defense counsel represented that he based the inquiry on the complainant's demeanor while testifying. It is apparent that defense counsel did not know or have a good faith belief that the complainant was under the care of a psychiatrist or, more significantly, that she had been diagnosed with a psychiatric condition that could affect her ability accurately to perceive the events of April 10, 2014, to recall those events, and to relate them to the jury. His personal observations of the complainant were insufficient. In the absence of adequate support for the inquiry in the record, a good faith belief by defense counsel, or a sufficient proffer to support the further inquiry, the court did not abuse its discretion in precluding the inquiry. See *State* v. *Beliveau*, supra, 237 Conn. 586 (discussing methods of establishing relevance of proffered testimony).

Although the defendant argues that the court prevented him from conducting "any cross-examination of the complainant regarding her acknowledged, ongoing psychiatric condition," the record belies this sweeping assessment of the court's ruling. Over the state's objection, the court permitted defense counsel to ask the complainant whether she had ingested "any kind of medications prior to coming here to court today." The court sustained the state's objection to a specific topic: defense counsel's inquiry with respect to whether the complainant's medication had been prescribed by a psychiatrist. Although defense counsel argues that the court prevented him from inquiring into the complainant's "condition," the record reflects that defense counsel did not ask the complainant whether she had ingested the medication on or before April 10, 2014; whether it affected her ability to perceive events; or whether the medication she ingested prior to her testimony impacted her ability to recall or narrate the events

at issue. The answers to these questions, which were never asked, might have provided a sufficient basis in the evidence to warrant additional inquiry. Instead, following the complainant's admission that she ingested medication to treat anxiety, defense counsel immediately asked her whether the medication was prescribed by a psychiatrist.

Additionally, the defendant argues that the court's ruling was erroneous because it precluded any further inquiry outside of the presence of the jury. The court heard argument with respect to the state's objection outside of the presence of the jury, and, as the defendant observed before this court, at one point during such argument, the prosecutor referred to the possibility that the witness could be questioned outside of the jury's presence. Yet, defense counsel never asked the court for permission to conduct any inquiry of this nature or otherwise make an offer of proof with respect to this issue. The court afforded the prosecutor and defense counsel an ample opportunity to address the court with respect to the state's objection. To the extent that there was any ambiguity in the court's ruling as to whether the court was precluding the defendant from conducting an inquiry outside of the jury's presence, the record does not suggest that defense counsel was discouraged from asking the court to clarify the ruling. On the record before us, the defendant is unable to point to any evidence that the complainant suffered from a condition that negatively affected her ability to perceive, to recall, or to relate the events of April 10, 2014.

Because we conclude that the court properly excluded the defendant's inquiry, we reject his claim that the court's evidentiary ruling violated his rights under the sixth amendment.

II

Next, the defendant claims that the court violated his sixth amendment right to present a defense and

confront his accuser when it prohibited him from presenting evidence purporting to show that the complainant had solicited a bribe from the defendant's wife. We agree.

The following additional facts are relevant to the present claim. During the defendant's case-in-chief, the defense presented testimony from Flutura Halili,[5] the defendant's wife. Halili testified that she emigrated to the United States from Albania ten years earlier. Halili testified that she was comfortable speaking in English, but she asked to use an interpreter during her examination if it became necessary to do so. In relevant part, Halili testified that she and her daughter were employed at a CVS.[6] Halili testified that she worked on "the floor" and that her daughter worked in the pharmacy as a pharmacy technician. After the complainant reported the events underlying this action to the police, the complainant interacted with her and her daughter at CVS. Halili testified that the complainant "came around us" many times and that the complainant "was . . . weird." Halili testified that, following these encounters at CVS, she and her daughter went to the police station to report these encounters to the police.

Defense counsel asked Halili whether the complainant made any "contact" with her, to which Halili began to refer to a specific incident that took place at CVS. The prosecutor objected to the inquiry on the ground of hearsay. The court excused the jury to hear argument on the matter. Outside of the presence of the jury, defense counsel made an offer of proof. Defense counsel asked, "what did [the complainant] say?" Halili testified: "She was talking over there, and I didn't realize

[5] Hereinafter, we refer to Flutura Halili as Halili and to Skender Halili as the defendant.

[6] Following Flutura Halili's testimony, the defense presented testimony from Alemsha Halili, the daughter of Flutura Halili and the defendant. As relevant to the present claim, Alemsha Halili testified that she was employed part-time at CVS in New Canaan.

her until I went there because she came in that place where I was working and she was talking about money, but she never put her head up. She was doing something, like, something she's doing, like by creams over there. She was watching over there, and she was saying something, the money, about money. When I walk there because always I walk away from her—in order not to be around her, but she came over there and she was talking something about my husband, but I don't know what she was talking. But she was talking about money first and my husband."

Defense counsel asked: "[D]id you have any understanding from what this woman said to you about your husband and about money; did you have any understanding that she was trying to get something from you?" Halili testified: "I think she was trying to get something from me. . . . I think she was talking just about to give her money. It's my point, because she came there many times and, that day, she came there just when I was alone over there."

Outside of the presence of the jury, the prosecutor conducted an examination of Halili, as follows:

"Q. Do you recall exactly what words she said?

"A. She was talking about money. She was saying something about forty thousand, something like that. And when I see her, she was saying something about husband, but I walk away always when she's there.

"Q. What did she say about forty thousand? She just said the words forty thousand or she said other words?

"A. She was talking, but when I there, she was saying those things.

"Q. But what was she saying about forty thousand?

"A. Just forty thousand. She was talking, but what I listen was forty thousand and something about my husband.

"Q. Did she . . . use any words around . . . did she just say the number forty thousand?

"A. No. She was saying other words, but I walk away from her.

"Q. But you don't know what those other words were?

"A. She was saying something about him.

"Q. So, she said some words about forty thousand?

"A. No. She was saying some words before forty thousand, and I went there, I saw her, and she said your husband, and I walk away from her.

"Q. So, the only words you can repeat for me today are husband and forty thousand?

"A. Yeah. She was talking more, but when went there and I walk right away because I saw it was her."

Defense counsel argued that "this is evidence from which a jury can find that [the complainant] was seeking . . . to be paid off in this case, and I think that that is certainly relevant to her credibility and, therefore, admissible evidence." Defense counsel argued that the testimony did not constitute hearsay because it was a verbal act and that the act was relevant to the jury's evaluation of the complainant's credibility. Defense counsel argued: "I think the court can take judicial notice that CVS does not sell anything for forty thousand dollars, and I think there's sufficient evidence here to allow this in."

The prosecutor argued that the testimony was not evidence of a verbal act because Halili was unsure what the complainant said. The prosecutor argued that

defense counsel lacked a good faith basis for his argument. The prosecutor argued that Halili was unable to articulate what the complainant said, Halili worked at a business involving money transactions, the incident was not relevant to an understanding of the defendant's alleged criminal acts, and there was nothing in the proffered testimony that would reflect on the complainant's credibility. The prosecutor stated: "[A]t this point, I would indicate that . . . despite the fact [that] the witness is claiming that she had an understanding, that the only words she can repeat for us are forty thousand and husband. I think, for that reason, there was no understanding gleaned there, and despite whatever opinion this witness may have formed."

The court stated: "I'm still skeptical. . . . I'm going to sustain the objection just based upon the fact that we're talking a number, a large number, and we're talking that she mentioned a husband. It's so tenuous. Again, I have no connection between the two. I don't know what words were said in between. I can't put that in front of the jury in all good faith and allow them to do anything other than to speculate as to what this conversation was about. I can't do that." Thereafter, the jury was summoned to the courtroom, and defense counsel indicated that he had no additional questions for the witness. Thus, the court appears to have agreed with the state that Halili's testimony lacked sufficient clarity to be considered evidence of the verbal act for which it was offered, specifically, that the complainant attempted to be paid off by Halili.

On appeal, the defendant argues: "The right of a defendant in a criminal trial to present evidence of bias or improper motivation on the part of a prosecution witness is protected by the confrontation clause of the sixth amendment. . . . Certainly, evidence that the complaining witness had sought a $40,000 payment

from the defendant's wife after she had filed her criminal complaint but before she testified at trial, and that the solicitation had been rebuffed, was evidence of [her] bias and motive well within the parameters of sixth amendment protection. Such evidence is material and not collateral, and may be presented through extrinsic evidence, as the defendant attempted to do in this case." (Citation omitted.) The defendant acknowledges that the testimonial evidence at issue was circumstantial in nature, subject to more than one interpretation, and, therefore, did not fall into the category of " 'smoking gun' " evidence. Yet, the defendant argues, the jury reasonably could have drawn inferences from the evidence and found that the alleged verbal act occurred.

The state appears to agree with the defendant that if, in fact, the defendant proffered evidence that the complainant solicited a bribe, such evidence is relevant impeachment evidence. Rather, as it did at trial, the state argues that the evidence "was far too speculative to establish that [the complainant] solicited a bribe from Flutura Halili, and . . . [was] not relevant to [an evaluation of the complainant's] credibility." The state argues: "Putting aside [Halili's] conclusory and self-serving conjecture that [the complainant] was asking for money, the facts that she testified to—that [the complainant] uttered the words 'money,' 'forty thousand,' and 'your husband,' amidst other unknown words—was far too vague to support the inference that [the complainant] was soliciting a bribe. In other words, the inferences that the defendant suggests were not supported by the proffer. This lack of connection between the words uttered and their proffered purpose made their admission 'not worthy or safe' to prove that [the complainant] had a motive or bias to be untruthful."

The principles set forth in part I of this opinion, related to an accused's right to confront the witnesses against him, also apply to our analysis of the present

claim. The sixth amendment guarantees the right to present facts to the jury that are relevant to an assessment of a witness' credibility and, in particular, his or her "motive, bias and interest. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense." (Internal quotation marks omitted.) *State* v. *Leconte*, supra, 320 Conn. 510. "In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 817, 135 A.3d 1 (2016). "A defendant is, however, bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence should not be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . The trial court retains the power to rule on the admissibility of evidence pursuant to traditional evidentiary standards." (Citation omitted; internal quotation marks omitted.) *State* v. *Romanko*, 313 Conn. 140, 147–48, 96 A.3d 518 (2014).

The parties appear to agree that, if the evidence demonstrated that the complainant solicited a bribe from Halili, it would be admissible as a verbal act that was relevant to an assessment of the credibility of the state's key witness, the complainant. "A verbal act is an out-of-court statement that causes certain legal consequences, or, stated differently, it is an utterance to which the law attaches duties and liabilities . . . [and] is admissible nonhearsay because it is not being offered for the truth

of the facts contained therein." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 255, 856 A.2d 917 (2004). "Extrinsic evidence may be admitted . . . if the subject matter of the testimony is not collateral, that is, if it is relevant to a material issue in the case apart from its tendency to contradict the witness. . . . Evidence tending to show the motive, bias or interest of an important witness is never collateral or irrelevant. . . . It may be . . . the very key to an intelligent appraisal of the testimony of the [witness]." (Citations omitted; internal quotation marks omitted.) *State* v. *Colton*, 227 Conn. 231, 248, 630 A.2d 577 (1993); *State* v. *Erick L.*, 168 Conn. App. 386, 402, 147 A.3d 1053, cert. denied, 324 Conn. 901, 151 A.3d 1287 (2016); Conn. Code Evid. § 6-5. The claim may be distilled to the issue of whether the evidence was relevant simply because it tended to demonstrate the fact for which it was admitted.

" 'Relevant evidence' means evidence having any tendency to make the existence of the fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The trial court has wide discretion to determine the relevancy of evidence and [e]very reasonable presumption should be made in favor of the correctness of the court's ruling in determining whether there has been an abuse of discretion. . . . [A]buse

of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 726, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

"Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . . Furthermore, [t]he fact that the [trier of fact] would have . . . to rely on inferences to make [a] determination does not preclude the admission of . . . evidence. . . . The trial court [however] properly could [exclude] evidence where the connection between the inference and the fact sought to be established was so tenuous as to require the [trier of fact] to engage in sheer speculation. . . . Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience." (Citations omitted; internal quotation marks omitted.) *Masse* v. *Perez*, 139 Conn. App. 794, 805–806, 58 A.3d 273 (2012), cert. denied, 308 Conn. 905, 61 A.3d 1098 (2013).

"[P]roof of a material fact by inference from circumstantial evidence need not be so conclusive as to exclude every other hypothesis. It is sufficient if the evidence produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well

established is our holding that a jury may draw factual inferences on the basis of already inferred facts." (Citations omitted; internal quotation marks omitted.) *State* v. *Copas*, 252 Conn. 318, 339–40, 746 A.2d 761 (2000).

At the outset of our analysis of the testimony at issue, we observe that, although Halili chose to testify without the aid of an interpreter, Halili's proficiency in English was not high. That her language skills were not strong does not necessarily lead us to conclude that her entire testimony was unintelligible or without probative value. As the state recognizes, Halili testified before the jury with respect to several facts: (1) she and her daughter were employed at CVS; (2) on several occasions, the complainant encountered Halili and her daughter while they were working at CVS; (3) Halili considered the complainant's conduct on these occasions to be "weird"; and (4) Halili and her daughter brought the matter to the attention of the police. Outside of the presence of the jury, Halili testified with respect to several additional facts: (1) on the occasion at issue, Halili once again observed the complainant in CVS; (2) when Halili approached the complainant, and the two women were alone in the store, the complainant made statements; (3) in her statements, the complainant referred to the defendant ("your husband") and money, specifically, the sum of $40,000; and (4) when Halili recognized that it was the complainant who was speaking, she walked away.

Despite the fact that Halili did not provide further details about what the complainant said in her presence, her proffered testimony, when viewed in light of the circumstances revealed by the evidence as a whole, provided a reasonable basis for the jury to infer that the complainant attempted to solicit money from Halili. Although it lacked clarity and completeness in some respects, Halili was unwavering in her testimony that, during her brief encounter with the complainant in CVS,

the complainant referred to her "husband" and "$40,000." The complainant made these statements while she and Halili were "alone" in a portion of the store, after she had encountered Halili and her daughter in the store and behaved in a "weird" manner on prior occasions, after she brought a police complaint against Halili's husband, and prior to her testimony at the trial. Halili testified that she and her daughter reported the complainant's prior conduct at their place of employment, CVS, to the police. This evidence reasonably supported an inference that Halili and her daughter at that time considered the complainant's conduct to be legally questionable. If Halili's testimony was credited, in light of the unique circumstances surrounding the encounter in CVS, it is difficult to conceive of an alternative explanation than that suggested by the defense for the fact that the complainant referred to the defendant and a specific sum of money during this encounter with the wife of the person who, according to her version of events, assaulted her sexually.[7] This, of course, does not mean that one does not exist.

Moreover, to the extent that Halili did not recall more specific statements by the complainant, in light of her language skills and her close relationship to the defendant, the jury reasonably could have considered that such lack of clarity in her testimony supported, rather than detracted from, a finding that Halili was testifying truthfully. And, we observe that it was not necessary that proof of such an illicit offer by the complainant be unambiguous or formal. The jury reasonably could have concluded that the complainant, mindful of the impropriety of her offer and the risk that, in a public place, persons other than Halili may hear her statements, chose to remain deliberately vague until Halili indicated a willingness to discuss the matter further.

[7] Indeed, at the time of oral argument before this court, the state was unwilling to provide a possible alternative explanation for the complainant's alleged conduct at CVS.

We are bound to look deferentially at the court's evidentiary ruling, and we recognize that, unlike this court, the trial court has a firsthand opportunity to observe witnesses. Although the state's objection to the testimony appears to have focused on a lack of completeness or clarity in Halili's testimony, the court did not find that the witness was incapable of remembering the events that she was asked to recall or that she was incapable of expressing herself before the jury without the aid of an interpreter.[8] Rather, the court expressed what appeared to be its own "skepticism" with respect to the testimony at issue, and stated that it was it was unable in its own mind to connect the reference to "money" and the reference to Halili's "husband." This suggests that the court simply did not find the evidence to be persuasive. The court is not entitled to exclude evidence simply because it does not consider it to be persuasive; the weight to be afforded the evidence is a question for the jury. As we have discussed, in light of the unique circumstances surrounding the complainant's statements, a jury reasonably could infer that these statements were made in an attempt to receive money from Halili in exchange for favorable treatment in the defendant's case. Stated otherwise, despite the fact that Halili was unable to testify in a more coherent manner concerning the statements made by the complainant, the defendant had the right to attempt to persuade the jury that the evidence nonetheless was proof of the illegal verbal act for which it was offered. The inference that the defendant wanted to invite the jury to draw from this evidence was not so unreasonable as to warrant its exclusion. Accordingly, we conclude that the proffered evidence was relevant

[8] "A person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person." Conn. Code Evid. § 6-3 (b).

and, therefore, admissible evidence that the court should have admitted at trial.

In connection with this claim, the state argues that the alleged constitutional violation did not occur because the court properly excluded the evidence on the ground that it was not relevant. The state, however, has not attempted to demonstrate that, if the court erroneously excluded the evidence, its ruling was harmless beyond a reasonable doubt. "Whether such error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) *State* v. *Merriam*, 264 Conn. 617, 649, 835 A.2d 895 (2003).

It suffices to observe that the state could not prevail in demonstrating that the court's erroneous ruling was harmless beyond a reasonable doubt. The proffered testimony was relevant to an assessment of the state's key witness, the complainant, concerning events that allegedly transpired when she was alone in an automobile with the defendant. The proffered testimony was not cumulative of any other evidence presented at trial, and although the defendant was afforded an ample opportunity to cross-examine the complainant, the cross-examination permitted did not cover this topic. Although the state presented evidence that corroborated the complainant's testimony in several respects, we are unable to conclude that the state's case was so

strong that the evidence at issue would not likely have persuaded the jury in reaching its verdict. If the jury credited the testimony at issue and inferred that it was evidence that the complainant solicited a bribe from a member of the defendant's family, it likely would have changed the outcome of the trial.

In sum, the court erroneously precluded the defendant from presenting extrinsic evidence to demonstrate that the complainant was motivated to testify untruthfully. The exclusion infringed on the defendant's right to confront the complainant and present a defense. Accordingly, the defendant is entitled to a new trial.

III

Finally, the defendant argues that the court improperly admitted evidence of the complainant's demeanor after she made an initial complaint to the police. We decline to reach the merits of this claim.

The defendant argues that, over his objection at trial, the court permitted the state to present testimony from Louise Simpson, the complainant's neighbor, that, in the hours after she reported the incident to the police on April 10, 2014, the complainant appeared to be distraught. Specifically, the record reveals that Simpson testified that the complainant generally exhibited a calm demeanor but, later in the morning on April 10, 2014, her demeanor was different because she "was shaking . . . teary eyed and distraught." The record reflects that the defendant objected to the state's inquiry on the ground that it was irrelevant. The state argued that the evidence, which was based on Simpson's firsthand observations of the complainant, was relevant "because it goes to credibility." The court overruled the defendant's objection.

The defendant also argues that, over his objection at trial, the court permitted the state to present testimony

from M.N., the complainant's sister, that, at or around noon on April 10, 2014, she observed that the complainant "was sweating profusely . . . her eyes were open wide. She looked very scattered. She seemed frazzled, and I had asked her what happened. That was the first thing that came out of my mouth is, what happened." M.N. testified that the complainant and her aunt went shopping together that day. The record reveals that, when the state inquired about the complainant's demeanor that day, the defendant objected on the ground that the evidence was irrelevant.

On appeal, the defendant argues that the court's rulings were improper because the court failed to analyze the admissibility of the evidence under the constancy of accusation doctrine. The defendant argues that "[a]fter the formal police complaint has been lodged . . . demeanor is increasingly suspect as probative evidence and, since it cannot be cross-examined, must be subject to the same sort of rational limitations which have been imposed upon constancy of accusation evidence." The defendant argues that the evidence at issue was "highly suspect" and that the probative value of the evidence was "dubious at best . . . ."

Because the defendant failed to raise this unique argument before the court at the time that he objected to the admissibility of the evidence, but merely objected on the ground that the evidence was not relevant, we decline to consider the merits of the argument here. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate

basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013).

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

In this opinion the other judges concurred.