DAVID SIMMONS *v.* SCOTT WEISS ET AL.
(AC 38610)
(AC 38657)

Alvord, Mullins and Bear, Js.

Syllabus

The plaintiff sought to recover damages for, inter alia, medical malpractice from the defendants, W, a podiatrist, B, a physician's assistant, and a hospital, in connection with a surgery in which two of the plaintiff's toes were amputated, allegedly without the plaintiff's informed consent. Thereafter, the hospital and B filed a motion to dismiss the action as against them on the ground that the plaintiff had failed to obtain and file a written opinion of a similar health care provider as required by statute (§ 52-190a) in medical malpractice actions. W subsequently filed a motion to dismiss the action as against him on the same ground. The trial court granted the defendants' motions to dismiss and rendered judgment dismissing the action, from which the plaintiff did not appeal. The plaintiff thereafter filed an untimely motion to open the judgment of dismissal. The trial court granted in part the motion to open, concluding that the first trial court had improperly granted the defendants' motions to dismiss with respect to the entire complaint because the complaint included a claim of lack of informed consent, which fell outside the scope of § 52-190a, and, therefore, the motions were applicable only to the medical malpractice claims. The court also concluded that compelling equitable circumstances required the court to rectify an injustice by opening the judgment of dismissal because the defendants had misled the first trial court by misstating the law in arguing that the entire complaint asserted claims governed by § 52-190a. Thereafter, W filed an appeal, and B and the hospital filed a separate appeal, with this court. On appeal, the defendants claimed that the trial court improperly had opened the judgment of dismissal more than four months after it was rendered when no exception to the statutory (§ 52-212a) four month limitation period for opening judgments was applicable, and, therefore, that court lacked the authority to open the judgment. *Held*:

1. This court had jurisdiction over the defendants' appeals; although the granting of a motion to open a judgment generally is not immediately appealable, an exception to that general rule is applicable when, as in the present case, an appellant asserts a colorable claim that the trial court lacked the authority to open the judgment.
2. This court concluded that the trial court improperly granted the plaintiff's motion to open the judgment of dismissal and remanded the case with direction to dismiss the motion to open, the trial court having lacked authority to open the judgment because the plaintiff filed his motion to

open more than four months after the judgment of dismissal was rendered and no exception to the statutory four month limitation period was applicable: the plaintiff neither claimed nor attempted to prove that the exceptions to the four month limitation period, namely, fraud, duress, and mutual mistake, applied in the present case, and the trial court did not make such a finding but, rather, opened the judgment of dismissal on the ground that it was erroneous as a matter of law; moreover, contrary to the trial court's conclusion that compelling equitable circumstances required the court to rectify an injustice by opening the judgment of dismissal, the defendants did not present the case in a manner that was deceptive or inconsistent with the complaint, because the plaintiff had failed to file a written opinion of a similar health care provider as required by 52-190a, neither the filing nor the granting of the motions to dismiss on that ground was a violation of the law or an injustice, even if there may have been lack of consent or lack of informed consent claims included in the complaint, the first trial court dismissed the complaint because it failed to comply with § 52-190a, and the existence of these other claims did not make the dismissal of the action manifestly unjust, and opening a judgment after the four month limitation period on the ground that a court improperly dismissed an action in full rather than in part was beyond the authority of the court.

Argued April 20—officially released September 5, 2017

Procedural History

Action to recover damages for, inter alia, the defendants' alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, granted the defendants' motions to dismiss and rendered judgment for the defendants; thereafter, the court, *Povodator*, *J.*, granted in part the plaintiff's motion to open the judgment, from which the named defendant and the defendant Scott Brown et al. filed separate appeals with this court. *Improper form of judgment; judgment directed.*

Liam M. West, for the appellant (named defendant).

Michael G. Rigg, for the appellants (defendant Scott Brown et al.).

Opinion

MULLINS, J. The defendants, Scott Weiss, Norwalk Hospital (hospital), and Scott Brown, appeal following

the trial court's granting in part of the motion filed by the plaintiff, David Simmons, to open a prior judgment that had been rendered against him. On appeal, the defendants claim that the trial court improperly opened the judgment more than four months after it was rendered when no exception to the timeliness requirement existed. We conclude that the trial court did not have the authority to open the judgment. Accordingly, we reverse the trial court's ruling on the motion to open and remand the case with direction to dismiss the motion to open.

The following facts and procedural history are relevant to our review of the defendants' claim. This medical malpractice action arose from a surgery in which Weiss, a podiatrist, amputated two of the plaintiff's toes. According to the plaintiff, Weiss, without "any real examination," recommended the amputation of the plaintiff's right foot, to which the plaintiff responded that amputation was unnecessary. Instead, the plaintiff underwent two surgeries at the hospital to open, scrape, and flush his right foot, both of which were performed by Weiss. During the second surgery, Weiss "amputated [two] noninfected perfectly normal toes." Brown is a physician's assistant who was an employee of the hospital at the time of the surgeries and who provided medical care to the plaintiff while he was an in patient at the hospital. The plaintiff, thereafter, brought this action against the defendants.

On November 21, 2014, the hospital and Brown moved to dismiss the action pursuant to General Statutes § 52-190a[1] on the ground that the plaintiff had failed

[1] General Statutes § 52-190a provides in relevant part: "(a) . . . The complaint . . . shall contain a certificate of the . . . party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . .

to obtain and file a written opinion of a similar health care provider. On November 25, 2014, Weiss filed a motion to dismiss on the same ground. On February 23, 2015, the trial court, *Lee*, *J.*, granted the motion to dismiss filed by Weiss, and, on March 2, 2015, it granted the motion to dismiss filed by the hospital and Brown. The trial court thereafter rendered judgment dismissing the action. The plaintiff did not appeal from that judgment.

On July 10, 2015, the plaintiff filed a motion to open the judgment of dismissal on the grounds of "[l]ack of legal assistance and . . . poor [response] from defense [attorney's] office," to which the defendants objected. On September 8, 2015, the trial court, *Povodator*, *J.*, issued an order in which it stated, sua sponte, that the defendants' motions to dismiss improperly had been granted by Judge Lee because the plaintiff's complaint included a claim for lack of informed consent, which exists outside the scope of § 52-190a, and, therefore, the motions to dismiss should have been applicable only to part of the complaint. Consequently, Judge Povodator ordered the defendants to brief the issue of whether Judge Lee erred in granting the motions to dismiss the entire complaint, with which the defendants complied.

On November 24, 2015, Judge Povodator issued a memorandum of decision in which he ordered that "the motion to open the judgment is granted in part, limited to the claims of the plaintiff asserting lack of consent and/or lack of informed consent, i.e., issues fairly within the scope of the complaint but not asserting medical negligence. The motion is denied with respect to the claims of medical negligence, for which § 52-190a is

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

applicable." Thereafter, Weiss, and Brown and the hospital filed separate appeals with this court. Additional facts will be set forth as necessary.

As a threshold matter, we must first determine whether we have jurisdiction over the appeals. "Ordinarily, the granting of a motion to open a prior judgment is not a final judgment, and, therefore, not immediately appealable. . . . Our Supreme Court, however, has carved out an exception to that rule where a colorable claim is made that the trial court lacked the power to open a judgment." (Internal quotation marks omitted.) *Nelson* v. *Charlesworth*, 82 Conn. App. 710, 712, 846 A.2d 923 (2004). The defendants argue that General Statutes § 52-212a bars a trial court from opening a judgment after four months, absent a common-law exception. They further argue that, in the present action, Judge Povodator did not make a finding of any of the common-law exceptions upon which he relied to open the judgment of dismissal. Consequently, they argue, the trial court lacked the authority to open the judgment after the four month period had expired. As the defendants' claim is a colorable claim that the trial court lacked the authority to open the judgment, we have jurisdiction over the appeals.

We next set forth our standard of review and relevant law. "Whether proceeding under the common law or a statute, the action of a trial court in granting or refusing an application to open a judgment is, generally, within the judicial discretion of such court, and its action will not be disturbed on appeal unless it clearly appears that the trial court has abused its discretion." (Internal quotation marks omitted.) Id., 713.

"[Section] 52-212a provides in relevant part: 'Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may

not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . .' Practice Book § 17-43 contains similar language. Courts have interpreted the phrase, '[u]nless otherwise provided by law,' as preserving the common-law authority of a court to open a judgment after the four month period." Id., 713–14. It is well established that "[c]ourts have intrinsic powers, independent of statutory provisions authorizing the opening of judgments, to vacate [or open] any judgment obtained by fraud, duress or mutual mistake." *In re Baby Girl B.*, 224 Conn. 263, 283, 618 A.2d 1 (1992).

In the present case, on February 23, 2015, the court granted Weiss' motion to dismiss, and it issued judicial notice of that decision on February 27, 2015. Therefore, the four month period within which the plaintiff had to file his motion to open expired on Monday, June 29, 2015.[2] The plaintiff, however, filed the motion to open on July 10, 2015. This is beyond the four month period in which the plaintiff properly could have filed a motion to open a judgment without an applicable exception. See Practice Book § 17-4.

Similarly, on March 2, 2015, the court granted the motion to dismiss filed on behalf of the hospital and Brown, and it issued judicial notice of that decision on March 4, 2015. Therefore, the four month period within which the plaintiff had to file his motion to open expired on Monday, July 6, 2015.[3] The plaintiff, however, filed the motion to open on July 10, 2015, which is beyond the four month period in which the plaintiff properly could have filed a motion to open a judgment without

[2] The four month period ended on June 27, 2015. Because June 27 fell on a Saturday, however, the period within which the plaintiff had to file his motion did not expire until Monday, June 29, 2015.

[3] The four month period ended on July 4, 2015. Because July 4 fell on a Saturday, however, the period within which the plaintiff had to file his motion did not expire until Monday, July 6, 2015.

an applicable exception. See Practice Book § 17-4. Thus, because the plaintiff filed his motion to open beyond the requisite four month time restriction, Judge Povodator would have had the authority to open the judgment of dismissal only if one of the exceptions to the four month period was applicable. Accordingly, we now turn to the exceptions to § 52-212a.

The exceptions to § 52-212a that authorize a trial court to open a judgment when the four month period has expired are fraud, duress, and mutual mistake.[4] See, e.g., *In re Baby Girl B.*, supra, 224 Conn. 283. The plaintiff neither claimed nor attempted to prove the existence of any one of these exceptions when he filed his motion to open the judgment of dismissal. See *Trumbull* v. *Palmer*, 123 Conn. App. 244, 257, 1 A.3d 1121 (burden of proof in motion to open is on moving party), cert. denied, 299 Conn. 907, 10 A.3d 526 (2010). Also, Judge Povodator did not make a finding that any of these exceptions applied. Consequently, Judge Povodator was without authority to open the judgment pursuant to § 52-212a.

Notwithstanding the foregoing, however, and relying primarily on our decision in *Connecticut Savings Bank* v. *Obenauf*, 59 Conn. App. 351, 758 A.2d 363 (2000), Judge Povodator concluded that compelling equitable circumstances required the court to rectify an injustice by opening the judgment.[5] In *Connecticut Savings*

[4] Pursuant to § 52-212a, parties also may waive the four month limitation period. The defendants, however, did not waive the statutory limitation and, instead, objected in part to the motion to open on the ground that it was not timely filed.

[5] Judge Povodator also relied on our holding in *Nelson* v. *Charlesworth*, supra, 82 Conn. App. 710, in which we found that the running of the four month limitation period was vitiated by the fraudulent behavior of the plaintiff's attorney, and, thus, the trial court properly granted the defendant's motion to open. Id., 714–15. In *Nelson*, after the defendant or her insurance carrier failed to answer the complaint, the trial court rendered a default judgment and awarded the plaintiff damages. Id., 711. Subequently, the plaintiff's attorney engaged in settlement negotiations with the defendant's insurance carrier, but at no time during negotiations did the plaintiff's attor-

Bank, we held that it was proper to open a judgment seven years after it was rendered because the judgment was facially inconsistent with the complaint. Id., 355–56. In that case, the plaintiff obtained a money judgment against a defendant where that defendant was the transferee in a fraudulent conveyance action. The judgment violated Connecticut law at the time, which provided that "a successful claim of fraudulent conveyance could not result in a judgment of liability against the transferee, joint and several or otherwise, on the underlying debt obligations owed by the transferor." Id., 355. Thus, we concluded that "[t]o allow the plaintiff to benefit from a judgment against the defendant in excess of $41,000 that was contrary to law at the time of its rendition 'shocks the judicial conscience' . . . and violates the principles of equity that govern our application of the law." (Citations omitted.) Id., 357.

The circumstances of this present case do not rise to the level of deception presented in *Connecticut Savings Bank*. According to Judge Povodator, the compelling equitable circumstances in the present case were that the defendants had misled Judge Lee, and, as a result, Judge Lee rendered a judgment that was erroneous. Specifically, Judge Povodator stated that he was "troubled by the seeming lack of forthrightness [by the defendants' counsel] with the court about the nature of the claims and the applicability of § 52-190a." Moreover, he found that by characterizing the entire claim as one of medical malpractice, the defendants' counsel led to the "distortion of adjudication . . . ." In essence, Judge Povodator suggested that the defendants misstated the

ney inform the insurance carrier of the outstanding judgment and the accruing interest. Id., 711–12. The parties did not reach an agreement, and the defendant subsequently filed a motion to open the judgment after the four month period had expired. Id., 712.

Judge Povodator acknowledged that the lack of candor he attributed to the defendants in the present case was far less egregious than the deceitful conduct in *Nelson*.

law with regard to § 52-190a (c) and, consequently, led Judge Lee to treat the one count complaint solely as a medical malpractice claim rather than as two separate claims of medical malpractice and lack of consent, each requiring separate legal analysis. In Judge Povodator's view, these "equitably compelling circumstances," which appear to be based on his conclusion that the defendants perpetrated a fraud upon the court, were sufficiently compelling to constitute an injustice and thus supported the opening of the judgment.

We do not agree with Judge Povodator. First, we do not agree that the defendants presented the case in such a manner that it was deceptive or inconsistent with the complaint. Indeed, the complaint was not a model of clarity but certainly included claims of medical malpractice without the requisite § 52-190a letter. Because the complaint lacked that letter, neither the filing nor granting of a motion to dismiss the complaint on that basis was a violation of the law or an injustice. See *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 822, 943 A.2d 544 (2008); see also *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 580–81, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).

Second, with respect to the fact that there may have been lack of consent or lack of informed consent claims included in the complaint, given that Judge Lee would have been able to view the operative complaint himself before deciding the motions to dismiss, it is unclear to this court on appeal how the defendants deceived Judge Lee or suppressed the truth regarding what claims were being presented in the complaint. Judge Lee dismissed the complaint because it failed to comply with § 52-190a. The fact that other claims may have been in the complaint does not make the dismissal of the action manifestly unjust. Indeed, § 52-190a (c) provides in relevant part that "failure to obtain and file the written

opinion letter . . . shall be grounds for dismissal of the *action*."[6] (Emphasis added.) This simply is not a case in which the original judgment is facially inconsistent with the complaint such that Judge Lee's decision to dismiss the complaint shocks the conscience. Consequently, we do not find that an injustice occurred in connection with the original judgment of dismissal that violates the principles of equity and, thus, justifies Judge Povodator's opening of the judgment.

Absent equitably compelling circumstances, Judge Povodator's only ground for opening the judgment of dismissal was that Judge Lee improperly had dismissed the action in full, when the complaint actually contained two claims, one for medical malpractice and one for lack of informed consent, and, therefore, two separate legal analyses were required when considering the motions to dismiss. Opening a judgment on such a ground, after the expiration of a four month period, however, is beyond the authority of the trial court. "After the expiration of the four month period . . . a judgment may not be vacated [or opened] upon the sole ground that it is erroneous in matter of law, except by a court exercising appellate or revisory jurisdiction,

[6] We note that the Superior Court judges are divided on the issue of whether an action can be dismissed in part. The majority of judges rule that dismissal of a portion of a complaint is not authorized; see *Recinos* v. *McCarthy*, Superior Court, judicial district of Waterbury, Complex Litigation Docket, Docket No. X06-CV-15-6028101-S (January 6, 2016, *Zemetis*, *J.*) (61 Conn. L. Rptr. 567) (citing numerous Superior Court decisions and concluding that "[t]he majority view of the judges of the Superior Court appears to be that § 52-190a authorizes only dismissal of the action not sections of it" and, therefore, the court does not have authority to dismiss only part of plaintiff's action under § 52-190a [internal quotation marks omitted]); the minority view is that partial dismissal is authorized.

We need not resolve that division of authority today because for purposes of the present case, Judge Lee clearly did not render a judgment that was so inequitable or unjust that compelling circumstances permitted Judge Povodator to open the judgment after the four month limitation period had expired. Also, as mentioned previously in this opinion, none of the recognized exceptions to the four month rule applied.

unless such action is authorized by statute or unless the error is one going to the jurisdiction of the court rendering the judgment." (Internal quotation marks omitted.) *Gallagher* v. *Gallagher*, 29 Conn. App. 482, 483–84, 616 A.2d 281 (1992).

Here, the four month period had expired when the plaintiff filed his motion to open. The trial court, therefore, did not have the authority to open the judgment unless an exception applied. The trial court, however, opened the judgment on the basis that Judge Lee's judgment of dismissal was erroneous as a matter of law. This, however, is not an exception to the four month rule. As such, the trial court exceeded its authority and improperly granted in part the plaintiff's motion to open.

The form of the judgment is improper, the trial court's ruling on the plaintiff's motion to open the judgment is reversed, and the case is remanded with direction to dismiss the motion to open.

In this opinion the other judges concurred.

WENDY J. DEJANA *v.* MICHAEL DEJANA
(AC 38884)

Keller, Prescott and Beach, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her postjudgment motion for contempt, in which she alleged that the defendant had not paid her the full amount due for unallocated alimony and child support as required under the parties' separation agreement, which had been incorporated into the dissolution judgment. On appeal, the plaintiff claimed that the court, in declining to hold the defendant in contempt, improperly interpreted the separation agreement. Specifically, she claimed that the defendant did not pay her support from that portion of his compensation that was comprised of moneys declared as income on his income tax return from a certain

long term incentive stock award program offered by his employer. The court had found that the separation agreement gave the defendant the right to apply all or a portion of the funds in dispute to the college education expenses of the parties' child without any claim by the plaintiff to receive any portion of those funds for her benefit. *Held*:

1. Contrary to the defendant's assertion, the plaintiff's claim that the trial court should have awarded her an arrearage consisting of 30 percent of the defendant's compensation from the stock incentive program for additional unallocated alimony and child support owed was preserved and considered by the trial court and, therefore, was reviewable on appeal; although the trial court noted in its memorandum of decision that the basis of the plaintiff's claim that her unallocated alimony and child support had been underpaid was that she was entitled to receive a percentage of the defendant's income from the funds of the stock incentive program, the court determined that the plaintiff was not entitled any percentage share of those funds, which, pursuant to the terms of the parties' separation agreement, were expressly reserved to the defendant for use in paying the son's college expenses.
2. The trial court did not abuse its discretion in denying the plaintiff's postjudgment motion for contempt, the defendant having complied with the provision of the separation agreement governing unallocated alimony and child support; the trial court properly determined that the language of the separation agreement that required the defendant to pay the plaintiff 40 percent of his base salary and 30 percent of his annual bonus as unallocated alimony and child support was clear and unambiguous, and required the defendant to pay unallocated alimony and child support based on a percentage of his base salary and annual incentive cash bonus, and to use the entirety of any income he received from his stock incentive program to fund his son's college education, and although the plaintiff would have liked the income from the stock incentive program to have been considered a form of bonus compensation from which the defendant would be required to pay her 30 percent of the value, the court correctly construed the specific language of the agreement as awarding all funds derived from the stock incentive program to the defendant for the purpose of paying the son's college expenses, as the specificity of the permitted usage of the stock incentive funds to meet the defendant's obligation for college expenses as set out in the separation agreement controlled and was given greater weight than the general definition of the word bonus, so as not to render any provision of the agreement superfluous.

Argued April 18—officially released September 5, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Marano*, *J.*;

judgment dissolving the marriage and granting certain other relief in accordance with the parties' separation agreement; thereafter, the court, *Sommer*, *J.*, denied the plaintiff's motion for contempt, and the plaintiff appealed to this court. *Affirmed.*

James H. Lee, for the appellant (plaintiff).

Dori-Ellen S. Feltman, for the appellee (defendant).

Opinion

KELLER, J. The plaintiff, Wendy J. Dejana, appeals from the judgment of the trial court denying her postjudgment motion for contempt against the defendant, Michael Dejana. On appeal, the plaintiff claims that the court, in declining to hold the defendant in contempt, improperly interpreted the parties' separation agreement, which had been incorporated into the judgment of dissolution. In support of this claim, the plaintiff argues that the court improperly determined that the separation agreement (1) required the defendant to pay unallocated alimony and child support based upon a percentage of his base salary and annual incentive cash bonus, and (2) permitted the defendant to use the entirety of the income he received from vested stock units, pursuant to his employer's long-term incentive program, to fund the private college education of the parties' son. We affirm the judgment of the court.[1]

The following factual and procedural history is relevant to our resolution of the plaintiff's claims. On April 21, 2015, the plaintiff filed a postjudgment motion for contempt, claiming, inter alia, that the defendant had not paid her the full amount due for unallocated alimony and child support since 2010. On September 2, 2015, and December 16, 2015, a hearing on the motion was

[1] Although not clearly expressed in the plaintiff's statement of issues, we presume that the plaintiff is also claiming that the court erred in denying her motion for contempt.

held before the court at which both parties testified and presented other evidence.

In its memorandum of decision, the court found the following facts and procedural history. "The marriage of the plaintiff and the defendant was dissolved on January 9, 2009. Among the orders entered by the court at the time of dissolution were unallocated alimony and child support orders set forth in article VIII of their separation agreement. [The plaintiff] has filed a motion for contempt, dated April 10, 2015, in which she alleges, inter alia, that the defendant mischaracterized his 2010–2013 compensation as base salary, resulting in [the] plaintiff receiving $84,821 less than she was entitled to receive. . . .[2]

"Article VIII of the separation agreement sets forth the terms of the parties' agreement regarding unallocated alimony and child support.[3] In addition to the alimony and support obligations set forth in paragraph 8.1 of [that article of] the separation agreement, the parties further agreed in article VII, [paragraph] 7.1, that the defendant would be obligated to pay all of the undergraduate college education expenses for the parties' minor son . . . . The agreement provided that the defendant shall have the option of fulfilling this obligation by scholarships and grants obtained by [the parties' son] and the use of [the defendant's Long-Term Incentive Award Program (LTIP), or as it is alternatively referenced, Performance Stock Deferred Plan, an award

[2] The court noted that the "[p]laintiff further submits that the amount of alleged underpayment for 2014 has not yet been determined."

[3] Article VIII of the parties' separation agreement is entitled, "Unallocated Alimony and Child Support." Paragraph 8.1 of article VIII provides: "The Husband, during his lifetime, shall pay to the Wife as alimony, immediately upon receipt of each of his base salary paycheck[s], forty (40%) percent of the gross amount of the base salary and thirty (30%) percent of any bonus upon receipt of same. Commencing April 1, 2012, the percentages shall be reduced to thirty-five (35%) percent with respect to the base salary and twenty-five (25%) percent with respect to the bonus."

program established by his former employer, the Royal Bank of Canada (bank)].[4]

"The parties do not dispute the following facts. [Their son] attended Trinity College from September, 2011, until he graduated in May, 2015, at a total cost of approximately $240,000. Pursuant to the parties' separation agreement, [the] defendant paid all of [the son's] college expenses. In compliance with the parties' separation agreement, [the] defendant utilized the funds in his [LTIP] to pay for . . . college expenses at Trinity College. [The defendant] received $225,746 from the [LTIP] program, net of taxes. He paid Trinity College $235,021 using funds from the . . . LTIP account in full, and supplementing his obligation to pay for [his son's] education from other funding sources. [The defendant] is no longer employed by [the bank] and is therefore no longer entitled to participate in, or receive benefits from, the [LTIP]. Following [their son's] graduation from Trinity College, [the] plaintiff filed the within motion for contempt, alleging that [the defendant] did not pay her the proper amount [of] unallocated alimony and child support, as required by the terms of the separation agreement. In simplest terms, [the] plaintiff's

[4] Article VII of the parties' separation agreement is entitled, "Educational Expenses." Paragraph 7.1 of article VII provides in pertinent part: "The Husband shall be responsible for and shall pay the costs of four (4) years of undergraduate college education leading to a bachelor's degree for the parties' minor child under only the following terms and conditions:

"(a) College education costs shall be defined as room and board, tuition, books, registration, laboratory, and special fees, reasonable travel to and from school, allowance, and ordinary miscellaneous fees.

"(b) College education shall be defined to include but not be limited to a four (4) year undergraduate program in any college or university, junior college, technical, vocational, secretarial or trade school.

"(c) The Husband shall have the option of fulfilling this obligation in whole or part by obtaining any scholarships or grants which are obtained by the child and the use of his [LTIP] with a current vested value of approximately $23,000 as of December 21, 2008, and a vested and unvested value of approximately $76,000. The Husband acknowledges his educational obligation hereunder even if the [LTIP] decreases in value. . . ."

claim arises from the fact that [the] defendant did not pay [the] plaintiff support from that portion of his compensation which was comprised of mon[eys] declared as 'income' on his income tax return from [the LTIP].

"[The plaintiff] called Dr. Daniel Purushothan in support of her claim that the LTIP mon[eys] [the] defendant received should be included in the calculation of her alimony payment. [Purushothan] was qualified to testify on the issue of executive compensation as related to [the] defendant's compensation. He provided a clear explanation of executive compensation. In this case, as noted, [the] defendant received, in addition to a base salary, a portion of his compensation as income pursuant to the [LTIP] established by his [former] employer, [the bank]. . . . Purushothan testified that, as an individual rises through the executive ranks, the proportion of [his] income attributed to regular salary diminishes, and the individual receives a higher proportion of income based on variable factors, such as bonuses or equity in the organization. In this case, [the] defendant's income is comprised of a base salary, annual incentive or cash bonus [(annual incentive cash bonus)] and the [LTIP].

"Notwithstanding the testimony of . . . Purushothan, at the time of dissolution, the parties themselves had determined how the portion of the defendant's income which was derived from his participation [in the bank's LTIP] award program should be utilized. That agreement clearly gave the defendant the right to apply those funds to their son's college education.

"The court has carefully considered the evidence and testimony presented and has applied the facts to the terms of the parties' [separation] agreement. Based on the foregoing, the [court] concludes that the plaintiff is attempting to require the defendant to pay her a portion of the LTIP income as alimony when she has

already agreed that these funds shall be applied to [their] son's education expenses. There is no limitation on the defendant's right to use the LTIP income for [the son's] college expenses. The parties could have provided that the portion of the . . . LTIP income remaining, net of any percentage paid as alimony, could be applied to . . . college expenses. They did not do so. The terms of the separation agreement are clear.

"The plaintiff has not sustained her burden of proving that the defendant has failed to pay her alimony as ordered by the court at the time of dissolution and that she has been . . . underpaid. [The plaintiff's] argument would require a finding that she was entitled to receive a percentage of the defendant's income from the . . . LTIP program and that, only thereafter, could the defendant apply the LTIP mon[eys] to pay for their son's college education. As agreed by the parties at the time of dissolution, the defendant had the option, i.e., it was his sole right to apply all or any portion of the funds in the LTIP account from that source to pay for the . . . college education [of the parties' son] without any claim by the plaintiff to receive any portion of the LTIP funds for her benefit." (Footnotes added.)

The court denied the plaintiff's motion for contempt and counsel fees. This appeal followed. Additional facts will be set forth as necessary.

I

We first address the defendant's assertion that the claim that the plaintiff presents on appeal was not preserved in the trial court and, therefore, we should decline to review it. We are not persuaded by this argument.

The defendant claims that the plaintiff asserts for the first time on appeal that the defendant's arrearage "comes to about $100,000," based upon a new theory

of the case: that the defendant paid her the correct percentage of his base salary and annual incentive cash bonus, but that, pursuant to article VIII, paragraph 8.1, of the separation agreement, he also should have paid her 30 percent of the income realized annually from the LTIP as additional unallocated alimony and child support.

"It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided by the trial court." (Internal quotation marks omitted.) *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010). "The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 454–55, 147 A.3d 655 (2016).

The defendant correctly points out that this claim differs substantially from the allegation made in the plaintiff's motion for contempt, that the defendant owed her $84,821[5] because he "mischaracterized his 2010 and 2011 income as base salary rather than bonus," and from an entirely different claim that was presented by the plaintiff during the contempt hearing, that the defendant owed her approximately $193,000 because he

[5] The plaintiff's counsel claimed during the second day of the hearing that this language in the motion for contempt was a "typo," and should have read the other way around, i.e. that the defendant mischaracterized his income as bonus salary rather than base salary. It would be nonsensical to claim that the defendant mischaracterized bonus income as base salary, which would have resulted in his paying more than he was obligated to under the separation agreement. Although the plaintiff's counsel indicated that she would amend the motion to conform to the proof adduced at the contempt hearing, no amendment was ever filed.

should have paid the plaintiff 40 percent of his total income, including his base salary, annual bonus, and the annual vested value of his stock units in the LTIP.

After thoroughly reviewing the record, we conclude, however, that the court interpreted certain representations made by the plaintiff as a third, alternative claim, now constituting the plaintiff's claim on appeal, which was rejected by the court. During the hearing, the court made several efforts to clarify the precise nature of the basis for the plaintiff's contempt motion. Midway through the second day of the contempt hearing, the defendant raised a due process claim on the basis of the plaintiff's lack of clarity as to her allegation of contempt. The court engaged in a lengthy discussion with the plaintiff's counsel regarding this lack of clarity, but determined that, essentially, the plaintiff was asserting an underpayment on the part of the defendant of his obligation under article VIII, paragraph 8.1, of the separation agreement, and given the amount of evidence that already had been presented, the court allowed the plaintiff to continue pursuing her motion despite the defendant's objection. At one point, however, the court characterized the plaintiff's claim as follows:

"The Court: Isn't the plaintiff's claim a matter of setting forth for the court a mathematical chart that says here's what I claim I'm entitled to? I, the plaintiff. Forty percent of the—

"[The Plaintiff's Counsel]: Right

"The Court: —base salary. The salary. Thirty percent of the [annual incentive cash bonus]. And according to the plaintiff's claim, if I understand correctly, also 30 percent of the [LTIP], because the plaintiff's argument is that the [LTIP] and the [annual incentive cash bonus] are both in that category. Isn't that what the plaintiff is claiming?

"[The Plaintiff's Counsel]: "We're claiming exactly that, the [LTIP] and [the annual incentive cash bonus] both belong in—in the general—

"The Court: Well, it's not exactly clear from this."

The defendant testified that, in accordance with his interpretation of the separation agreement, he paid the plaintiff 40 percent of his semimonthly, base salary paycheck, and at the end of each year, when he was awarded his annual incentive cash bonus, he paid the plaintiff 30 percent of that. He further testified that he used all the income he received from his LTIP to pay for the college expenses of the parties' son, and that he actually incurred a shortfall after exhausting the LTIP funds.

Later during the hearing, counsel for the plaintiff indicated that one of the bases for the plaintiff's claim of an arrearage being owed to her is that the defendant "should have paid [the plaintiff] a portion of the vested LTIP shares as he received them . . . in addition to . . . using [them] to pay for college," and that the LTIP, as part of the defendant's total direct cash compensation, should be treated as either base or bonus salary.[6]

At the conclusion of the hearing, during the plaintiff's testimony, she referred to a spreadsheet of calculations she had prepared in support of her claim, and she requested that the court either find that the defendant should have been paying her, as unallocated alimony and child support, 40 percent of his total compensation, including his base salary, annual incentive cash bonus, and the LTIP funds, *or in the alternative*, 40 percent of his base salary, 30 percent of his annual incentive cash bonus, and 30 percent of his LTIP income.

[6] Treating the LTIP as either a base or bonus salary which was included in paragraph 8.1 of article VIII of the parties' separation agreement would have required the defendant to pay either 40 percent or 30 percent of the LTIP income to the plaintiff.

We therefore conclude that the claim on appeal—that the court should have awarded the plaintiff an arrearage consisting of 30 percent of his LTIP compensation for additional unallocated alimony and child support owed—was preserved, albeit somewhat inartfully, and considered by the trial court. In its memorandum of decision, the court noted that the basis of the plaintiff's claim that her unallocated alimony and child support had been underpaid was that she was entitled to receive a percentage of the defendant's income from the LTIP funds. Although this alleged percentage owed, as claimed by the plaintiff, was either 30 percent or 40 percent, the court ruled that the plaintiff was entitled to no percentage share of the defendant's LTIP income, as that income was expressly reserved to the defendant by the terms of the separation agreement for use in paying the son's college expenses.

II

We next address both aspects of the plaintiff's claim together, as they each involve the court's interpretation of the parties' separation agreement, and are interrelated.

We begin with general principles and the applicable standards of review. The order at issue in the present case is contained in the parties' separation agreement, which was incorporated into the court's judgment of dissolution. "It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted *in the light of the situation of the parties and the circumstances connected with the transaction.* . . . [T]he intent of the parties is to be ascertained by a fair and reasonable

construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . . When the language of a contract is ambiguous, the determination of the parties' intent is a question of fact. . . . When the language is clear and unambiguous, however, the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Emphasis in original; internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015).

"A contract is unambiguous when its language is clear and conveys a definite and precise intent. . . . The court will not torture words to impart ambiguity where ordinary meaning leaves no room for ambiguity. . . . Moreover, the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . .

"In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 192, 112 A.3d 144 (2015).

The plaintiff claims that the court improperly interpreted the parties' separation agreement as (1) requiring the defendant to pay unallocated alimony and child support based upon a percentage of his base salary and annual incentive cash bonus, and (2) permitting the defendant to use the entirety of the income he received from vested stock units pursuant to his former employer's LTIP to fund the private college education of the parties' son. The defendant argues that the court properly interpreted the plain and unambiguous language of the separation agreement as requiring the defendant, under article VIII, to pay unallocated alimony and child support based upon a percentage of his base salary and annual incentive cash bonus, and permitting the defendant under article VII to use the entirety of any income he received from his LTIP to fund his son's college education. We agree with the defendant.

At the time of the parties' divorce in 2009, the defendant worked at the bank, and the parties had one minor child. The defendant's compensation from the bank consisted of three components: (1) a base salary; (2) an annual incentive cash bonus paid in December of each year; and (3) the LTIP, an award of stock units that automatically vested three years after each award of stock was made.

The parties' separation agreement addressed the three components of the defendant's compensation package in two separate and independent provisions.

The first two components of the defendant's compensation, specifically, the defendant's base salary and annual incentive cash bonus, are indisputably addressed in article VIII, entitled "Unallocated Alimony and Child Support." That article sets forth that the defendant would pay to the plaintiff 40 percent of his base salary and 30 percent of his annual bonus as unallocated alimony and child support until the earlier of the

defendant's death, the plaintiff's death or remarriage, or thirteen and one-half years from the first payment, with the percentages reduced to 35 percent of the defendant's base salary and 25 percent of the defendant's bonus on April 1, 2012.[7] Although, during the contempt hearing, the plaintiff also argued that all three compensation components were part of the defendant's base salary, she now concedes on appeal that there is no dispute as to the precise meaning of "base salary," which consists of the semimonthly gross salary paid to the defendant by the bank, 40 percent of which was to be paid to the plaintiff upon receipt. The parties also do not disagree over the inclusion of the annual incentive cash bonus within the meaning of the word "bonus" in paragraph 8.1 of article VIII of the separation agreement.

The dispute centers around whether, in addition to the annual incentive cash bonus that the defendant received every December 15, the term "bonus," in paragraph 8.1 of article VIII, also includes the income derived from the defendant's vested LTIP stock awards. To resolve the claim presented in this appeal, we must determine whether the court properly concluded that article VII, paragraph 7.1, of the separation agreement unambiguously provides that the defendant could use his existing and future LTIP income toward the payment of college expenses. That issue presents a question of

[7] Subsequent to the date of the dissolution of their marriage, on October 1, 2013, the plaintiff and the defendant reached an agreement to modify the dissolution judgment and eliminate the reduction in the percentages to be paid from April 1, 2012, to the date that their child attained the age of twenty-two on September 11, 2015. This agreement, which was in writing, modified the terms of the judgment, but was never made an order of the trial court. The defendant testified that he complied with this modification agreement. The issue of whether the defendant should be credited with any additional amounts paid pursuant to the terms of this agreement, although discussed during the contempt hearing, was not addressed by the court and has not been raised on appeal.

law over which our review is plenary to determine if the court's conclusions are legally and logically correct. See *Flaherty* v. *Flaherty*, 120 Conn. App. 266, 269, 990 A.2d 1274 (2010).

The plaintiff relies on a broad definition of "bonus," the word used in article VIII, paragraph 8.1, to support her claim that the defendant also was ordered to pay her 30 percent of the value of the income from his vested LTIP stock awards, since "bonus" has been expansively defined as "money or an equivalent given in addition to the usual compensation." (Emphasis omitted; internal quotation marks omitted.) *Ziotas* v. *Reardon Law Firm, P.C.*, 111 Conn. App. 287, 295, 959 A.2d 1013 (2008) (citing definition of "bonus" in Webster's Third New International Dictionary), rev'd in part on other grounds, 296 Conn. 579, 997 A.2d 453 (2010).

The defendant counters that although the LTIP generally might be considered as a form of bonus compensation, the court correctly construed the specific language of paragraph 7.1 of article VII, entitled "Educational Expenses," as awarding all funds derived from the LTIP compensation to the defendant for the purpose of assisting him in paying the college expenses of the parties' son.[8] We agree with the defendant.

The record reveals that the court in the present case determined that the contractual language in article VII, paragraph 7.1, clearly and unambiguously provided that the LTIP funds the defendant received as additional compensation prior to and after the marriage dissolution were specifically reserved for the defendant's use in paying the college education expenses of the parties' son. As a result, viewing the contract as a whole, the LTIP funds were necessarily excluded from the reference to bonus income in article VIII, paragraph 8.1,

[8] Pursuant to the terms of the separation agreement, the plaintiff was not obligated to pay for any of the college expenses of the parties' son.

which described how the amounts of the defendant's payments of unallocated alimony and child support were to be calculated. Significantly, the court did not articulate any factual findings with respect to the intent of the parties in enacting the contractual language at issue. Had the court found article VII, paragraph 7.1, to be ambiguous, it necessarily would have made factual findings as to the intent of the parties. See *Fazio* v. *Fazio*, 162 Conn. App. 236, 250, 131 A.3d 1162 (ambiguity in separation agreement "required" trial court "to make a finding of fact as to the parties' intent"), cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016). No such findings are reflected in the record before us.

Article VII, paragraph 7.1, provides in relevant part that the defendant "shall have the option of fulfilling [his] obligation [for paying the costs of four years of college education] in whole or part by obtaining any scholarships or grants which are obtained by the child and the use of his [LTIP] . . . ." Although the agreement notes the vested and unvested value of the LTIP as of December 21, 2008, the year prior to the date of the parties' marriage dissolution, it does not limit the dollar amount the defendant can access from the fund.[9] There is no reference in paragraph 7.1 that, for the purpose of paying college expenses, the defendant can use only the LTIP income remaining net of any percent paid as unallocated alimony and child support. In fact, paragraph 7.1 provides that the defendant must fulfill his total educational obligation even if the LTIP decreases in value in the future, which implicitly acknowledges that the value of the fund might increase

[9] This provision for the payment of the son's college expenses was quite generous. It does not include any of the limitations that would have been imposed pursuant to an educational support order entered in accordance with General Statutes § 46b-56c (f). The defendant agreed to be responsible for private college tuition, room and board. He also agreed to a host of additional expenses related to the son's attendance at college, including an allowance.

or decrease in future years and, therefore, the LTIP might not entirely provide the defendant with the means to pay the son's college expenses.[10]

Although the plaintiff would like to have the expansive general definition of the word "bonus" applied to incorporate the LTIP funds into paragraph 8.1 of article VIII for the purpose of calculating unallocated alimony and child support, the specificity of the permitted usage of the LTIP funds to meet the defendant's obligation for college expenses in paragraph 7.1 of article VII should control and be given greater weight than the general definition of the word "bonus." See 2 Restatement (Second), Contracts § 203 (1981). If the parties had intended that the defendant would pay the plaintiff a percentage of his LTIP income annually to the plaintiff, there was no reason to include any language in article VII specifically permitting him to use the funds for college expenses; he would not have needed permission to spend the remaining percentage, after paying unallocated alimony and child support, in any way he chose. We decline to interpret the language of article VII referencing the LTIP funds in a manner that would render this provision superfluous. "When interpreting a contract, we must look at the contract as a whole, consider all relevant portions together and, if possible, give operative effect to every provision in order to reach a reasonable overall result." (Internal quotation marks omitted.) *R.T. Vanderbilt Co.* v. *Continental Casualty Co.*, 273 Conn. 448, 462, 870 A.2d 1048 (2005).

We further note that the separation agreement, in article XXIV, incorporates into and makes part of the agreement the financial affidavits of both parties that were filed at the time of the marriage dissolution in

[10] In fact, the defendant testified that he used all of the LTIP funds for college expenses, but that those funds did not cover all of his expenditures for his son's college education.

January, 2009. The agreement provides that it is "expressly understood that the terms of this agreement and the financial arrangement hereunder were made upon the representations contained in said affidavits," and that "the parties hereto relied upon said representations in executing this agreement." This is significant because the defendant's financial affidavit references only one "bonus," the annual incentive cash bonus, which he listed, along with his base salary, as part of his weekly income. The LTIP fund was not listed as bonus income, but rather as an asset, on the defendant's financial affidavit. The fact that the financial affidavit includes only the annual incentive cash bonus as bonus income lends further support to the court's determination that the LTIP income was not part of the bonus referred to in article VIII, which governed unallocated alimony and child support.

The court correctly determined that the language in article VII, paragraph 7.1, of the separation agreement was clear and unambiguous, and effectively removed the LTIP funds from the calculation of the 30 percent of bonus income contemplated in article VIII, paragraph 8.1, of the unallocated alimony and child support provision of the agreement. The defendant, therefore, had complied with paragraph 8.1 of the separation agreement. Accordingly, the court did not abuse its discretion in denying the plaintiff's postjudgment motion for contempt.

The judgment is affirmed.

In this opinion the other judges concurred.

KIM THOMSON *v.* DEPARTMENT OF SOCIAL SERVICES (AC 38851)

Sheldon, Beach and Flynn, Js.

Syllabus

The plaintiff employee commenced an action against her employer, the defendant Department of Social Services, alleging that the defendant had violated the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) by discriminating against the plaintiff on the basis of her disability as a result of the defendant's failure to provide her with a reasonable accommodation. The plaintiff suffered from a severe chronic disease that required her to periodically miss work. In January 2013, the plaintiff, who was not eligible for federal family and medical leave, provided G, one of the defendant's human resources representatives, with a medical certificate from her physician that indicated that the plaintiff would have to work on a reduced schedule, but the physician did not indicate a date when she could return to work full-time. Approximately one week later, the plaintiff left a note under G's door indicating that she would be taking a medical leave lasting more than thirty days, depending on her condition. The note listed the plaintiff's cell phone number and home address, and stated that she could be contacted regarding any questions. Thereafter, O, another human resources representative who replaced G, sent a certified letter to the address listed in the plaintiff's note, stating that she was ineligible for family and medical leave, that she had not provided the documents necessary to support a medical leave of absence, and that she was currently on unauthorized leave. The letter stated that O had called the plaintiff's cell phone and left a voicemail message but that she had not received a response. The letter provided that the plaintiff's absence would be deemed a resignation not in good standing if she did not return to work or provide a medical certificate to support her leave by a certain date. After that date had passed, O sent the plaintiff a letter stating that she had "been resigned not in good standing" because she had failed to return to work and failed to provide a completed medical certificate. The trial court thereafter granted the defendant's motion for summary judgment, concluding that the plaintiff failed to present evidence sufficient to support a prima facie case of discrimination because she had not provided evidence demonstrating that she was able to perform her job with or without a reasonable accommodation, or that the defendant did not reasonably accommodate her. From the summary judgment rendered thereon, the plaintiff appealed to this court, claiming that the trial court had improperly rendered summary judgment for the defendant because her request for leave was a reasonable accommodation that would have enabled

her to perform the essential functions of her job. *Held* that the trial court properly determined that the plaintiff could not meet her burden of proving a prima facie case of disability discrimination because her request for leave was not a reasonable accommodation, as the plaintiff informed the defendant that she would be taking a leave of absence but did not provide the defendant with any time frame for her return and did not respond to the defendant's subsequent attempts to contact her regarding her request for leave, and the defendant was not required to wait indefinitely for the plaintiff's medical condition to be corrected; moreover, the defendant was not given an opportunity to engage in the required interactive process with the plaintiff regarding a reasonable accommodation for her disability given that she had failed to follow through with her own directions to the defendant as to how communications would occur.

Argued March 6—officially released September 5, 2017

Procedural History

Action to recover damages for alleged disability discrimination, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Elgo*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Matthew F. Larock, assistant attorney general, with whom, on the brief, were *George Jepsen*, attorney general, and *Ann E. Lynch*, assistant attorney general, for the appellee (defendant).

Michael Roberts filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

BEACH, J. The plaintiff, Kim Thomson, appeals from the judgment of the trial court granting the motion for summary judgment filed by the defendant, the Department of Social Services. On appeal, the plaintiff contends that the court improperly held that insufficient facts were presented to support a prima facie case for

disability discrimination. We affirm the judgment of the trial court.

The following facts, taken from the materials submitted in connection with the motion for summary judgment, are relevant to this appeal. The plaintiff was employed by the defendant as a clerical assistant from 1987 to 2013. She has suffered from severe chronic asthma since birth. Throughout her employment with the defendant, the plaintiff suffered occasional "flare-ups" of her condition. During these flare-ups, the plaintiff required rest for recovery and was unable to work. On several occasions the plaintiff arranged with her human resources representative, Kelly Geary, to take medical leave pursuant to the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (2012) (FMLA). By October, 2012, however, the plaintiff was no longer eligible for FMLA leave because she had not worked the number of hours required to maintain eligibility. The plaintiff, Geary, and the plaintiff's supervisor, Louis Polzella, met to discuss how they could accommodate the plaintiff without using FMLA leave and determined that the plaintiff could use sick leave, personal leave, governor's leave, and unpaid leave when necessary to accommodate her disability.

On January 30, 2013, the plaintiff notified Geary that she would need to take intermittent leave as an accommodation for her disability. The plaintiff provided Geary with a medical certificate on which the plaintiff's physician indicated that she would need "to . . . work only intermittently or on a reduced schedule as a result of the condition," and would be unable to work for four days per month going forward. The form left space for the plaintiff's physician to indicate when she would be able to return to work full-time, but he drew a line through the space and did not fill in a date.

Early in 2013, Geary became responsible for supervising another unit, and Lisa Owens replaced Geary as the

plaintiff's human resources representative. On January 31 of that year, Geary sent Owens a memo informing her that the plaintiff "[h]as had FMLA—fed intermittent for years" and that "last time she submitted," she did not have the hours required to take any additional FMLA leave. Geary also indicated that the plaintiff had mentioned that she may need to take leave soon and had requested the ability to use leave donated from a coworker, but that Geary "advised her she could not enact it until she was out on 'long term' illness of [more than thirty] days."

Approximately one week later, on February 6, 2013, the plaintiff left a note under Geary's office door indicating that she would be taking a medical leave of absence beginning the next day, February 7, 2013, and lasting for "over thirty days depending on my lung condition as I need to get well and my lungs better." The plaintiff noted that she had not spoken with Polzella about taking a leave of absence. The plaintiff also provided her cell phone number and her home address, which she listed in bold type font, and asked Geary to contact her if she had any questions. The plaintiff otherwise did not speak with Geary about taking this leave of absence.

The plaintiff also left paperwork with Geary to make claims under two short-term disability insurance policies. The paperwork left space in several places for the plaintiff and her physician to indicate when she would be returning to work. On the paperwork for one policy, the plaintiff indicated that she would be unable to work from February 7, 2013, "[until] reevaluated." On the same form, the plaintiff's physician indicated that she would be unable to work from "2/7/13" to "ongoing," and that he expected "significant improvement in the [plaintiff's] medical condition" in one to two months. On the paperwork for her other policy, the plaintiff's physician indicated that she would be unable to work from "2/7/13" through "ongoing," and would be able to

return to work "when reevaluated," but did not indicate when that reevaluation would occur. The plaintiff did not provide Geary with a medical certificate sufficient to support this request for leave. On February 7, 2013, Geary sent the plaintiff's note and paperwork to Owens.

On February 13, 2013, Owens mailed a certified letter to the plaintiff's home address notifying her that she was ineligible for FMLA leave, that she had not provided the documents necessary to support a medical leave of absence, that she was not eligible to use leave time donated by a coworker, and that she was currently on unauthorized leave. Owens also notified the plaintiff that she needed to contact her supervisor to request leave on a daily basis, and that, if she did not return to work or provide a medical certificate to support her leave by February 21, 2013, her absence "may be deemed a resignation not in good standing." (Internal quotation marks omitted.) Owens noted that she had called the plaintiff's cell phone number and left a voicemail message on February 8, 2013, but had not received a call back. The plaintiff did not respond and did not return to work. On February 22, 2013, Owens sent the plaintiff a second letter via regular mail notifying her that she had "been resigned not in good standing" because she had failed to return to work and failed to provide a completed medical certificate on or before February 21, 2013.

The plaintiff did not receive either of these letters until February 24, 2013, when she returned home from an approximately two week stay at her daughter's home in Hartford. The plaintiff had not been retrieving her mail from her home address while she was away. On February 25, the plaintiff began calling and leaving messages for Geary and Owens, asking whether the donated leave had been applied, requesting that the disability paperwork be completed, and seeking to "make sure that everything [is] going in the manner that it should

be." On February 27, Owens spoke with the plaintiff on the phone and informed her that, per the letters sent to her home address, she had been deemed resigned not in good standing. On March 15, 2013, the plaintiff mailed a replica of her January 30, 2013 medical certificate to Owens with the additional notation: "[a]sked to stay off work 2/7/13 [until] improved." No action was taken on the basis of that certificate.

The plaintiff commenced an action alleging that the defendant had discriminated against her on the basis of her disability and had failed to provide her with a reasonable accommodation in violation of General Statutes § 46a-60 (a) (1), a provision of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. The defendant filed a motion for summary judgment arguing that the plaintiff had failed to present evidence sufficient to support a prima facie case of discrimination, and the trial court granted the defendant's motion. The court agreed and noted that "the plaintiff has not produced evidence demonstrating that she was able to perform her job with or without reasonable accommodation nor has she shown that the defendant did not reasonably accommodate [her]." This appeal followed.

We begin by setting forth the relevant standard of review and applicable legal principles. "A court shall render summary judgment if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Practice Book § 17-49. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . The test is whether the party

moving for summary judgment would be entitled to a directed verdict on the same facts. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 402–403, 944 A.2d 925 (2008).

"Our Supreme Court has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws. . . . While certain elements of the Fair Employment Practices Act and the [Americans with Disabilities Act, 42 U.S.C. § 12101 et seq. (2012) (ADA)] differ, [c]laims for violations of the [Fair Employment Practices Act] are analyzed under the same standards as claims for violations of the ADA. . . . [D]iscrimination on [the] basis of [a] disability under [the] ADA includes not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity. . . . Under the ADA, a qualified individual with a disability is one who is capable of performing the essential functions of the desired job with or without reasonable accommodation." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Langello* v. *West Haven Board of Education*, 142 Conn. App. 248, 259–60, 65 A.3d 1 (2013).

"In order to survive a motion for summary judgment on a reasonable accommodation claim, the plaintiff must [first establish a prima facie case of disability discrimination by] produc[ing] enough evidence for a reasonable jury to find that (1) [s]he is disabled within the meaning of the [statute], (2) [s]he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant],

despite knowing of [the plaintiff's] disability, did not reasonably accommodate it." (Internal quotation marks omitted.) *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 415; see *McBride* v. *BIC Consumer Products Mfg. Co.*, 585 F.3d 92, 96–97 (2d Cir. 2009). "Once a disabled individual has suggested to his [or her] employer a reasonable accommodation . . . the employer and the employee engage in an informal, interactive process with the qualified individual with a disability in need of the accommodation . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. . . . In this effort, the employee must come forward with some suggestion of accommodation, and the employer must make a good faith effort to participate in that discussion." (Citation omitted; internal quotation marks omitted.) Id., 416.

"The plaintiff bears the burdens of both production and persuasion as to the existence of some accommodation that would allow her to perform the essential functions of her employment . . . ." *McBride* v. *BIC Consumer Products Mfg. Co.*, supra, 583 F.3d 97. "To satisfy this burden, [the] [p]laintiff must establish both that [her] requested accommodation would enable [her] to perform the essential functions of [her] job and that it would allow [her] to do so at or around the time at which it is sought." (Internal quotation marks omitted.) *Nandori* v. *Bridgeport*, United States District Court, Docket No. 3:12CV673 (JBA), 2014 WL 186430, *5 (D. Conn. January 16, 2014); see also *McBride* v. *BIC Consumer Products Mfg. Co.*, supra, 97–98 (plaintiff requesting reassignment as accommodation required to "demonstrate the existence, at or around the time when accommodation was sought, of an existing vacant position to which she could have been reassigned").

To satisfy the second element of her prima facie case, the plaintiff must show that the requested accommodation was reasonable and enabled her to function in the

workplace. See *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 419 ("[i]n order to survive summary judgment on a reasonable accommodation claim, the plaintiff has the burden of showing that an accommodation would enable him [or her] to perform the functions of the job and that, 'at least on the face of things,' it is feasible for the employer to provide the accommodation"); see also *Graves* v. *Finch Pruyn & Co.*, 457 F.3d 181, 185 (2d Cir. 2006); *Nandori* v. *Bridgeport*, supra, 2014 WL 186430, *5–6. The plaintiff argues that her request for leave was a reasonable accommodation and would have enabled her to perform the essential functions of her job. The defendant contends that the plaintiff's request for leave was not reasonable, and, therefore, that she failed to prove that she was able to perform the essential functions of her job with a reasonable accommodation. We agree with the defendant.

We first note that a medical leave of absence is a recognized form of accommodation. See *Green* v. *Cellco Partnership*, 218 F. Supp. 3d 157, 164–65 (D. Conn. 2016); *Hutchinson* v. *Ecolab, Inc.*, United States District Court, Docket No. 3:09CV1848 (JBA), 2011 WL 4542957, *9 (D. Conn. September 28, 2011). Federal courts have held, however, that "[t]he duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely while the employee attempts to recover, nor does it force an employer to investigate every aspect of an employee's condition before terminating him [or her] based on [an] inability to work." *Parker* v. *Columbia Pictures Industries*, 204 F.3d 326, 338 (2d Cir. 2000); see also *Mitchell* v. *Washingtonville Central School District*, 190 F.3d 1, 9 (2d Cir. 1999) ("[n]or, especially in light of the . . . the absence of any indication from [the plaintiff] . . . [that] he expected to be able to return [to work], was the [defendant] required to grant [the plaintiff] an indefinite leave of absence"); *Nandori* v.

Bridgeport, supra, 2014 WL 186430, *8 ("[p]laintiff's only identified accommodation was a request for indefinite injury leave, which, as a matter of law, does not constitute a reasonable accommodation").

Although not bound by it, "we review federal precedent concerning employment discrimination for guidance in enforcing our own antidiscrimination statutes." *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 415. We find persuasive the reasoning of the United States Court of Appeals for the Fourth Circuit in *Myers* v. *Hose*, 50 F.3d 278, 283 (4th Cir. 1995), that "reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question. . . . [R]easonable accommodation does not require [an employer] to wait indefinitely for [the employee's] medical conditions to be corrected . . . ." See also *Mitchell* v. *Washingtonville Central School District*, supra, 190 F.3d 9, citing *Myers*; *Rogers* v. *International Marine Terminals, Inc.*, 87 F.3d 755, 759–60 (5th Cir. 1996) (finding no merit in argument that indefinite leave was reasonable accommodation).

The plaintiff argues that she had requested a reasonable accommodation, thereby satisfying the second element of her prima facie case. We disagree. The plaintiff, prior to her departure, *informed* Geary that she would be taking leave for "*over thirty days* depending on my lung condition . . . ." (Emphasis added.) At a subsequent deposition, the plaintiff was asked, with respect to her request for leave, that "you didn't know how long you were going to be out, correct?" The plaintiff responded, "[c]orrect." One of the forms the plaintiff submitted on February 6, 2013, indicated that her physician expected "improvement" within "one to two months," and additionally stated, in at least three places, that the plaintiff would be absent "[until] reevaluated." The forms did not indicate when the plaintiff

was expected to be reevaluated. Neither the plaintiff's note to Geary nor her short-term disability paperwork indicated when—or even whether—the plaintiff would be returning to work.

When the defendant attempted to obtain further information by contacting the plaintiff by certified and regular mail, the plaintiff did not respond. As the trial court noted, "the defendant's efforts to communicate with the plaintiff were stymied by the plaintiff's failure to follow through with her own directions to the defendant as to how communications would occur." The plaintiff did not attempt to contact the defendant until she had been absent from work for more than two weeks, despite the fact that her request for leave had never been approved. The defendant, then, was not given an opportunity to engage in the required interactive process with the plaintiff regarding a reasonable accommodation for her disability.[1]

The plaintiff informed the defendant that she would be taking a leave of absence, did not provide the defendant with any time frame for her return, and did not respond to the defendant's subsequent attempts to contact her regarding her request for leave. The plaintiff effectively asked the defendant "to hold [her] position open indefinitely while [she] attempt[ed] to recover . . . ." *Parker* v. *Columbia Pictures Industries*, supra, 204 F.3d 338. On the basis of the record before us, the plaintiff has failed to demonstrate that she requested a reasonable accommodation that enabled her to perform

[1] The plaintiff argues that "[b]efore an employer should be able to rely on the 'indefiniteness' of a leave request as a justification for avoiding the accommodation, the interactive process should compel the employer to explain its particular difficulty surrounding the lack of a return date, and to invite the employee to seek an approximate return to work [time frame] from a health care provider." We do not disagree. The defendant, however, did attempt to engage in the necessary interactive process, and the plaintiff did not respond for more than two weeks.

the essential functions of her job, and, therefore, the court properly determined that as a matter of law the plaintiff could not meet her burden of proving a prima facie case of disability discrimination.[2]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ZANE R. MEGOS (AC 38967)

Lavine, Mullins and Beach, Js.

Syllabus

The defendant, who previously had pleaded guilty to six counts of larceny in the fourth degree and was serving probation in connection with that conviction, appealed to this court from the judgment of the trial court revoking his probation and imposing a sentence of sixty months incarceration. The defendant had been charged with violating his probation following his arrest on charges of larceny in the third degree and criminal impersonation, which involved an incident in which he was alleged to have wrongfully obtained a deposit from F for a sham real estate transaction. The trial court found, by a preponderance of the evidence, that the defendant had violated his probation by committing the crimes charged. On appeal, the defendant claimed, inter alia, that the trial court erroneously found that he had violated the condition of his probation that he not violate any criminal law. *Held*:

1. The trial court's findings that the defendant had violated his probation by committing criminal impersonation and larceny in the third degree were not clearly erroneous, there having been evidence presented that demonstrated that the defendant had impersonated another individual and acted in a manner so as to defraud F and to permanently deprive her of her money: the evidence showed that the defendant previously had defrauded two other victims by wrongfully retaining cash deposits for sham real estate transactions in which he falsely promised to rent or to sell them property in exchange for a cash deposit, that he had attempted to repeat that scam by obtaining money from F by falsely

[2] In making a claim for disability discrimination, the plaintiff has the burden to prove all three elements of the prima facie case. See *Curry* v. *Allan S. Goodman, Inc.*, supra, 286 Conn. 415. Because she has failed to establish the second element, we need not address the plaintiff's remaining claims.

promising to rent her a condemned apartment, that he returned F's deposit only after she confronted him, and that, as part of his scheme to defraud F, he impersonated his business partner, gave F receipts previously signed by the business partner, and used the name of his business partner, not his actual name, when asked directly for his name, all of which demonstrated that he impersonated another person and acted in such assumed character with the intent to defraud F, and that he intended to permanently deprive F of the deposit by falsely promising a condemned apartment that would never be ready for her to occupy; moreover, although the defendant claimed that the court should have credited evidence he presented showing that he did not intend to permanently deprive F of her money, he did not return the deposit until F explicitly asked for it back, and it was the exclusive province of the court as the trier of fact to weigh conflicting testimony and to credit some, all or none of the defendant's testimony.

2. The defendant's claim that the state did not establish that he wilfully or intentionally violated his probation or any laws was without merit; our Supreme Court has determined previously that wilfulness is not an element of a probation violation, as the state needs to establish only that a probationer knew of the condition and engaged in conduct that violated it, and the defendant here did not dispute that he knew that, as a condition of his probation, he could not violate any criminal laws of this state, and the record demonstrated that he engaged in conduct that violated the criminal laws of this state.

3. The trial court did not abuse its discretion by admitting testimony concerning two of the defendant's six prior convictions for larceny in the fourth degree, which was offered by the state to show a common scheme or plan; it is well settled that probation proceedings are informal and that strict rules of evidence do not apply to such proceedings, in which a broad evidentiary standard is applied, and on the basis of the similarity between the past crimes and the incident involving F, the trial court properly determined that the evidence regarding the prior crimes was relevant to the inference that the defendant intended to keep F's deposit.

4. The trial court did not abuse its discretion in revoking the defendant's probation and imposing a sentence of sixty months incarceration; that court, which balanced the defendant's liberty and rehabilitation against the protection of society, found that the defendant was not amenable to probation, based on his similar conduct within months of the start of his probationary period, it considered the need to protect the public from the defendant's conduct, and it acted within its discretion by imposing the remainder of the defendant's sentence, which was not unjust or excessive.

Argued May 17—officially released September 5, 2017

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial

district of New London and tried to the court, *Williams*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Kenneth A. Leary, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Rafael I. Bustamante*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Zane R. Megos, appeals from the judgment of the trial court revoking his probation pursuant to General Statutes § 53a–32 and imposing a sentence of sixty months incarceration. On appeal, the defendant claims that the trial court: (1) erroneously found that he violated the conditions of his probation, (2) abused its discretion by admitting evidence of prior crimes that he had committed, and (3) abused its discretion by revoking his probation. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the defendant's claims on appeal. On April 29, 2014, the defendant pleaded guilty under the *Alford* doctrine[1] to six counts of larceny in the fourth degree in violation of General Statutes §§ 53a-119 and 53a-125 (a).[2] His conviction on two of those larceny counts arose from incidents in which the defendant wrongfully obtained and withheld cash "deposits"

[1] See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[2] General Statutes § 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner."

General Statutes § 53a-125 provides in relevant part: "(a) A person is guilty of larceny in the fourth degree when he commits larceny as defined in section 53a-119 and the value of the property or service exceeds one thousand dollars."

from the victims by falsely promising to rent them an apartment or sell them a house. In the first incident, the defendant received $1600 from a disabled, wheelchair-bound woman as a deposit on an apartment that he had advertised on Craigslist. The defendant told the victim that she would be able to move in on the first day of the month, but the apartment was not ready on that date. The defendant continued to tell the victim that the apartment would be ready at various dates in the future, but the apartment never was available when those dates arrived. The defendant did not return the victim's deposit, despite her request that he do so. In the second incident, the defendant obtained $4550 from another victim as a deposit on the purchase of a house. Several months after taking the deposit, the house was sold to someone else, and the defendant kept the victim's money.

After pleading guilty to six larceny charges, the defendant was sentenced to six years incarceration, execution suspended, followed by three years of probation. The terms of the defendant's probation, which he signed on April 29, 2014, included the standard condition that he "not violate any criminal law of the United States, this state or any other state or territory." The defendant's probation began on April 29, 2014.

Several months after his probation began, the defendant was involved in another incident in which he was alleged to have wrongfully obtained a deposit for a sham real estate transaction. Sometime in October, 2014, the defendant posted an online advertisement offering an apartment in Norwich for rent. At the time that the defendant posted that advertisement, however, the advertised apartment was condemned.

On October 29, 2014, the defendant met with Nicole Foster. Foster, who was a disabled mother, was seeking to rent the apartment advertised by the defendant

because a fire had destroyed her family's house in September, 2014. The defendant allowed Foster to view the apartment and told her that she would need to provide him with a cash deposit on that same day.

Although she did not have the full deposit at that moment, Foster decided to rent the apartment advertised by the defendant and with her father, gave the defendant $500 in cash. Later that day, Foster tendered the rest of the cash deposit, totaling $2925 to the defendant. In return, the defendant gave Foster three receipts that had been presigned by the defendant's business partner, Bishop Taylor. According to the defendant, he and Taylor agreed to use receipts signed only by Taylor because the Norwich Building Department had a "vendetta" against the defendant: "We didn't want to draw attention to the building department [that] I was involved in the building. We didn't want them coming out and writing . . . up the wazoo . . . new [building code] violations. . . . It wasn't with intent to defraud. I said to [Taylor] we're not gonna get this through if it's in my name." Upon examining the receipts, Foster's father told the defendant that he could not read "what *your* first name is," and the defendant answered "Bishop." (Emphasis added.)

At this meeting, the defendant also informed Foster that the apartment was not ready because the city needed to perform inspections. The defendant had represented to Foster that an inspection would occur on several different dates. No inspections had been scheduled for the premises, however, until more than a month later on December 12, 2014.

On November 10, 2014, Foster spoke with an employee at the Norwich Building Department and learned that the man to whom she had given her deposit actually was the defendant, not Taylor. She also learned that no inspections were scheduled for the premises.

Thereafter, Foster and her father confronted the defendant and requested the return of the deposit, which the defendant subsequently returned to Foster.

On August 4, 2015, as a result of the incident with Foster, the defendant was arrested for larceny in the third degree in violation of General Statutes § 53a-124,[3] and criminal impersonation in violation of General Statutes § 53a-130.[4] On the basis of his arrest for those alleged crimes, the defendant was charged with violating the terms of his April, 2014 probation.

A violation of probation hearing was held over the course of four days during February, 2016. In an oral ruling, the court found, by a preponderance of the evidence, that the defendant had violated his probation by committing the crimes of criminal impersonation and larceny in the third degree.[5] The court then revoked the defendant's probation and sentenced him to sixty months incarceration for the violation. The court reasoned that the defendant had failed to take "full advantage" of his probation and had "instead decided . . . to defraud and to deceive the people who needed immediate housing." Specifically, the court found that the defendant was "not amenable to probation, based on

[3] General Statutes § 53a-124 provides in relevant part: "(a) A person is guilty of larceny in the third degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds two thousand dollars . . . ."

[4] General Statutes § 53a-130 provides in relevant part: "(a) A person is guilty of criminal impersonation when such person: (1) Impersonates another and does an act in such assumed character with intent to obtain a benefit or to injure or defraud another . . . ."

[5] The court also found that the state proved by a preponderance of the evidence that the defendant committed attempt to commit larceny in the third degree. The taking of Foster's deposit was the basis of the attempt to commit larceny and the completed larceny. Thus, the attempted larceny does not appear to be a separate and independent basis supporting the court's judgment. Also, on appeal both the defendant and the state exclusively address the completed act of larceny. Therefore, we do not address the court's mention of the attempt to commit larceny.

[his] similar criminal conduct within months of the start of [his] probationary period." This appeal followed. Additional facts will be set forth as necessary.

As a preliminary matter, we set forth the general principles of law pertaining to revocation of probation proceedings. "[R]evocation of probation hearings, pursuant to § 53a–32, are comprised of two distinct phases, each with a distinct purpose. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Internal quotation marks omitted.) *State* v. *Maurice M.*, 303 Conn. 18, 25–26, 31 A.3d 1063 (2011).

With respect to the evidentiary phase of a revocation proceeding, "[t]o support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . A fact is more probable than not when it is supported by a fair preponderance of the evidence. . . . [T]he purpose of a probation revocation hearing is to determine whether a defendant's conduct constituted an act sufficient to support a revocation of probation . . . rather than whether the defendant had, beyond a reasonable doubt, violated a criminal law. The proof of the conduct at the hearing need not be sufficient to sustain a violation of a criminal law." (Citation omitted; internal quotation marks omitted.) *State* v. *Sherrod*, 157 Conn. App. 376, 382–83, 115 A.3d 1167, cert. denied, 318 Conn. 904, 122 A.3d 633 (2015). Thus, "*a probation violation need be proven only by a preponderance of the evidence.*" (Emphasis added.) *State* v. *Rollins*, 51 Conn. App. 478, 483, 723 A.2d 817 (1999).

Regarding the second phase of a revocation proceeding, the dispositional phase, if the trial court "determines that the evidence has established a violation of a condition of probation, then it proceeds to . . . the determination of whether the defendant's probationary status should be revoked. On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion." (Internal quotation marks omitted.) *State* v. *Sherrod*, supra, 157 Conn. App. 381–82.

I

The defendant first claims that the trial court's finding that he violated the conditions of his probation requiring him not to violate any criminal law is clearly erroneous. This claim essentially consists of three separate challenges to the court's finding of a violation. Specifically, the defendant argues that the state did not establish, by a preponderance of the evidence, that he (1) committed criminal impersonation, (2) committed larceny in the third degree, and (3) "wilfully and intentionally violated his probation or any laws . . . ." We consider these three challenges seriatim and conclude that they all are without merit.

A

The defendant's first challenge to the court's finding that he violated his probation is that the evidence fails to demonstrate that he committed criminal impersonation. We disagree.

We begin our analysis of the defendant's claim by setting forth our well settled standard of review. "This court may reverse the trial court's initial factual determination that a condition of probation has been violated

only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling." (Internal quotation marks omitted.) *State* v. *Sherrod*, supra, 157 Conn. App. 382.

Our analysis also is informed by a review of the statutory elements of the crime of criminal impersonation. "A person is guilty of criminal impersonation when such person: (1) *Impersonates another* and *does an act in such assumed character with intent to obtain a benefit or to injure or defraud* another . . . ." (Emphasis added.) General Statutes § 53a-130 (a).

After applying the applicable law to the record before us, we conclude that the trial court's finding that the defendant had violated his probation by committing criminal impersonation was not clearly erroneous. There was evidence presented that, prior to meeting with Foster, the defendant had defrauded two other victims by wrongfully retaining cash deposits for sham real estate transactions. In an apparent attempt to repeat this scam, the defendant met with Foster, offering to rent her a condemned apartment. When Foster agreed to rent the apartment, the defendant insisted on an immediate cash deposit. The defendant also told Foster that, although the apartment was not yet ready, it would soon be inspected. Afterward, Foster learned that the apartment was never scheduled for an inspection, and, when she confronted the defendant about this, he returned her deposit. As part of the defendant's scheme to defraud Foster, the defendant impersonated his business partner, Bishop Taylor. The defendant gave Foster receipts presigned by Taylor in order to avoid

"draw[ing] attention to the building department [that] [he] was involved in the building." Furthermore, when asked directly for his name, the defendant replied, "Bishop," instead of his actual name.[6] Accordingly, we conclude that it was not clearly erroneous for the court to find that the defendant had violated the terms of his probation by impersonating another person and acting in such assumed character with the intent to defraud Foster.

B

The defendant next argues that it was clearly erroneous for the court to find that he had violated his probation by having committed larceny in the third degree. We disagree.

We begin our analysis of the defendant's second challenge to the court's finding that he violated his probation by reviewing the statutory elements of larceny in the third degree. "A person is guilty of larceny in the third

[6] The gravamen of the defendant's first challenge to the court's finding that he violated his probation appears to be that there was conflicting testimony regarding whether he impersonated his business partner. Foster testified that her father told the defendant that he could not "read what *your* first name is" and asked him for *his* first name. (Emphasis added.) In contrast, the defendant testified that he heard her father ask him, "who is the owner?" Thus, according to the defendant, he simply was identifying the name of the owner on the receipt, not impersonating someone else. We reject this argument because "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony." (Internal quotation marks omitted.) *State* v. *Allen*, 289 Conn. 550, 559, 958 A.2d 1214 (2008). As the trier of fact, the court was free to credit the testimony indicating that the defendant impersonated his business partner.

Indeed, the trial court expressly found the defendant not to be credible: "[T]he court notes that [the defendant] himself conceded that he is a felon with a history of convictions for crimes of dishonesty, but it is his present criminal conduct, rather than his criminal past, that causes the court to disbelieve his testimony. His substantially similar criminal conduct from years past, however, remains an unavoidable, additional obstacle that his attempt at credibility cannot overcome."

degree when he commits larceny, as defined in section 53a-119, and . . . (2) the value of the property or service exceeds two thousand dollars . . . .'' General Statutes § 53a-124 (a). Pursuant to § 53a-119: ''A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner.'' Larceny includes obtaining property by false promises. ''A person obtains property by false promise when, pursuant to a scheme to defraud, he obtains property of another by means of a representation, express or implied, that he . . . will in the future engage in particular conduct, and when he does not intend to engage in such conduct . . . . In any prosecution for larceny based upon a false promise, the defendant's intention or belief that the promise would not be performed may not be established by or inferred from the fact alone that such promise was not performed.'' General Statutes § 53a-119 (3).

After applying the applicable law to the record before us, we conclude that the trial court's finding that the defendant had violated the terms of his probation by having committed larceny in the third degree was not clearly erroneous. There was evidence presented that the defendant obtained $2925 from Foster by falsely promising to rent her a condemned apartment. As previously set forth in considerable detail, the defendant had perpetrated several schemes in the past in which he defrauded victims by falsely promising to rent or to sell them property in exchange for a cash deposit. In one of those prior incidents, the defendant promised a victim an apartment that he never made ready for her to occupy, and he kept her deposit. Thus, the court could have inferred that the defendant intended to do the same with Foster, i.e., permanently deprive her of the deposit by falsely promising a condemned apartment that would never be ready for her to occupy.

Accordingly, we conclude that it was not clearly erroneous for the court to find that the defendant had violated his probation on the foregoing basis.

We are unpersuaded by the defendant's contention that the court improperly disregarded evidence suggesting that he did not commit larceny in the third degree. The defendant argues that the trial court should have credited evidence he presented that tended to show that he had not intended to *permanently* deprive Foster of her money. The defendant, however, did not return the deposit until Foster explicitly asked for it back. In any event, the defendant's argument must fail because, as previously explained in this opinion, "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony." (Internal quotation marks omitted.) *State* v. *Allen*, 289 Conn. 550, 559, 958 A.2d 1214 (2008).

C

The defendant's final challenge to the court's finding that he violated his probation is that the state did not establish that he "wilfully and intentionally violated his probation or any laws . . . ." This claim is without merit.[7] Our Supreme Court has stated unequivocally that "the language of [§ 53a-32] demonstrates that the legislature did not intend to make wilfulness an element of a probation violation." *State* v. *Hill*, 256 Conn. 412, 420, 773 A.2d 931 (2001). "[T]o establish a violation, the state needs only to establish that the probationer knew of the condition and engaged in conduct that violated the condition." Id., 424.

[7] Within this claim, the defendant also appears to repeat his arguments that the court erroneously found that he committed the crimes of criminal impersonation and larceny in the third degree. These arguments already have been addressed, and they warrant no further discussion. See parts I A and B of this opinion.

In the present case, the defendant does not dispute that he knew that as a condition of his probation, he could not violate this state's criminal laws. Furthermore, we already have concluded in parts I A and B of this opinion that the defendant engaged in conduct that violated this state's criminal laws and, therefore, a condition of his probation. Accordingly, we conclude that it was not clearly erroneous for the trial court to find that the defendant violated the terms of his probation.

II

The defendant's second claim is that the court improperly admitted evidence of other crimes that he had committed. The defendant argues that the court, pursuant to § 4-5 (c) of the Connecticut Code of Evidence,[8] erred by admitting testimony concerning two of his six prior convictions for larceny in the fourth degree. The state argues, in part, that the rules of evidence do not apply in violation of probation hearings, and, therefore, the evidence did not have to satisfy § 4-5 (c) of the Connecticut Code of Evidence to be admissible. We agree with the state.

The following additional facts and procedural history are relevant to the resolution of the defendant's claim. The state called Chief Probation Officer Tamara Lanier to testify regarding two of the defendant's prior larceny convictions. Defense counsel objected, claiming that the prior convictions were not relevant and would be prejudicial. The prosecutor argued that the state intended to offer the testimony to show a common scheme or plan. The court overruled defense counsel's

[8] Section 4–5 (c) of the Connecticut Code of Evidence provides in relevant part: "Evidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony."

objection, citing § 4-5 (c) of the Connecticut Code of Evidence.[9]

After Lanier had testified regarding the defendant's having taken $1600 from a disabled woman, defense counsel renewed his objection to Lanier's testimony. The court overruled the objection again, based on the same provision of the Connecticut Code of Evidence. Lanier then explained the facts of the failed real estate sale, when the defendant did not return a prospective buyer's deposit despite the fact that the house had been sold to another party. At this point, defense counsel objected again. The court overruled the objection, stating that the testimony "is relevant to the present proceedings insofar as the basis for the alleged violation of probation is somewhat similar to the two incidents that were just reported by Chief Lanier."

We begin by stressing that the Connecticut Code of Evidence does not apply to proceedings involving probation. Section 1-1 (d) (4) of the Connecticut Code of Evidence specifically provides: "The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following . . . Proceedings involving probation." "It is well settled that probation proceedings are informal and that strict rules of evidence do not apply to them. . . . Hearsay evidence may be admitted in a probation revocation hearing if it is relevant, reliable and probative. . . . At the same time, [t]he process . . . is not so flexible as to be completely unrestrained; there must be some indication that the information presented to the court is responsible and has some minimal indicia of reliability." (Citation

[9] The trial court incorrectly referred to § 4-5 (b). Section 4-5 of the Connecticut Code of Evidence was amended in 2011, and subsection (b) involves the admissibility of other sexual misconduct to establish that the defendant had a tendency or propensity to engage in sexual misconduct. The court's reference to subsection (b) is understood to refer to subsection (c).

omitted; internal quotation marks omitted.) *State* v. *Lanagan*, 119 Conn. App. 53, 58, 986 A.2d 1113 (2010).

"The evidentiary standard for probation violation proceedings is broad. . . . [T]he court may . . . consider the types of information properly considered at an original sentencing hearing because a revocation hearing is merely a reconvention of the original sentencing hearing. . . . The court may, therefore, consider hearsay information, evidence of crimes for which the defendant was indicted but neither tried nor convicted, evidence of crimes for which the defendant was acquitted, and evidence of indictments or informations that were dismissed." (Citation omitted; internal quotation marks omitted.) *State* v. *Young*, 81 Conn. App. 710, 716, 841 A.2d 737, cert. denied, 269 Conn. 901, 852 A.2d 733 (2004).

Regarding challenges to the trial court's evidentiary rulings, our standard of review "is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Bullock*, 155 Conn. App. 1, 38, 107 A.3d 503, cert. denied, 316 Conn. 906, 111 A.3d 882 (2015).

The evidence presented regarding the defendant's prior crimes was relevant. "[R]elevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue." (Internal quotation marks omitted.) *State* v. *Mark*, 170 Conn. App. 254, 262, 154 A.3d 572, cert. denied, 324 Conn. 926, 155 A.3d 1269 (2017). Indeed, in order to prove that the defendant

committed larceny in the third degree, the state needed to prove that the defendant took a deposit from Foster for a property that was not available and that he intended to keep that deposit. Each incident involved the defendant taking a deposit for a unit that was not available for occupancy. In the prior two incidents, the defendant refused to return the deposits. Those prior crimes support the inference that the defendant intended to keep Foster's deposit. On the basis of the similarity between the past crimes and the present incident, the court found the testimony to be relevant.

After reviewing the record, we conclude that the court did not abuse its discretion in admitting the evidence regarding the defendant's prior crimes of larceny in the fourth degree. The facts of the prior crimes were sufficiently similar to the present circumstances to be relevant.

III

The defendant's final claim is that the trial court abused its discretion in revoking his probation and imposing a sentence of sixty months incarceration. We disagree.

"The standard of review of the trial court's decision at the sentencing phase of the revocation of probation hearing is whether the trial court exercised its discretion properly by reinstating the original sentence and ordering incarceration. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling. . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making

this second determination, the trial court is vested with broad discretion. . . . In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society. . . . The important interests in the probationer's liberty and rehabilitation must be balanced, however, against the need to protect the public." (Internal quotation marks omitted.) *State* v. *Francis*, 146 Conn. App. 448, 453–54, 76 A.3d 744, cert. denied, 310 Conn. 960, 82 A.3d 628 (2013).

The record reveals that the trial court balanced the defendant's liberty and rehabilitation against the protection of society. Specifically, the court noted that the defendant was "not amenable to probation, based on [his] similar criminal conduct within months of the start of [his] probationary period." The court considered the need to protect the public from the defendant's conduct, recognizing that the defendant's latest victim was a woman in need of immediate housing. It was within the court's discretion to impose the remainder of the defendant's sentence, and we do not find the court's imposition of a sixty-month sentence to be unjust, excessive, or an abuse of the court's discretion.

The judgment is affirmed.

In this opinion the other judges concurred.

WILLIAM LUGO *v.* TERESA LUGO
(AC 38800)

Mullins, Beach and Harper, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's postjudgment motion for modification of the parenting plan concerning the parties' minor child as set forth in the parties' separation agreement, which had been incorporated into the

dissolution judgment. Under the separation agreement, the parties shared joint legal and physical custody of the child with a shared parenting plan. The plaintiff sought a modification of the parental access orders to allow him to have additional time with the child. Prior to a hearing on the motion for modification, the plaintiff filed his compliance with trial management orders, in which he requested sole custody of the minor child, and the trial court denied, inert alia, the defendant's motion in limine, in which she sought to preclude the admission of evidence on the issue of a change in custody. Following a hearing on the motion for modification, which was held on three days over a period of three months, the trial court awarded the plaintiff sole legal custody of the minor child. On appeal, the defendant claimed, inter alia, that the trial court improperly awarded sole custody to the plaintiff when the plaintiff failed specifically to include a claim for sole legal custody in his motion for modification, as required by the applicable rule of practice (§ 25-26), and, thus, that she lacked adequate notice that a change in legal custody was contemplated. *Held* that the trial court did not err in granting the plaintiff sole legal custody of the parties' minor child; although the plaintiff's motion for modification did not specifically request the relief of sole legal custody, the record showed that the defendant had notice that custody issues would be raised at the hearing, as the motion specifically requested a broader role for the plaintiff and the defendant had at least several months to prepare for the hearing on the motion for modification following the denial of her motion in limine concerning the issue of a change in custody, and because the defendant failed to provide this court with the transcripts of the three day hearing on the motion for modification, this court was unable to find an abuse of discretion by the trial court or to determine that the defendant was harmed by any degree of curtailed notice.

Argued April 17—officially released September 5, 2017

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford, and tried to the court, *M. Taylor*, *J.*; judgment dissolving the marriage and granting certain other relief in accordance with the parties' agreement; thereafter, the court, *Ficeto*, *J.*, granted the plaintiff's motion for modification, and the defendant appealed to this court. *Affirmed.*

Derek V. Oatis, for the appellant (defendant).

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

Opinion

BEACH, J. The defendant, Teresa Lugo, appeals from the trial court's judgment granting the postdissolution motion for modification filed by the plaintiff, William Lugo. On appeal, the defendant claims that the court erred in (1) granting the plaintiff's motion for modification by awarding the plaintiff sole legal custody of the minor child, and (2) denying her motion in limine seeking to prevent consideration of the question of sole legal custody. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. The parties were married on July 12, 2003. They have one minor child. In 2008, the plaintiff filed for a divorce. On August 10, 2010, the court, *M. Taylor*, *J.*, rendered a judgment of dissolution that incorporated by reference a separation agreement entered into by the parties. The separation agreement provided that "[t]he parties shall have joint legal and shared physical custody of the minor child with a shared parenting plan for their child."

On April 10, 2014, the plaintiff filed a motion for modification in which he noted that the parties had joint legal and shared custody of the minor child and had a specific parenting schedule. He stated that "the current orders are not in the best interest of the minor child. The plaintiff respectfully requests that the court modify the parenting plan by altering the parties' parenting time to allow more time with the plaintiff father." The defendant requested that the court "modify the parental access orders to allow additional time with

the plaintiff father, and such other and further relief as the court deems equitable."

A hearing on the motion was scheduled for September 3, 2015. On August 24, 2015, the plaintiff filed his compliance with trial management orders; in his compliance, he requested sole custody of the minor child. On August 26, 2015, the guardian ad litem for the minor child, Margaret Bozek, filed her proposed orders, which included a recommendation that the parties continue to have joint legal custody of the minor child, but that the plaintiff have final decision-making authority if the parties could not agree after consultation. In her August 31, 2015 proposed orders, the defendant requested that the parties continue to have joint legal custody of the minor child.

The hearing on the plaintiff's motion for modification was held on three days, September 3, October 8 and November 12, 2015. On the first day of the hearing, the defendant filed a motion in limine seeking to preclude the admission of evidence on the issue of a change in custody of the minor child. The record reflects that the court, *Ficeto*, *J.*, denied the defendant's motion on September 3, 2015. We do not know what reasoning was stated for the denial of the motion in limine because we do not have a transcript of the hearing. On September 15, 2015, the defendant filed a motion for a continuance of the next hearing, then scheduled for September 21, because she needed more time to obtain information from the minor child's therapist. Although the court denied the motion for continuance, the next hearing was not held until October 8, 2015, and, as previously stated, a third session occurred on November 12, 2015.

In its memorandum of decision, the court ordered that the plaintiff was to have sole legal custody of the minor child, and that he was to keep the defendant apprised of all substantive matters concerning the

minor child, including, but not limited to, educational programs, medical treatment, religious upbringing, attendance at camp, and participation in extracurricular activities. The court found that it was "abundantly clear" that the parties were unable to coparent despite the tools available to them since the dissolution, and that the parties' inability to coparent had a negative impact on the minor child. The court noted that the guardian ad litem had testified and had recommended joint custody with the plaintiff having final decision-making authority. The court further stated that all attempts to coparent amicably since the dissolution judgment had failed, and that "[t]here was nothing to suggest during the three days of evidence that the history between the parties will change to permit the feasibility of joint custody." After considering the best interest of the child and all other relevant statutory criteria, the court ordered that the plaintiff have sole legal custody of the minor child. This appeal followed.

The defendant makes the closely related claims that the court erred in denying her motion in limine and ordering sole custody to the plaintiff when the plaintiff failed specifically to include a claim for sole legal custody in his motion for modification, as required, she argues, by Practice Book § 25-26 (e).[1] The plaintiff argues that the defendant's claim is unreviewable because she has not provided transcripts of the hearing on the motion for modification and, therefore, the

[1] Practice Book § 25-26 (e) provides: "Each motion for modification shall state the specific factual and legal basis for the claimed modification and shall include the outstanding order and date thereof to which the motion for modification is addressed."

The plaintiff's motion appears to have complied with the language of Practice Book § 25-26 (e), in that it recited the prior order and stated a general basis. The defendant appears to take issue primarily with the *title* of the motion, "Motion for Modification of Parenting Plan–Post Judgment." Her principal argument is that the motion did not provide adequate notice that the question of legal custody would be addressed and amended.

record is not adequate for review. The plaintiff argues substantively that his motion for modification did request other equitable relief, that the defendant had actual notice, and that, in any event, a trial court's conclusion as to custody will not be overturned for lack of specific pleading, so long as fundamental requirements of due process are met. The defendant contended at oral argument before this court that transcripts of the motion for modification hearing were not necessary because the resolution of the issue on appeal involves a plenary review of the motion for modification to ascertain whether, in light of § 25-26 (e), the court lawfully could award the plaintiff sole legal custody. We agree with the plaintiff.

The defendant's position, reduced to its essentials, is that the plaintiff's motion for modification did not supply adequate notice that a change in legal custody was contemplated. The plaintiff contends that actual notice that custody was at issue was in fact supplied, by notice to the parties from the guardian ad litem, as early as April, 2015. The court made no finding, so far as we can tell, to that effect. We assume, then, for the purpose of this opinion, that the first formal notification of the specific remedy sought was made one week before the first hearing in the plaintiff's compliance with trial management orders. The general subject matter of child custody, of course, had been known for months. As previously noted, the plaintiff's motion for modification was not deficient in identifying prior orders sought to be modified or the grounds for modification. The motion did not, however, specifically request the relief of sole legal custody.

In the circumstances of this case, we cannot conclude that the court erred in granting the plaintiff sole legal custody. Significant case law supports the plaintiff's position on appeal. In *Kidwell* v. *Calderon*, 98 Conn. App. 754, 911 A.2d. 342 (2006), the plaintiff had filed a

custody complaint seeking joint legal custody and "[a]ny further orders that the [c]ourt in law or equity deems necessary." Id., 755. The trial court awarded the plaintiff sole custody. The defendant argued to this court that "because the plaintiff did not specifically ask for sole custody in his complaint or file a motion seeking sole custody, the court abused its discretion in granting him sole custody." Id., 757. This court disagreed. Due process requirements of notice and reasonable opportunity to be heard had been satisfied; the defendant had adequate notice. Id., 758–59. Although the complaint had not requested the specific relief of sole custody, the requested relief was broadly stated and, in the circumstances of that case, the court properly considered the best interests of the child. Id.

Similarly, in *Petrov* v. *Gueorguieva*, 167 Conn. App. 505, 146 A.3d 26 (2016), the trial court had modified primary physical custody on a ground different from that asserted in the plaintiff's motion to modify. Id., 519. We held that modification was appropriate nonetheless. Id. The court was guided by the best interests of the child, and the record revealed that the defendant had adequate actual notice of the ground relied on and an opportunity to contest the ground. Thus, "the [plaintiff's] failure to raise [the] ground in filing his motion to modify did not unduly prejudice or surprise the defendant." Id., 522.

In the present case, the record shows that the defendant had notice that custody issues would be raised at the hearing on the motion for modification. Although her motion for continuance was formally denied, the defendant had at least several months to prepare. The motion to modify itself specifically requested a broader role for the plaintiff, and the hearing took place over a period of three months. A purpose of specificity in pleadings is to provide notice; *Petrov* v. *Gueorguieva*, supra, 167 Conn. App. 518–19; and here, the defendant

has not shown that notice was inadequate. Because the defendant has failed to provide us with the transcripts of the September 3, October 8 and November 12, 2015 proceedings, we are unable to find an abuse of discretion in the court's decisions on the motions for modification and in limine, and we are unable to determine that the defendant was harmed by any degree of curtailed notice. See, e.g., *Sabanovic* v. *Sabanovic*, 108 Conn. App. 89, 92, 946 A.2d 1288 (2008).

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* EVAN JARON HOLMES (AC 39077)

Lavine, Prescott and Beach, Js.

Syllabus

Convicted of the crimes of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a pistol or revolver, the defendant appealed. The defendant's conviction stemmed from an incident in which he and S allegedly forced their way into the apartment of the victim and fired ten gunshots from an automatic pistol at the victim, who died from his injuries. The defendant claimed, inter alia, that the trial court improperly overruled his objection, pursuant to *Batson* v. *Kentucky* (476 U.S. 79), to the state's use of a peremptory challenge to strike W, an African-American prospective juror. The state exercised its peremptory challenge to exclude W after he made comments suggesting that he may harbor resentment toward police and prosecutors, and that he had concerns regarding the fairness of the criminal justice system. *Held*:

1. The trial court properly denied the defendant's *Batson* challenge and determined that the state's use of its peremptory challenge to exclude W from the jury was not tainted by purposeful racial discrimination, the state having advanced a plausible and, on its face, race neutral explanation for its having exercised a peremptory challenge, and the defendant having failed to show that the trial court's factual conclusion that the prosecutor did not act with discriminatory intent in exercising the peremptory challenge was clearly erroneous; the state's reasons for excluding W were his stated distrust of police and the criminal justice system, which clearly related to the trial of this criminal proceeding, in

which the police would provide significant evidence, the state exercised its peremptory challenge only after engaging in a detailed discussion with W about the views he had expressed in response to defense counsel's questions, the state asked a relatively uniform set of questions of all jurors, there was no evidence of any venireperson of a race different from that of W who expressed the same or similar views regarding the police and the criminal justice system but who was nevertheless permitted to serve on the jury, the state did not advance any explanation that was based on an inapplicable group trait, and it did not use a disproportionate number of peremptory challenges to exclude African-Americans from the jury, which, was comprised in part of three African-Americans; moreover, our Supreme Court previously has held that a venireperson's expressed fear of police is a race neutral ground for exercising a peremptory challenge, and this court cannot modify a decision of our Supreme Court and must follow it as binding precedent, and, furthermore, the state was not required to accept W's assurances that he believed he could follow the court's instructions and act as an impartial juror.

2. The defendant could not prevail on his claim that the trial court improperly admitted a tape-recorded statement of a witness as a prior inconsistent statement pursuant to *State* v. *Whelan* (200 Conn. 743) because it lacked the necessary indicia of reliability; the defendant having failed to adequately brief how he was prejudiced by the court's allegedly erroneous evidentiary ruling or how it may have affected the outcome of the trial, he failed to meet his burden of showing both that the court's evidentiary ruling was improper and harmful, and, therefore, the claim was deemed abandoned and this court declined to address its merits.

3. The defendant could not prevail on his claim, raised pursuant to *Doyle* v. *Ohio* (426 U.S. 610), that the state improperly infringed on his constitutional right to remain silent when it cross-examined him at trial about his failure to disclose to the police at the time of his arrest certain exculpatory information that he later testified to at trial: although defense counsel raised a *Doyle* objection at trial, it was subsequently abandoned, and the defendant could not prevail on his resurrected *Doyle* claim on appeal pursuant to *State* v. *Golding* (213 Conn. 233) because he failed to demonstrate that a constitutional violation existed that deprived him of a fair trial, as the record showed that the defendant voluntarily spoke to a detective after he was in custody and had been advised of his *Miranda* rights, that he did not invoke his right to remain silent until after he was transported to the police department, that he chose to tell the detective that neither he nor his girlfriend had anything to do with the shooting incident and that there was no gun in his vehicle, and that he nevertheless testified on cross-examination that he never told the detective certain facts to which he testified on direct examination, and, therefore, rather than impermissibly attempting to impeach the defendant with his choice to remain silent, the state's cross-examination

focused on why, having chosen to speak with the detective, the defendant never provided the same exculpatory details that he later testified to at trial; accordingly, the state properly inquired about the defendant's prior inconsistent statement to the detective, and that inquiry did not violate the rule set forth in *Doyle* that the impeachment of a defendant through evidence of his silence following his arrest and receipt of *Miranda* warnings violates due process.

(*One judge concurring separately*)

Argued March 13—officially released September 5, 2017

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, felony murder, home invasion, conspiracy to commit home invasion and burglary in the first degree; thereafter, the charge of criminal possession of a pistol or revolver was tried to the court; judgment of guilty; subsequently, the court vacated the verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a pistol or revolver, from which the defendant appealed; thereafter, the court, *Jongbloed, J.*, issued an articulation of its decision. *Affirmed.*

Jay Alan Black, assigned counsel, for the appellant (defendant).

Paul J. Narducci, senior assistant state's attorney, with whom were *Sarah Bowman*, assistant state's attorney, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

PRESCOTT, J. The defendant, Evan Jaron Holmes, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), and conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa. The defendant also appeals from the judgment of conviction, rendered after a trial to the court, of criminal possession of a pistol or revolver in violation of General Statutes § 53a-217.[1] On appeal, the defendant claims that the trial court improperly (1) overruled his objection to the state's use of a peremptory challenge to strike an African-American prospective juror; (2) admitted a tape-recorded statement of a witness pursuant to *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); and (3) permitted the state to cross-examine the defendant regarding his conversation with a police detective at the time of his arrest in violation of his right to remain silent. We are not persuaded by the defendant's claims on appeal and, thus, affirm the judgment of conviction.

The jury reasonably could have found the following facts. During the early morning hours of November 12,

[1] The jury found the defendant not guilty of murder, but found him guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes §§ 53a-55 (a) (1) and 53a-55a. The jury also found the defendant guilty of burglary in the first degree in violation of General Statutes § 53a-101 (a) (1). The trial court subsequently vacated the manslaughter and burglary verdicts on the ground that they are lesser included offenses of felony murder and home invasion. See *State* v. Polanco, 308 Conn. 242, 255, 61 A.3d 1084 (2013) (if defendant convicted of greater and lesser included offenses, trial court must vacate conviction of lesser offense rather than merging convictions and vacating sentence for lesser included offense). That determination is not challenged on appeal. The defendant received a total effective sentence of seventy years of incarceration.

2011, the defendant, who recently had been released from prison, attended an after-hours party at a club in New London with friends, including Davion Smith. During the party, the defendant was involved in an altercation outside the club with other attendees of the party, including Todd Silva. During the fight, the defendant suffered a laceration on his finger, a black eye, and other scratches and abrasions on his face. Following the fight, the defendant was angry and in a highly agitated state.

Sometime around 4 a.m. that same day, the defendant and Smith forced entry into a third floor apartment at 252 Montauk Avenue in New London, where the victim, Jorge Rosa, lived. The victim also was known by his nickname "Loc" or "Loke." At that time, Silva lived in the apartment with the victim.

Inside the apartment, the victim and his girlfriend, Gabriela Gonzales, were sleeping in his bed. The defendant and Gonzales previously had been in a romantic relationship that began in high school, but that relationship had ended when Gonzales obtained a restraining order against the defendant, who shortly thereafter went to prison.

Gonzales awoke to find the defendant and Smith standing at the foot of her bed, each pointing a gun at the victim. The defendant asked who "Loke" is. The defendant then fired ten shots from an automatic pistol at the victim, who died within a few minutes from numerous gunshot wounds, including several to his chest, arms, and genitalia. The defendant and Smith subsequently fled the apartment. The defendant's blood, from his lacerated finger, and DNA were subsequently found in the stairwell leading up to the victim's apartment and in various rooms inside the apartment, including the bedroom.

Gonzales called 911, and the police arrived a few minutes later. Although Gonzales initially stated to the police in the 911 call and at the scene that she did not know the identity of the shooter, within a short period of time and while still at the scene, she stated that the defendant had shot the victim and that Smith had accompanied him. She also described the defendant's automobile, a white "Crown Vic," to assist the police in locating him.

At approximately 4:45 a.m., the defendant picked up his girlfriend, Shanice Sebastian, and told her that they were going to stay in a motel. The defendant and Sebastian then checked into the Days Inn in Old Saybrook, despite the existence of numerous motels closer to their location in New London. While at the Days Inn, the defendant admitted to Sebastian that he had been looking for the kid that "jumped him," that he had gone to the apartment of Gonzales' boyfriend and shot somebody, and that he had been with "his boy."

At approximately 9:30 a.m., a patrolman employed by the Old Saybrook Police Department observed the defendant's vehicle at the Days Inn. Other police units responded and located the defendant, who then attempted to flee. He was apprehended in the parking lot with the assistance of a K-9 officer. The defendant was still bleeding from his finger at the time of his arrest. Additional facts will be set forth as necessary to discuss the specific claims of the defendant.

The defendant subsequently was tried before a jury and elected to testify at trial. He denied shooting the victim but admitted that he had been in the victim's apartment with Smith and another individual, Zach Perkins, just prior to the time of the shooting in order to resolve amicably his dispute with Silva.[2] The defendant

[2] According to the defendant's testimony, he first encountered Perkins shortly after the altercation at the after-hours party.

testified that he left the apartment after being told that Silva was not there. Defense counsel argued to the jury that Gonzales had framed the defendant for the victim's murder, which actually had been committed by Perkins, who, after the shooting, had a sexual relationship with Gonzales and fathered a child with her.

As previously discussed, the jury found the defendant guilty of felony murder, home invasion, and other charges; see footnote 1 of this opinion; and the court found the defendant guilty of the gun possession charge. The jury found the defendant not guilty of murder. This appeal followed.

I

The defendant first claims that the court improperly overruled his objection to the state's use of a peremptory challenge to strike an African-American prospective juror. We disagree.

The following facts are relevant to this claim. The defendant is of mixed race. On the first day of jury selection, defense counsel noted that the entire venire panel appeared to be "white Caucasian" and that every prospective juror who had completed a jury questionnaire had indicated that they were either white or Caucasian, or had not indicated a race or ethnicity.

On the second day of jury selection, only one prospective juror had indicated on the questionnaire that he or she was African-American. During the voir dire examination of one venireperson, W.T., he stated to defense counsel that he was African-American. W.T. indicated that he had obtained a master's degree in social work from the University of Connecticut and currently was employed by the state of Connecticut as a supervisory social worker with the Department of Children and Families.

He also disclosed that he performed volunteer work for the Department of Correction and had worked directly with inmates. When asked by defense counsel whether that work might affect him as a juror, W.T. responded: "Because I work with, like I say, inmates, and also my work, I do—I mean, you see a lot of different things and you see a lot of sad situations. I'm sure as a professional and because I work with people who've been through a lot of stuff, you know, I'm sure I have an understanding of what they're doing. And also, just—just in the criminal justice system in general, I know how sometimes people are not, you know, given a fair trial or they may be disproportionately have to go to jail and different things of that nature. So, part of my whole experience is as an African-American, as an American and also studying these situations, I know that there's a lot of issues go on in various systems. The criminal justice system, the educational system and various systems, but people are not fairly treated, so I know that much. But I don't use that, you know, I can—I could make a professional—and I think keep my composure and do my job just like—as a professional, as I work—even as I do volunteer work, but you have to know the reality in life as well, though." In response to a subsequent question by defense counsel regarding whether, in light of his life experiences, he could be fair to both sides in the case, W.T. stated that he could.

During the state's voir dire examination of W.T., the following exchange occurred:

"[The Prosecutor]: Now, you've obviously had a little more dealing with the court systems than most—most people that we see in through here. Have you formulated any opinions about the criminal justice system based on your experiences? Is it too lenient, too stringent, it works, it doesn't work; any feeling about that.

"[W.T.]: And like I said, probably already share too much stuff about—that talk about in terms of I have seen people, have had family members had went to prison before.

"[The Prosecutor]: Right.

"[W.T.]: And I just think—I think that's why I became a social worker, because I wanted to make a difference, and that's why I have been doing mentoring programs—

"[The Prosecutor]: Yep.

"[W.T.]: —try to help young people so they won't get into trouble. So, I meant the system, all various systems, there's a lot of discrimination still goes out. Even today, ladies are still not getting equal pay. So, it's a lot. We've come a long way, but we have a long way to go.

"[The Prosecutor]: Right.

"[W.T.]: But I think I can make—I could keep the facts and be able to look at the facts of the case and judge by the facts.

"[The Prosecutor]: . . . We need to know how you're feeling, so we can make the appropriate assessment and you can make the appropriate assessment. . . . I think that it's not a perfect system, but it's improving every day, and [there are] not as many systems that I can think of that are, any—come anywhere close. One of the concerns that people may have is, jurors who are in the—using their time as a juror to try to fix the system. You indicated, and I think you said, that you would listen to the evidence and decide it on the evidence and you wouldn't let any concerns that you had filter in.

"[W.T.]: That's correct.

"[The Prosecutor]: Fair to say?

"[W.T.]: That's correct.

"[The Prosecutor]: Okay. And so, that you would sit and listen to what all the evidence is and make a decision based on the evidence.

"[W.T.]: That's correct. . . . .

"[The Prosecutor]: Okay. With respect to that, as much as you know about those situations, were you satisfied with the way the police reacted to your family being or friend being the victim of a crime?

"[W.T.]: Sometimes and sometimes not.

"[The Prosecutor]: Okay.

"[W.T.]: So-so.

"[The Prosecutor]: Fair to say that it's an individual situation and that the police have been—have acted in a way that was satisfactory toward your family members or friends, and in other situations they weren't satisfied with what the police did.

"[W.T.]: That's correct.

"[The Prosecutor]: Okay. Had you had any interactions with the police in any respect in which you developed an—either a strong, favorable impression or an unfavorable impression about the police and the way they treated you in any situation, speeding tickets, calling up to complain about any noisy neighbor, something with work.

"[W.T.]: I'm, like—just growing up in this society, I fear, you know, I fear my life. I got a new car, I feared that, you know, I might get stopped, you know, for being black, you know. So, you know, that's concerning and sometimes I get afraid—even me, you know, I—when I see the police in back of me, I wonder, you know, if I'm going to be stopped.

"[The Prosecutor]: Okay. Now with—with respect to that, there will probably be police officers who will be

testifying here, and the judge will tell you that [you] can't give a police officer more credibility merely because they are a police officer. Conversely, though, they don't get less credibility merely became they are police officers. They are to be treated like anybody else. Would you have any difficulty following the judge's instructions concerning that?

"[W.T.]: No, I wouldn't.

"[The Prosecutor]: Okay. And I can appreciate what you're saying. Obviously, I haven't been in that—in your shoes. I haven't been in your situation, nor do we ask the jury to put themselves in the shoes of either the police or a particular defendant. We can't ask you to do that. But having now life's experience, is that something that you think you can put aside and decide the evidence based on everything that's presented to you, or is there some concern that you might have that you might not be able to do that."[W.T.]: No, I will be able to because another thing, too, is, I know good police officers who are—who are good people, nice people, mentors who work in the community. So—so, yes, I'd be able to.

"[The Prosecutor]: Okay. Okay. And have you had the positive experiences with the police as well?

"[W.T.]: Yes.

"[The Prosecutor]: Okay. So, I guess like anybody else, there are bad lawyers and there are good lawyers. There are bad social workers, there are good social workers. . . . But what I'm driving at is, we make an individual assessment based on what we hear and what we see and what we listen to. And that is what we're going to ask you to do if you're a juror.

"[W.T.]: Yes.

"[The Prosecutor]: We want to make sure you don't carry in any preconceived notions one way or the other.

"[W.T.]: Yes.

"[The Prosecutor]: No problems with that.

"[W.T.]: No problem.

"[The Prosecutor]: Okay. We can count on your word on that, then.

"[W.T.]: That's right.

"[The Prosecutor]: Okay. I asked about being the victim of a crime and your family member. The flip side to that, have you, any member of your family or any close personal friends ever been either accused or ever convicted of crimes?

"[W.T.]: Yes. I have family members who've been in—who served time in jail.

"[The Prosecutor]: Okay. This obviously is a crime of violence. Any—any family members who have been convicted of crimes of violence?

"[W.T.]: No. . . .

"[The Prosecutor]: You mentioned that your family members have—have served time. With respect to that, were—did you develop any feelings about the way the police had treated your family members in those situations?

"[W.T.]: Well, I think the—like I told you earlier, my life experiences living in this world—

"[The Prosecutor]: Right.

"[W.T.]: —you see that things are not fair. And then you—I mean, you—you experience things, you know, and you see things happen. And some things are not fair, some things not—not all people are the same, all police are not bad or, like, you know, just like you said everybody, but when you see firsthand your own family

members, then you experience something a little bit different.

"[The Prosecutor]: Of course.

"[W.T.]: Other people who, you know, so—

"[The Prosecutor]: Of course. And I guess it's kind of tough, because I—you know, I could ask you questions all day long and I'm not going to get to know you as well you know yourself. But there's a difference, I think, between I'm upset that my family member had to go through this versus I'm upset that the police treated my family member in such a way. Do you understand the distinction I'm trying to make, that you're not satisfied that your family member ended up in prison versus I'm not satisfied that they were treated properly by either the court system or by the police. There's a difference, and I'm not sure I'm explaining it very well.

"[W.T.]: Are you saying more, like, for instance, like, someone may have gone to jail because they did something wrong—

"[The Prosecutor]: Right.

"[W.T.]: —and they had to pay the consequences.

"[The Prosecutor]: Right. And you know, like that, but—

"[W.T.]: So—exactly. You have to—even if it's your family member or not, you did something wrong, you need to pay the consequences.

"[The Prosecutor]: Right.

"[W.T.]: You need to pay the consequences for whatever you've done wrong, you know.

"[The Prosecutor]: Right."

Following the voir dire examination, defense counsel stated that W.T. was acceptable to the defendant. The

state, however, exercised a peremptory challenge and asked that W.T. be excused.

The defendant immediately raised a *Batson*[3] objection to the state's use of a peremptory challenge, citing the fact that W.T. was the first African-American venireperson to be examined and that, in essence, W.T. had assured the court and the state that, regardless of his views about the criminal justice system or the police, he could be a fair and impartial juror.

The state then responded: "I understand exactly where [defense counsel] is coming from, would agree with him for the most part with the exception of, I do believe that there are race neutral reasons for this. It was somewhat of a struggle for me, but I looked at some of the answers. And even though he responded favorably after further questioning, the concerns that I did have was the—the comments that—about disproportionate amount of people being sent to jail, disproportionate amount of jail time, the fact that he's had family members who have been convicted and have served time, the fact that he works to rehabilitate people. And none of this is per se bad, but I think in the context of this particular case, it's important, it's race neutral. If we had a Caucasian who was in the same situation, the exercising of a peremptory challenge would be the same, I think.

"Additionally, the fact that he did mention . . . his concern about and his life's experience about driving and seeing a police officer behind him and his concern about police officers. Yes, he said that there are other police officers who are good and people can be good, but there is that life's experience that I would submit would make it difficult for him to be fair and impartial in this particular—in this particular case.

[3] See *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

"Again, I understand exactly what [defense counsel] is saying. I believe that they are race neutral reasons, and I was exercising the peremptory based on those race neutral reasons."

The court then asked for argument from the defendant, and defense counsel gave the following response: "With respect to being, as an African-American male, fearful when the police are behind you, I mean, that's just, you know, something that [the prosecutor] and I never have had to deal with it, but if this gentleman sitting next [to] me is entitled to a jury of his peers, we've picked three white people already. We've accepted them. I mean, isn't he—and that's a common complaint by African-American people, that they feel that they get pulled over too often, and there are probably studies that say it's disproportionate. So, that particular reason does seem to me to be race based . . . . It was [W.T.]'s view and, I mean, again, that's—he's entitled to a jury of his peers, and we get nobody who feels that way or has those thoughts is not really his peers because that's probably the experience or experiences of a lot of African-Americans go through."

The prosecutor, when asked if he wanted to argue further, stated: "Only briefly, and maybe it's a matter of semantics. I think *Batson*'s is, oh, I see an African-American gentleman, I see an Asian-American, I see a Hispanic, I'm going to excuse them. If an African-American comes in with a distrust of the police and will not listen to a police officer and says he will not listen to a police officer, that isn't a challenge based on that person's race or ethnicity; it's a challenge based on that person's personal views.

"If a white—a Caucasian person came in and said, I don't like being followed by the cops because I see a number of cops punch friends of mine in the face, it's not because he is a Caucasian, it's because of life's

experiences. And I think that's what I would be arguing, that the comments that were made were not because of his ethnicity or his race, but rather his—his expressed opinions. And I think it's a distinction, I think it's a legitimate distinction, but I defer to Your Honor with respect to this."

After argument by counsel, the court orally denied the *Batson* challenge, stating: "I do think that in both situations it's an issue with regard to negative contact with the police and that, I believe, has been found to be a legitimate race neutral reason for exercising the peremptory challenge. So, under all the circumstances, I am going to find that the state has given a race neutral reason for exercising a peremptory challenge in this case. And I'm going to overrule the *Batson* challenge." Throughout the remainder of the voir dire process, the state asked a uniform set of questions of all jurors. Furthermore, three African-American jurors were selected to serve in this case—two as regular jurors and one as an alternate juror.

Following the filing of this appeal, the defendant filed with this court a motion for articulation, which was referred to the trial court pursuant to Practice Book § 66-5. The trial court granted the motion and in a memorandum concluded that all of the reasons set forth by the state in exercising its peremptory challenge were race neutral.

On appeal, the defendant claims that the court improperly denied his *Batson* challenge to the state's use of its peremptory challenge with respect to W.T. because the state's reasons were not race neutral. We are not persuaded by the defendant's claim.

Our Supreme Court in *State* v. *Edwards*, 314 Conn. 465, 483–90, 102 A.3d 52 (2014), recently reviewed Connecticut's jury selection process and the contours of *Batson* challenges to the state's use of its peremptory

challenges: "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. Conn. Const., art. I, § 19; General Statutes § 54-82f; Practice Book [§ 42-12]. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one state-created means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any

reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . .

"Under Connecticut law, a *Batson* inquiry involves three steps. First, a party must assert a *Batson* claim . . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . [See] *Purkett* v. *Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) ([t]he second step . . . does not demand an explanation that is persuasive, or even plausible) . . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual. . . . In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation *in light of all the other evidence relevant to* [*a party's*] *intent.* The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination. . . .

"This court previously has articulated the standard of review applicable to *Batson* claims without differentiating between the second and third analytical steps,

or, at the very least, has not specifically stated the standard applicable to a trial court's determination with respect to the second step. We take this opportunity to clarify the standard of review for *Batson* claims. The second step of the *Batson* inquiry involves a determination of whether the party's proffered explanation is facially race neutral and, thus, is a question of law. . . . Because this inquiry involves a matter of law, we exercise plenary review. . . .

"The third *Batson* step, however, requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 483–90.

The defendant's brief is unclear regarding whether he is challenging the court's resolution of both the second and third *Batson* steps, or whether he is challenging only the court's ultimate factual conclusion that the prosecutor did not act with discriminatory intent in exercising a peremptory challenge with respect to W.T. To the extent that the defendant is arguing that the state's proffered explanation for its use of a peremptory challenge—that W.T. may harbor resentment toward the police or prosecutors, or has concerns regarding the fairness of the criminal justice system as a whole—are not facially neutral, we disagree that such explanations violate the equal protection clause as a matter of law.

Distrust of the police or concerns regarding the fairness of the criminal justice system are viewpoints that

may be shared by whites and nonwhites alike. In other words, the prosecutor's questions regarding potential jurors' attitudes about the police and the criminal justice system are likely to divide jurors into two potential categories: (1) those who have generally positive views about the police and our criminal justice system, and (2) those who have generally negative views of the police or concerns regarding the criminal justice system. See id., 491–92 (prosecutor's explanation for use of peremptory challenge race neutral because it divided jurors into two general categories, either of which may include racial minorities). As in *Edwards*, the prosecutor here also did not refer to race in his explanation except as necessary to respond to the *Batson* challenge.

Indeed, our case law supports the conclusion that such explanations are facially neutral. For example, in *State* v. *King*, 249 Conn. 645, 644–67, 735 A.2d 267 (1999), our Supreme Court upheld the state's use of a peremptory challenge to an African-American juror who expressed "his belief that African-American defendants often receive more sentences than white defendants for the same crimes"; id., 664; on the ground that the venireperson's views "might make it difficult for him to view the state's case with complete objectivity." Id., 666. In *State* v. *Hinton*, 227 Conn. 301, 327, 630 A.2d 593 (1993), the court similarly upheld the use of a peremptory challenge to a potential juror who expressed distrust of the judicial system's treatment of minority defendants. See also *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531 (resentment or distrust of police and prosecuting authorities legitimate and race neutral bases for use of peremptory challenge), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999); *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) ("dissatisfaction with law enforcement by itself was a legitimate reason for the government to strike . . . two jurors").

Furthermore, to the extent that the defendant attempts to advance an argument that resentment of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans,[4] such a "disproportionate impact" argument is not legally cognizable with respect to our analysis under the second step of the *Batson* rubric. A race neutral explanation for purposes of our analysis under step two "means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the *facial validity* of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." (Emphasis added; internal quotation marks omitted.) *State* v. *Hinton*, supra, 227 Conn. 324.

"In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. A court addressing this issue must keep in mind the fundamental principle that official action will not be held unconstitutional *solely because it results in a racially disproportionate impact*. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause. . . . Discriminatory purpose . . . implies more than intent as volition or intent as

[4] In his brief, the defendant states: "[W.T.] was merely stating a real fear among probably the majority of the African-American people; that of being stopped by the police. If this is to be considered by the courts to be a race neutral reason for exclusion, this reason could be used to challenge a large proportion of the potential African-American . . . venirepersons. Especially with the recent rash of police shootings of minority populations, the defendant would urge this court to modify [the] holding in *King* concerning being afraid of the police as a nonrace neutral reason. Minority populations are genuinely afraid of police, and therefore this is not race neutral."

awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (Emphasis added; internal quotation marks omitted.) Id. Any disproportionate impact argument is more appropriately confined to step three, the rationale for such argument being that the proffered explanation, even if neutral on its face, applies disproportionately to a particular protected class and is invoked solely as a pretext for excluding that class from the jury. See *State* v. *Edwards*, supra, 314 Conn. 479 (noting disproportionate impact arguments recognized as factor establishing pretext in *Batson* hearing).

On the basis of our plenary review of the record, and considering the present state of the case law, we conclude that the state in the present case advanced a plausible and, on its face, race neutral explanation for its having exercised a peremptory challenge with respect to W.T. We, thus, turn our attention to the third step of the *Batson* analysis, namely, whether the court's ultimate factual conclusion—that the prosecutor did not act with discriminatory intent in exercising the peremptory challenge against W.T.—is clearly erroneous.

In challenging the court's rejection of his *Batson* challenge, the defendant does not appear to argue that due consideration of any of the six factors enumerated by our Supreme Court in *Edwards* would weigh in favor of his assertion that the prosecutor acted with any discriminatory intent. Although the ultimate determination of whether a discriminatory intent was the basis for exercising a peremptory strike depends on " 'an aggregate assessment of all the circumstances' "; *State* v. *Hodge*, supra, 248 Conn. 223; it is significant that, in the present case, all of the *Edwards* factors support the court's conclusion that the state properly exercised

its right to use a peremptory challenge with regard to W.T.

First, the state's reasons for excluding W.T. were his stated distrust of police and the criminal justice system, which clearly related to the trial of this case because it is a criminal proceeding in which police would provide significant evidence. Second, the state did not exercise its peremptory challenge without questioning W.T., but rather engaged in a detailed discussion with W.T. about the views he had expressed in response to defense counsel's questions. Third, the defendant concedes, and our review of the record confirms, that the state asked a relatively uniform set of questions of all jurors. Accordingly, W.T. and the other African-American venirepersons were not asked questions that were not asked of other jurors or that sought to elicit a particular response. Fourth, we are unaware of any venireperson of a race different from W.T.'s, who expressed the same or similar views regarding police and the criminal justice system as those of W.T., but, nevertheless, was permitted to serve on the defendant's jury. Fifth, the state did not advance any explanation that was based on an inapplicable group trait. Finally, and perhaps most significantly, the state did not use a disproportionate number of peremptory challenges to exclude African-Americans from the jury. In fact, as the defendant acknowledges, three African-Americans were selected to serve, two as regular jurors and one as an alternate. Although the racial composition of an empaneled jury certainly is not dispositive of the issue of impermissible motive for use of a peremptory strike as to a particular juror, it is among the various factors that a reviewing court can consider in evaluating whether the explanation for exercising a peremptory challenge is pretextual and, thus, constitutionally infirm. *State* v. *Hinton*, supra, 227 Conn. 332.

The primary argument advanced by the defendant in support of his *Batson* claim is that distrust of the criminal justice system and fear of being stopped by police is "a real fear among probably the majority of the African-American people" and that if the court were to accept the expression of such concerns as a racially neutral ground for excluding venirepersons, this reason could be used as a pretext to challenge a large proportion of African-American venirepersons. The defendant urges this court to modify the holding in *King* that a venireperson's expressed fear of police is a race neutral ground for exercising a peremptory challenge. Even if we were inclined to do so, we are compelled to decline this invitation for at least two reasons.

First, *King* is a decision of our Supreme Court, which this court cannot modify and must follow as binding precedent. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that this court has the final say on matters of Connecticut law and that the Appellate Court and Superior Court are bound by our precedent"). We recognize, of course, that the defendant is required to make this claim in order to preserve it for further appellate review.[5]

[5] We are not blind to the reality that African-Americans and other minority groups have disproportionately negative views regarding law enforcement and the criminal justice system as a whole when compared with whites. Although the defendant did not offer any evidence at trial regarding these facts, our review of studies conducted by reputable research firms strongly supports this understanding. For example, in a 2016 study of 4538 United States adults conducted by the Pew Research Center, "[o]nly about a third of blacks but roughly three-quarters of whites say police in their communities do an excellent or good job in using the appropriate force on suspects, treating all racial and ethnic minorities equally and holding officers accountable when misconduct occurs." R. Morin & R. Stepler, Pew Research Center, "The Racial Confidence Gap in Police Performance," (September 29, 2016), p. 1, available at http://www.pewsocialtrends.org/2016/09/29/the-racial-confidence-gap-in-police-performance/ (last visited August 30, 2017) (copy contained in the file of this case in the Appellate Court clerk's office). A 2016 study that aggregated multiple Gallup polls yielded similar evidence: "Fifty-eight percent of whites have confidence in the police, compared with 29% of blacks." F. Newport, Gallup, "Public Opinion Context: Americans, Race

and Police," (July 8, 2016), p. 1, available at http://www.gallup.com/opinion/polling-matters/193586/public-opinion-context-americans-race-police.aspx (last visited August 30, 2017) (copy contained in the file of this case in the Appellate Court clerk's office). In the same study, only 28 percent of blacks rate the honesty of police officers as very high or high compared with 60 percent of whites. Id., p. 3. Thus, permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result.

Moreover, we are also cognizant that "[p]sychological studies suggest that people readily provide a nonracial explanation of their behavior even when race is actually influencing their decision." J. Bellin & J. Semitsu, "Widening *Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1102–1103 (2011). Professors Bellin and Semitsu state that "judges . . . inevitably struggle to discredit proffered race-neutral explanations. Any investigation will be unproductive because attorneys not only are hesitant to admit bias but also may not even be aware of their bias." Id., 1104.

We make this point not to suggest that the prosecutor conducting voir dire in this case was motivated by racial bias, but to recognize the need to be particularly vigilant in assessing a prosecutor's use of peremptory challenges, especially if the proffered explanation may have a disproportionate impact on minority participation on juries. As Justice Thurgood Marshall predicted in his concurring opinion in *Batson*, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." *United States* v. *Batson*, supra, 476 U.S. 106. Recently, in *Foster* v. *Chapman*, U.S. , 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016), the United States Supreme Court determined that a *Batson* violation had occurred in that case. *Foster*, however, involved the unusual situation in which the evidence included various markings and notes on the jury venire list used by the prosecutor during jury selection, which the Supreme Court concluded evidenced a clear intent to preclude prospective black jurors, despite the facially neutral explanation advanced by the prosecutor. Id., 1748–55. *Foster*, therefore, is simply not truly representative of a typical *Batson* challenge, which often turns in large part solely upon the court's assessment of the credibility of the party exercising the peremptory challenge. See N. Marder, "*Foster v. Chapman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1183–85 (May 2017) (discussing why *Batson* challenges are easily evaded by lawyers and difficult for courts to review and advocating for elimination of peremptory challenges because "mere tweaks" to *Batson* test were unlikely to resolve problems).

We share many of the concerns expressed by Judge Lavine in his concurring opinion, but, as an intermediate state appellate court, we are, of course, bound by extensive precedent that limits our ability to remedy the weaknesses inherent in the *Batson* standard. Our cases are clear that disparate impact alone is insufficient to demonstrate a *Batson* violation. Accordingly, as our Supreme Court did in *State* v. *Hinton*, supra, 227 Conn. 330, we are confined to reminding trial courts to be particularly diligent in assessing

Second, the defendant is correct that W.T. indicated during his voir dire testimony that, despite his expressed concerns and fears, he believed that he could follow the court's instructions and act as an impartial juror. The state was not required, however, simply to accept those reassurances at face value. Rather, a prosecutor is "entitled to rely on his or her own experience, judgment and intuition in such matters." *State* v. *Hodge*, supra, 248 Conn. 231. "A venireperson's assessment of his own prejudices may be untrustworthy for a variety of reasons. For instance, he may be lying in an effort to be chosen for the jury, embarrassed to reveal unsavory truths publicly or simply unaware of the existence of bias. Through subtle questioning and scrutiny of body language during the jury selection process, counsel may uncover subconscious prejudice even in the face of an outright denial of prejudice by the venireperson." *State* v. *Smith*, 222 Conn. 1, 14–15, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992).

On the basis of our careful scrutiny of the record, we conclude that the defendant has not demonstrated that the court made an erroneous factual finding that the explanation offered by the state was neither insufficient nor pretextual. In sum, we conclude that the court properly determined that the state's use of its peremptory challenge to exclude W.T. from the jury was not tainted by purposeful racial discrimination, and, therefore, it properly denied the defendant's *Batson* challenge.

II

The defendant next claims that the court improperly admitted a tape-recorded statement of a witness, Melvin Simmons, pursuant to *State* v. *Whelan*, supra, 200 Conn.

the use of peremptory challenges in circumstances that, if left unscrutinized for pretext, may result in "an unconstitutionally disparate impact on certain racial groups."

753.[6] The police had identified Simmons as having been around the defendant during much of the evening preceding the defendant's arrest. Although Simmons never gave a formal written statement to the police, he was interviewed prior to trial. The officer who conducted that interview prepared a report. Later, he contacted Simmons by telephone to review the report with him, the contents of which Simmons verbally acknowledged and affirmed. That telephone conversation was recorded by the officer. After Simmons testified at trial that he did not remember any specifics regarding the events in question, the state sought to introduce the tape recording as a prior inconsistent statement under *Whelan*.

The defendant argues on appeal that the court should not have admitted the tape recording because it lacked the necessary indicia of reliability, it was not inconsistent with Simmons' trial testimony, and the defendant was deprived of an opportunity to engage in any meaningful cross-examination. The state responds that the tape recording was properly admitted under the *Whelan* hearsay exception, and even if it was not, the defendant has failed to demonstrate on appeal how the admission of the tape could have affected the result of the trial. Because the defendant has failed to adequately brief how he was prejudiced by the court's allegedly erroneous evidentiary ruling, we deem the claim abandoned and decline to address its merits.

[6] "In *State* v. *Whelan*, supra, 200 Conn. 753 . . . we adopted a hearsay exception allowing the substantive use of prior written inconsistent statements, signed by the declarant, who has personal knowledge of the facts stated, when the declarant testifies at trial and is subject to cross-examination. This rule has also been codified in § 8-5 (1) of the Connecticut Code of Evidence . . . . The *Whelan* hearsay exception applies to a relatively narrow category of prior inconsistent statements . . . [and was] carefully limited . . . to those prior statements that carry such substantial indicia of reliability as to warrant their substantive admissibility." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 128–29, 158 A.3d 826, cert. denied, 326 Conn. 907, A.3d (2017).

"[T]he admissibility of evidence, including the admissibility of a prior inconsistent statement pursuant to *Whelan*, is a matter within the . . . discretion of the trial court. . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where an injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Simpson*, 286 Conn. 634, 643, 945 A.2d 449 (2008). "Additionally, it is well settled that even if the evidence was improperly admitted, the [party opposing its admission] must also establish that the ruling was harmful and likely to affect the result of the trial." (Internal quotation marks omitted.) *State* v. *Vidro*, 71 Conn. App. 89, 98, 800 A.2d 661, cert. denied, 261 Conn. 935, 806 A.2d 1070 (2002). "In nonconstitutional claims, the defendant has the burden of demonstrating the harmfulness of the claimed error. . . . He must show that it is more probable than not that the claimed error affected the verdict." Id. A challenge to the admission of a prior inconsistent statement for substantive purposes under the *Whelan* exception to the hearsay rule is not of constitutional magnitude. *State* v. *Hannah*, 104 Conn. App. 710, 721, 935 A.2d 645 (2007), cert. denied, 285 Conn. 916, 943 A.2d 475 (2008).

"[W]hether [an improper ruling] 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." (Internal quotation marks omitted.) *State* v. *Toro*, 172 Conn. App. 810, 817, 162 A.3d 63 (2017).

If the defendant fails to address in his principal brief on appeal how he purportedly was harmed by an allegedly improper evidentiary ruling, we will not reach the

merits of the evidentiary claim. Id., 817–18. "[W]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where the parties cite no law and provide no analysis of their claims, we do not review such claims." (Internal quotation marks omitted.) *State* v. *Davila*, 75 Conn. App. 432, 441 n.6, 816 A.2d 673, cert. denied, 264 Conn. 909, 826 A.2d 180 (2003), cert. denied, 543 U.S. 897, 125 S. Ct. 92, 160 L. Ed. 2d 166 (2004).

In his brief in the present case, the defendant addresses and analyzes only whether the tape recording at issue should have been admitted under *Whelan*, without any additional discussion or analysis of how that allegedly erroneous admission was harmful to his defense or may have affected the outcome of the trial. Because the defendant has the burden to show not only that the court's evidentiary ruling was improper, but that he was prejudiced by the adverse ruling, his failure to address the prejudice portion of his claim renders it unreviewable.

III

Finally, the defendant, relying upon *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), claims that the state improperly infringed upon his constitutional right to remain silent when it cross-examined him at trial about his failure to disclose to the police at the time of his arrest certain exculpatory information that he later testified to at trial. We are not persuaded.

The following additional facts, which the jury reasonably could have found on the basis of the evidence presented, and procedural history are relevant to our resolution of this claim. Detective Matthew Galante of the New London Police Department was among the

officers who responded to the Days Inn after learning that the defendant's vehicle had been located there. Galante arrived at about the time the defendant was being apprehended in the parking lot and placed into custody. As he approached the defendant in the parking lot, Galante noticed a female, whom he later learned was the defendant's girlfriend, Sebastian, sitting nearby with another police officer. The defendant, who recognized Galante from prior dealings, asked, "what was up, what was going on with his . . . shorty."[7] Galante first responded by advising the defendant of his *Miranda* rights[8] and asking the defendant if he understood those rights, to which the defendant responded in the affirmative. Galante then asked the defendant what he was asking about his girlfriend.

The defendant told Galante that Sebastian had had nothing to do with whatever had transpired in New London. When Galante asked what he was referring to, the defendant said he didn't know, but also volunteered that, whatever was going on in New London, he also had nothing to do with it. Shortly thereafter, the defendant asked if he could sit in his vehicle because he was cold. Galante told the defendant that the vehicle was part of an active crime scene. The defendant then stated that the police were not going to find a gun in the car, so he should be allowed to wait in there. Eventually, a police cruiser was dispatched to take the defendant to the New London police headquarters. Prior to transportation, Galante advised the defendant that his *Miranda* rights still applied and that Galante would speak with the defendant when Galante returned to headquarters.

At trial, the defendant testified on his own behalf. According to his direct testimony, he admitted to

[7] At trial, Galante testified that, in street lingo, "a shorty is somebody's girlfriend."

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

attending an after-hours party on the night of November 11, 2012. He explained that, at about 4 a.m., he had attempted to break up an altercation and "got jumped." He was beaten up "pretty badly," cut his finger, and was bleeding as a result. He asked his friends to take him to a hospital. He got into his car with Simmons and two other persons, Perkins and Smith. Simmons was driving. On the way to the hospital, the car made a stop at 252 Montauk Avenue. The defendant was told that Silva wanted to discuss the earlier altercation to explain that it was a mistake. The defendant claims that Perkins entered the apartment first and that he and Smith followed. Simmons stayed with the car. The defendant, Perkins and Smith made their way toward the back of the apartment looking for Silva. When the defendant asked where Silva was, he was "[s]hooed out of the room." He went back outside and waited for Simmons, who had apparently left on an errand, to return with his car. When Perkins and Smith returned outside, they got into the car and the defendant told them that "they got to get out. Enough is enough. I'm tired of running around." The defendant never went to a hospital, but instead called Sebastian, picked her up, and went to the Days Inn in Old Saybrook, where he eventually was arrested.

On cross-examination by the state, the defendant acknowledged that he had listened to all of the other witnesses testify at trial and, in particular, heard the testimony that his blood was found throughout the apartment at 252 Montauk Avenue. He also acknowledged that this was the first time he had "told anybody about this story about . . . Perkins going in there . . . ." He admitted that he had spoken with Galante at the Days Inn after he was given his *Miranda* warnings and that he was familiar with Galante from "prior dealings" with him. The prosecutor asked the defendant: "And at that point in time, you didn't tell Detective

Galante what you've told us here today after you've listened to all this evidence, have you?" Defense counsel objected to the question, arguing that it came close to violating the defendant's right to remain silent. The prosecutor stated that he believed his question was proper cross-examination because it went to the credibility of the defendant's direct testimony, but that he would try to further focus his inquiry.

The prosecutor then elicited from the defendant that he had never told Galante about getting into a fight earlier in the evening, about going to 252 Montauk Avenue, or anything about Perkins' involvement in the events of that night. Defense counsel renewed his objection. Because cross-examination of the defendant had started near the end of the day, the court dismissed the jury and inquired whether counsel would like to be heard on the objection before the court adjourned for the day. Defense counsel indicated that he would like the state to cite the case that allows this type of questioning. The parties agreed to confer on that issue and suggested that the court could resume hearing argument the following morning. In the morning, however, defense counsel indicated to the court that after consulting with the prosecutor about the scope of the questions, he now "understood his basis" and was withdrawing his objection.

Cross-examination of the defendant resumed, and upon inquiry, the defendant recounted his asking Galante why Sebastian was being arrested because she had nothing to do with what was going on. He also acknowledged that he never mentioned that he had been "jumped" at the after-hours party or that he had been inside 252 Montauk Avenue with Perkins and Smith. Defense counsel did not object to this line of questioning.

Despite defense counsel's expressly having raised a *Doyle* objection at trial that he subsequently abandoned,

the defendant argues that he is entitled to review of his resurrected *Doyle* claim on appeal pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989).[9] As established in *Golding*, and later modified in *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), "a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis omitted; footnote omitted.) *State* v. *Golding*, supra, 239–40. Although we agree with the defendant that the first two prongs are met here, we conclude that the claim fails on the third prong because the defendant has not demonstrated that a constitutional violation existed that deprived him of a fair trial.

"In *Doyle* . . . the United States Supreme Court held that the impeachment of a defendant through evidence of his silence following his arrest and receipt of

[9] Because the state does not challenge the defendant's assertion that he is entitled to *Golding* review, we will afford his claim that review. Nevertheless, it is important to note that our decision to do so is limited to the particular circumstances of this case. *Golding* review arguably should be unavailable to the defendant because, rather than failing to preserve the *Doyle* claim by not raising it in any fashion before the trial court, the claim here was undeniably raised at trial, but later expressly abandoned by defense counsel, who withdrew the objection before the court ruled on the issue. Because we have determined that he cannot prevail on the merits of his claim, there is no prejudice to the state in engaging in *Golding* review of the defendant's *Doyle* claim and, in doing so, we avoid the more thorny issue of waiver. This case should not be cited, however, for the proposition that an evidentiary claim that a defendant is entitled to *Golding* review in circumstances in which he raised and then expressly abandoned a claim at trial.

Miranda warnings violates due process. The court based its holding [on] two considerations: First, it noted that silence in the wake of *Miranda* warnings is insolubly ambiguous and consequently of little probative value. Second and more important[ly], it observed that while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. . . .

"*Doyle* applies whenever *Miranda* warnings have been given regardless of an arrest or custody. . . . There are limits, however, to the protection afforded to an accused by *Doyle* and its progeny. *Doyle* does not apply to cross-examination regarding prior inconsistent statements." (Citation omitted; internal quotation marks omitted.) *State* v. *Bell*, 283 Conn. 748, 764–65, 931 A.2d 198 (2007). "Inconsistencies may be shown not only by contradictory statements but also by omissions." *State* v. *Whelan*, supra, 200 Conn. 748 n.4. The court in *Bell* cited to *Anderson* v. *Charles*, 447 U.S. 404, 408, 100 S. Ct. 2180, 65 L. Ed. 2d 222 (1980), which held that questioning regarding prior inconsistent statements "makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all."

In *State* v. *Talton*, 197 Conn. 280, 292–93, 497 A.2d 35 (1985), our Supreme Court noted for purposes of evaluating a claimed *Doyle* violation that there is a distinction between a defendant who remains silent after he is arrested and advised of his rights, and a defendant who, after being given *Miranda* warnings,

chooses to forgo such rights. "Once an arrestee has waived his right to remain silent, the *Doyle* rationale is not operative because the arrestee has not remained silent and an explanatory statement assuredly is no longer insolubly ambiguous. By speaking, the defendant has chosen unambiguously not to assert his right to remain silent. He knows that anything he says can and will be used against him and it is manifestly illogical to theorize that he might be choosing not to assert the right to remain silent as to part of his exculpatory story, while invoking that right as to other parts of his story. While a defendant may invoke his right to remain silent at any time, even after he has initially waived his right to remain silent, it does not necessarily follow that he may remain selectively silent." (Internal quotation marks omitted.) Id., 295.

We agree with the state that the defendant has failed to establish that any of the prosecutor's questions during cross-examination of the defendant implicated the concerns expressed in *Doyle*. The defendant in this case voluntarily spoke to Galante after he was in custody and after being advised of his *Miranda* rights. By his own admission, he did not invoke his right to remain silent until after he was transported to the police department. He chose to speak to Galante about the fact that neither he nor Sebastian had anything to do with what happened in New London and that there was no gun in his vehicle. He nevertheless admitted during cross-examination that he never told Galante that he had been in a fight in New London or that he had gone into 252 Montauk Avenue with Smith or Perkins, both facts that he testified to at trial. Rather than impermissibly attempting to impeach the defendant with his choice to remain silent after being informed of his *Miranda* rights, the state's cross-examination focused on why, having chosen to speak with Galante, the defendant never provided the same exculpatory details that he

later testified to at trial. We conclude that the state properly inquired about the defendant's prior inconsistent statement to Galante; see *State* v. *Bell*, supra, 283 Conn. 764–65; and that the inquiry did not violate the rule set forth in *Doyle*. Because the defendant has failed to demonstrate the existence of a constitutional violation, his claim fails to satisfy the third prong of *Golding*.

The judgment is affirmed.

In this opinion BEACH, J., concurred.

LAVINE, J., concurring. I agree with the majority's conclusion that in the present case, the peremptory challenge was properly exercised under prevailing law and practices. I especially agree with the observations expressed in footnote 5 of the majority's opinion, including the admonition that trial courts must be particularly diligent in assessing the use of peremptory challenges in cases in which the opportunity for pretextual use of such challenges is present. It is my view, however, that no amount of judicial diligence and oversight can remedy a problem that has become embedded in the *Batson*[1] procedure itself unless that procedure is revised. I write separately because this case brings into sharp relief a serious flaw in the way *Batson* has been, and can be, applied. *Batson* is designed to prevent lawyers from peremptorily challenging prospective jurors for manifestly improper reasons based on race, national origin, and the like. It was *not* designed to permit prosecutors—and other lawyers—to challenge members of suspect classes solely because they hold widely shared beliefs within the prospective juror's community that are based on life experiences. This flaw is in plain sight for all to see and must be remedied if the jury selection process is to attain the goal of producing juries representing all of the communities in our state

[1] See *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

and gaining their confidence and trust. I believe a blatant flaw that significantly disadvantages black defendants[2]—and people belonging to other suspect classes—has become part of the *Batson* process itself. I conclude that Connecticut should reform its jury selection process to eliminate the perverse way in which *Batson* has come to be used. I put forth a suggestion that, I hope, will prompt discussion.

In the present case, the prospective juror, W.T., a social worker and a volunteer for the Department of Correction, was asked if he had had any interactions with the police in which he had developed either a strong or unfavorable impression of the police or of the way in which he was treated by the police in any situation. He responded by stating that based on his experiences growing up in this society, he fears for his life. He stated that he sometimes is concerned when he sees a police car behind him when he is driving and wonders if he's going to be stopped. He further stated that he has family members who had spent time in jail, but that he would not be influenced by that fact. In addition, he noted that, based on his experiences working with inmates, he is aware of issues within the American criminal justice system, such as the fact that African-Americans represent a disproportionate number of inmates in jail.[3] He stated, however, that he could

[2] Many reported *Batson* cases arise from criminal cases in which the prospective juror struck was African-American, and the party exercising the challenge is a prosecutor. However, *Batson* is applicable in civil and criminal cases, irrespective of which party is seeking to exercise a peremptory challenge against someone from a suspect class. While *Batson* itself primarily discusses issues relating to African-American prospective jurors, it applies as well to other suspect classes and categories of people. For simplicity, I will use the phrase "suspect class" throughout this opinion.

[3] The problem of over-incarceration of African-American males has been the subject of much discussion and debate in recent years. See, e.g., M. Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2012). Studies indicate that the percentage of black men in prison is disproportionately higher than the percentage of black men in the general population. The September, 2014 bulletin of the United States Department

be fair and would have no trouble following the court's instructions.

Notwithstanding the concerns I express here, I think that, under the present regime, there was at least an arguable basis to conclude that W.T. could not be fair. In light of all of his views considered together, not having been in the courtroom to personally observe W.T., and taking the prosecutor at his word, I am unable to conclude that the use of a peremptory challenge was pretextual.

Acknowledging that there is a diversity of opinion within every community, however, W.T.'s views appear to me to be by no means radical or unreasonable. On the contrary, they appear to be logical, fact-based, and understandable in light of the troubling—to use a euphemism—history of relations between minority communities, on the one hand, and the police and criminal justice system, on the other. They are particularly understandable in light of the many shootings of young black men by police around the country in recent years. One need not share W.T.'s beliefs in every respect to believe them to be rational and widely held in his community. Yet, under *Batson*, W.T.'s understandable beliefs provide a basis for the proper use of a peremptory challenge given the way *Batson* is presently administered.

Justice Marshall noted in his concurring opinion in *Batson* that "defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are . . . flagrant . . . . A prosecutor's own conscious or unconscious racism may lead him easily

of Justice, Bureau of Justice Statistics, indicates that as of December 31, 2013, of 1,516,879 sentenced prisoners under the jurisdiction of state or federal correction authorities, 526,000 were black men; 454,100 were white men; and 314,600 were Hispanic men. E. Carson, "Prisoners in 2013," (September 2014), p. 8, Bureau of Justice Statistics, United States Department of Justice, available at https://www.bjs.gov/content/pub/pdf/p13.pdf (last visited August 30, 2017).

to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such as an explanation as well supported." (Citations omitted.) *Batson* v. *Kentucky*, 476 U.S. 79, 105–106, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Indeed, disingenuous explanations for the use of peremptory challenges against various categories of prospective jurors abound in the case law.[4] Justice Marshall himself urged the total elimination of all peremptory challenges. Id., 107. Judge Mark W. Bennett, a United States District Court judge in the Northern District of Iowa, shares that view and has written that "[b]ecause *Batson*'s framework is flawed, it has produced the lingering and tragic legacy that the courts always *do not* find purposeful discrimination, regardless of how outrageous the asserted race-neutral reasons are." (Emphasis in original.) M. Bennett,

[4] In *People* v. *Randall*, 283 Ill. App. 3d 1019, 1025–26, 671 N.E.2d 60 (1996), former Justice Alan J. Greiman, the author of the majority opinion, offered a harsh appraisal of the ease with which *Batson* could be subverted through disingenuous explanations for the use of a peremptory challenge. He stated: "Having made these observations, we now consider the charade that has become the *Batson* process. The State may provide the trial court with a series of pat race-neutral reasons for exercise of peremptory challenges. Since reviewing courts examine only the record, we wonder if the reasons can be given without a smile. Surely, new prosecutors are given a manual, probably entitled, 'Handy Race-Neutral Explanations' or '20 Time-Tested Race-Neutral Explanations.' " Id.

For a discussion of some of the "almost laughable" race neutral reasons some prosecutors have proffered, and courts have accepted, see J. Bellin & J. Semitsu, "Widening *Batson*'s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1093 (2011). In truth, decisions in jury selection—as in other areas of life—are often influenced by the sometimes very subtle implicit biases we all carry with us. See, e.g., M. Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 161 (2010); J. Kang, "Implicit Bias—A Primer for Courts," National Center St. Cts., (August 2009), available at http://wp.jerrykang.net.s110363.gridserv-

"Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 161 (2010).

The reality is that "[u]nder [the] current *Batson* doctrine, the trial court cannot reject a peremptory challenge unless it makes a finding of attorney misconduct that has at least two facets, either of which would give any reasonable trial judge pause. First, the judge must make a factual finding that the race- or gender-neutral explanation proffered by the striking attorney at *Batson*'s second step is not, in fact, the reason for the strike but is instead 'pretextual . . . .' In other words, the court must find that the attorney has made a misrepresentation to the court of a material fact—a serious breach of the attorney's ethical duty of candor. Second and relatedly, the judge must find that the attorney exercised a peremptory challenge based on race or gender and accordingly violated the juror's constitutional right to equal protection under the law. Indeed, considered together, a trial court ruling in favor of a *Batson* movant constitutes a judicial determination that an attorney, in open court, engaged in a misrepresentation of a material fact to obscure a violation of the law—an action that, in other contexts, could warrant criminal prosecution. . . . Given the implications of the findings required to establish a *Batson* violation, it is understandable that in all but the most extreme cases, trial courts will err on the side of crediting the reason proffered for a strike." (Footnotes omitted.) J. Bellin & J. Semitsu, "Widening *Batson*'s Net to Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113–14 (2011). Put simply, judges are reluctant to find that a

er.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf (last visited August 30, 2017).

prosecutor's stated reasons are based on conscious, or unconscious, racist beliefs or assumptions.[5]

The problem presented by this case, then, must be viewed in the context of the generally ineffectual application of *Batson*.

Where does that leave things? What is to be the fate of the hypothetical black prospective juror who testifies under oath that he can be fair to both the state and the defense, but also indicates that he has concerns because he has been stopped, for no apparent, valid reason, while driving? Or because members of his family have been jailed? What about the hypothetical female prospective juror, who is being questioned in a criminal sex assault case, who swears that she can be fair to the state and the defendant, but who has formed the opinion that police sometimes do not treat the victims of sexual assault with all the seriousness and dignity to which they are entitled? Or the hypothetical Japanese-American prospective juror, in a civil case in which a federal employee is the plaintiff, who swears he or she could be fair to both sides, but who recounts his or her family's suffering at the hands of the federal government when subject to internment during World War II?

There are two things fundamentally wrong with a system that permits someone with the rational and fact-based views of these hypothetical prospective jurors to be peremptorily challenged and excluded from jury service.

[5] Chief Justice Warren E. Burger, in his dissenting opinion in *Batson*, points out that permitting lawyers to use their intuition to excuse certain prospective jurors can redound to the benefit of members of suspect classes. He posits an example in which an Asian defendant is on trial for the murder of a white victim and the prospective jurors, all white, deny harboring racial prejudice. The defendant, however, continues to harbor a hunch, an assumption, or an intuitive judgment that these white prospective jurors will be unfair to him due to racial biases. The ability of the defendant to use peremptory challenges without need for explanation can protect that defendant, notes Burger. See *Batson* v. *Kentucky*, supra, 476 U.S. 128.

First, permitting someone with the stated beliefs of these hypothetical prospective jurors to be excluded from jury service is an affront to the community with which he or she identifies and undermines the claim of the jury selection system to be fairly representative of all segments of our diverse society. The reality is that permitting the use of peremptory challenges under these circumstances *effectively excludes a significant number of people belonging to suspect classes from jury service*. *Batson*, as it has evolved, permits the elimination of certain categories of prospective jurors whose views are reasonable and widely shared in their communities. The potential for the kind of categorical exclusion that *Batson* permits is simply unacceptable in a system that strives to treat everyone equally. It sends a troubling message to members of minority communities who should be encouraged—not discouraged—to actively engage in, and trust, the criminal justice system.

Second, permitting a peremptory challenge to be used under these circumstances is an affront to the dignity of the individual prospective juror who is excluded for honestly voicing reasonable and widely held views. It minimizes or negates his or her life experience in an insulting and degrading way. It must be remembered that one of the rationales for *Batson* is that the inappropriate exclusion of prospective jurors deprives the *prospective juror* of his or her constitutional right to serve on a jury—a basic right of citizenship. See *Batson* v. *Kentucky*, supra, 476 U.S. 87. To prohibit a significant percentage of people belonging to a suspect class from serving on a jury because they express a reasonable, fact-based, and widely held view cannot be countenanced. As Justice Powell, writing for the court, stated in *Batson*, "[s]election procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." Id.

Moreover, if members of a suspect class are punished for honestly voicing their widely shared views; for example, they are concerned when they see a police car behind them when they are driving because they fear being stopped for no valid reason;[6] the present regime creates an incentive for them to give dishonest or deceitful answers, rather than honest ones. This, in and of itself, undermines a fair jury selection system, which relies on prospective jurors honestly answering the questions put to them.

It is true, of course, that peremptory challenges play an important function in our system because they permit lawyers to use their intuition in the very human

[6] Connecticut law requires the maintenance of records by police departments so authorities can annually track the nature and extent of racial profiling of black drivers. Annual reports indicate that there are racial and ethnic disparities in the traffic stop patterns of various police departments. A. Ba Tran, "Digging Deeper Into Racial Disparities in Connecticut Traffic Stops," TrendCt.org, (June 14, 2016), available at http://trafficstops.trendct.org/story/digging-deeper-into-racial-disparities-in-ct-traffic-stops/ (last visited August 30, 2017). Connecticut police officials have claimed that independent reviews have demonstrated that reports that minority drivers are stopped disproportionately are flawed. D. Collins, "Connecticut Chiefs Say Police Profiling Reports are Flawed," Associated Press, May 4, 2017, available at https://www.usnews.com/news/best-states/connecticut/articles/2017-05-04/connecticut-chiefs-say-police-profiling-reports-are-flawed (last visited August 30, 2017).

Still, the ubiquitous stopping of black drivers—particularly black males—is widely recognized. See F. Weatherspoon, "Racial Profiling of African-American Males: Stopped, Searched, and Stripped of Constitutional Protection," 38 J. Marshall L. Rev. 439 (2004). Professor Weatherspoon cites a study undertaken by the Washington Post and the Black America's Political Action Committee, which determined that "approximately forty-six percent of African-American males registered to vote believe they had been stopped by law enforcement officers on the basis of their race." Id., 444 n.25; see also D. Harris, "The Stories, the Statistics and the Law: Why 'Driving While Black' Matters," 84 Minn. L. Rev. 265, 298 (1999) ("Racially targeted traffic stops cause deep cynicism among blacks about the fairness and legitimacy of law enforcement and courts. . . . Thus, it is no wonder that blacks view the criminal justice system in totally different terms than whites do. They have completely different experiences within the system than whites have, so they do not hold the same beliefs about it.").

jury selection process. Lawyers should have the opportunity to look prospective jurors in the eye, size them up, and evaluate their answers. This is a time-honored and important practice. However, as Justice Marshall noted in his concurring opinion in *Batson*, "the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial." Id., 108. When the use of a peremptory challenge, in cases similar to the present one, has the potential to exclude categorically large swaths of people within a suspect class, the price the system pays for maintaining that practice is too high.

This problem cannot be solved simply by urging restraint upon the lawyers selecting a jury. Their job, after all, is to win their clients' cases by selecting a jury most likely to return a verdict in their favor. The player in the system with the responsibility for ensuring that prospective jurors belonging to suspect classes are properly treated so that the system is fair, and is perceived as fair, is the judge. Our judges are tasked with making many difficult and sensitive decisions in a wide variety of contexts. Our judges decide which parent a child should live with in highly contested divorce cases; and decide what sort of a sentence to mete out when serious violent crimes are committed; and decide whether and how much punitive damages should be awarded in bitter business disputes. And judges already determine whether a prospective juror should be excused for cause. Our judges can be trusted to administer the jury selection process so as to protect all of the important societal interests involved, not only those of the state and the defendant.

I understand Connecticut's deep and long-standing attachment to the individual *voir dire*.[7] Therefore, I

[7] A recent article in the Connecticut Law Review concludes that abolition of the peremptory challenge is the only way to remedy problems posed by *Batson*. See N. Marder, "*Foster v. Chapman*: A Missed Opportunity for

suggest an alteration in the way *Batson* is administered in Connecticut to ameliorate the negative effects of the present regime. I would remove some of the discretion from the lawyers selecting a jury and reallocate it to the judge supervising the process. I believe the flaw illustrated by cases of this sort could be ameliorated substantially if judges are given the discretion to disallow the use of peremptory challenges in cases in which: (1) the prospective juror is part of a suspect class; (2) the prospective juror gives an unequivocal assurance, under oath, that he or she can be fair to both sides; (3) the prospective juror expresses reasonable and fact-based views, which, in the opinion of the judge, following argument by the lawyers, are widely shared in the prospective juror's particular community; and (4) the judge concludes that the prospective juror can, in fact, be fair.

The application of this proposed test would tend to ensure that a peremptory challenge could not exclude the previously discussed hypothetical jurors. Suppose, however, that one of these prospective jurors testifies that he or she distrusts the criminal justice system because he or she heard someone on "talk radio" criticize it. In this instance, the judge would permit the exercise of a peremptory challenge because the prospective juror's views, in part, would not be reasonable and based on the potential juror's life experience.

I acknowledge that this approach would deprive lawyers of some degree of discretion in their use of peremptory challenges and would transfer that discretion to the judge. But I believe this reallocation of discretion from lawyers picking juries, to judges supervising the process, is needed. As cases raising these issues illustrate, the price society pays by permitting prospective

Batson and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1185 (May 2017).

jurors, like W.T., to be excluded is unacceptably high. The justice system has an obligation to do everything it can to encourage participation by all segments of society, particularly those who have grown understandably suspicious of that system. I can think of no better way to accomplish this than by trusting our judges to monitor this process, keeping well in mind the lamentable history of racial discrimination that has afflicted African-American communities and other people belonging to suspect classes. The *Batson* problem discussed here deserves study in the interest of ensuring that Connecticut juries are fairly composed of representatives from the many diverse groups that make up our great state.

STATE OF CONNECTICUT *v.* JOSEPH C. ACAMPORA, JR.
(AC 38468)

DiPentima, C. J., and Alvord and Bear, Js.

Syllabus

Convicted of the crimes of assault of a disabled person in the third degree and disorderly conduct, the defendant appealed to this court. He claimed, inter alia, that the trial court violated his constitutional right to counsel when it permitted him to represent himself at arraignment and during plea negotiations without obtaining a valid waiver of his right to counsel. *Held*:

1. The trial court did not abuse its discretion when it determined that the defendant knowingly, intelligently and voluntarily waived his right to counsel and invoked his right to self-representation: that court had no duty to canvass the defendant concerning his waiver of the right to counsel and his invocation of the right to self-representation until he clearly and unequivocally invoked his right to self-representation, which he did not do at arraignment, and although the defendant clearly and unambiguously invoked his right to self-representation at a pretrial hearing, the court canvassed the defendant that same day; moreover, to the extent that the defendant claimed that the court violated his right to counsel by not canvassing him prior to the date of that hearing, this court declined to review that claim, the defendant having raised the

claim for the first time in his reply brief and there having been no exceptional circumstances to warrant a consideration of the claim.

2. The defendant could not prevail on his claim that the court's canvass at the pretrial hearing was constitutionally inadequate because the court did not explain in sufficient detail the nature of the charges against the defendant and did not advise him of specific dangers and disadvantages of self-representation: it was not necessary that the defendant be specifically informed of the particular elements of the crimes he was charged with before being permitted to waive counsel and to proceed pro se, as the court advised the defendant of the statutory names of the charges pending against him as well as the penalties associated with those charges, the elements of which were relatively straightforward and aligned with the statutory names of the offenses, and the court reasonably could have concluded that the defendant understood the nature of the charges against him sufficiently to render his waiver of the right to counsel knowing and intelligent; moreover, during its canvass, the court explored the defendant's lack of familiarity with substantive law and procedural rules, and alerted him to the fact that he would be expected to educate himself on those areas of the law and procedure and to comply with the same rules that govern attorneys during trial, and that discussion sufficiently apprised the defendant of the general dangers and disadvantages associated with self-representation, as opposed to representation by an attorney trained in the law.

3. The defendant could not prevail on his unpreserved claim that the trial court violated his right to present a defense by improperly denying his motion to open the evidence so that he could present the testimony of an objective third party witness who would have been able to directly attack the credibility of the victim as to whether an ambulance had been dispatched to his residence on the date of the incident at issue; the evidence that the defendant sought to admit would not have been admissible in his case-in-chief, as it was a voice mail message that constituted inadmissible hearsay, the defendant did not identify any exception to the hearsay rule that would have permitted its admission, and even if the court interpreted the defendant's statements about the voice mail as a request to open the evidence, the testimony about whether an ambulance was dispatched to the victim's residence related to a collateral matter and not a material issue, and the impeachment of the victim's testimony on a collateral matter through extrinsic evidence was not permitted under our rules of evidence.

Argued May 22—officially released September 5, 2017

Procedural History

Substitute information charging the defendant with the crimes of assault of a disabled person in the third degree, disorderly conduct and interfering with an

emergency call, brought to the Superior Court in the judicial district of New Haven, geographical area number seven, and tried to the jury before *Klatt*, *J.*; thereafter, the court denied the defendant's motion to open the evidence; verdict and judgment of guilty of assault of a disabled person in the third degree and disorderly conduct, from which the defendant appealed to this court. *Affirmed.*

Mary A. Beattie, assigned counsel, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *James R. Dinnan*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Joseph C. Acampora, Jr., appeals from the judgment of conviction, rendered after a jury trial, of one count of assault of a disabled person in the third degree in violation of General Statutes § 53a-61a and one count of disorderly conduct in violation of General Statutes § 53a-182 (a) (1). The defendant was found not guilty of interfering with an emergency call in violation of General Statutes § 53a-183b. The defendant represented himself at trial. On appeal, the defendant claims that the trial court (1) violated his right to counsel under the sixth and fourteenth amendments to the United States constitution when it permitted him to represent himself without obtaining a valid waiver of his right to counsel and (2) violated his right to present a defense, as guaranteed by the sixth and fourteenth amendments to the United States constitution, when it denied his motion to open the evidence. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts.

The defendant and the victim, Anthony Toth, are brothers. The victim has cerebral palsy. In August, 2011, they shared an apartment in a multifamily house with their mother. At approximately 11:40 a.m. on August 3, 2011, the defendant entered the victim's bedroom and grabbed him. The defendant accused the victim's friend of putting a hole in the windshield of his van when they were setting off fireworks the night before. The defendant slapped and punched the victim in the face and head, and dragged him about the apartment. When the victim grabbed his phone, the defendant took it from him and threw it, causing the battery to fall out. Thereafter, the defendant called the Wallingford Police Department to report that his van had been vandalized, and the victim called the police to report the assault after he located and replaced his phone's battery.

At approximately noon that same day, Officer James Onofrio was dispatched to the defendant and the victim's residence in response to the defendant's vehicle vandalism complaint. When Onofrio arrived, he met with the defendant outside and examined the defendant's damaged windshield. The defendant explained that he believed that the victim's friend had damaged the windshield with a firework the night before, but he admitted that he had no proof of who caused the damage. While talking to the defendant, police dispatch informed Onofrio of the victim's assault complaint. The defendant informed Onofrio that he needed to leave to go to a doctor, and Onofrio obliged because he did not know, at that time, that the defendant was the subject of the assault complaint.

Onofrio met the victim in his apartment. The victim had a cut on his nose and blood on his nose, neck, and arm, and he explained to Onofrio that the defendant had assaulted him earlier that day because he believed that the victim's friend damaged his van's windshield. Consistent with the victim's complaint, a neighbor

informed Onofrio that approximately fifteen minutes before he had arrived in response to the defendant's vehicle vandalism complaint, she had heard the defendant yelling and "loud banging and a lot of commotion" coming from the defendant and victim's apartment.

Thereafter, the defendant was charged with assault of a disabled person in the third degree, disorderly conduct, and interfering with an emergency call. After a jury trial, at which the defendant represented himself, the defendant was found guilty of assault of a disabled person in the third degree and disorderly conduct. The defendant was found not guilty of interfering with an emergency call. The court sentenced the defendant to a total effective sentence of one year of imprisonment. This appeal followed.

I

We begin with the defendant's claim that his right to counsel was violated when the court permitted him to represent himself without obtaining a valid waiver of his right to counsel. Specifically, the defendant claims that the court improperly permitted him to represent himself at arraignment and during plea negotiations without canvassing him concerning his waiver of his right to counsel. The defendant also claims that the canvass performed by the court at a pretrial proceeding on February 23, 2012, was constitutionally inadequate. We reject both of these claims.

The following additional facts are relevant to these claims. On September 14, 2011, the defendant appeared for arraignment unrepresented by counsel. Because the case involved allegations of domestic violence, a discussion was held concerning whether family services, part of the Court Support Services Division, was going to be involved in the case, whether a protective order needed to be put in place, and what the conditions of that order should be because the defendant and the

victim lived together. The defendant declined the assistance of family services, and the court, *Scarpellino*, *J.*, ultimately agreed to permit the defendant to return to the apartment that he shared with the victim. The court continued the matter for one week so that family services could contact the victim and obtain more information. The following week, on September 21, 2011, family services indicated that it had still been unable to contact the victim, and the court granted another continuance.

Between September 28, 2011, and November 29, 2011, the defendant requested and received four continuances so that he could retain counsel. At the hearing on November 29, 2011, the following colloquy occurred:

"[The Prosecutor]: [The defendant] is asking for a continuance to hire an attorney.

"[The Defendant]: Still going.

"The Court: One week.

"[The Defendant]: One week.

"The Court: Well, how many times do you want me to continue? You know—

"[The Defendant]: —well, listen, I'm not the one pursuing the case. You guys are coming after me, so—

"The Court: Yeah, well—

"[The Defendant]: —I mean—

"The Court: —you can get a public defender—

"[The Defendant]: —I don't—I'll represent myself, Your Honor.

"The Court: Did you apply for a public defender?

"[The Defendant]: I, I got too much unemployment. I get just enough not to get it, and—

"The Court: All right. What was the offer on this?

"[The Prosecutor]: There hasn't been one because he wanted to retain the services of counsel.

"The Court: Once you tell the prosecutor you want a lawyer, the prosecutor is going to—

"[The Defendant]: Well, no. I did not tell him that.

"The Court: All right.

"[The Defendant]: They told me to get a lawyer, Your Honor. So—

"The Court: All right, well, because, so, so, then give him—send it back and then give him an offer."

Thereafter, the defendant interjected that the case was "ridiculous . . . ." The court explained to the defendant that "the charge that's there . . . carries a mandatory year in jail. You, you need to get an attorney . . . ." The defendant proceeded to argue about why the case was "based on a bunch of crap" and stated: "And now, you—I, I,—if you want a big trial thing about it, then I'd rather represent myself and I'll do my own investigation. . . . Because, honestly, from what I see of attorneys, I believe I can do a better job myself." The court said, "All right," and the defendant asked, "So, we'll give it one week again?" The court instructed the defendant to talk to the prosecutor about his case first. When the defendant's case was recalled, the prosecutor indicated that he was unable to have a "cogent conversation" with the defendant and stated that the defendant "really needs an attorney to help him out." The court therefore granted the defendant's motion for a continuance.

On December 13, 2011, after the defendant's case was called, the prosecutor noted that "[t]his is a matter that's been continued since September 14 [2011] at the request of the defendant each time to hire counsel. The state's made an offer." The court asked the defendant

how his efforts to retain counsel were proceeding. The defendant responded: "Saving up [for an attorney]. I got, like, $500 saved, and the lowest I got they want is, like, $800. So, I'm unemployed. So, I've been unemployed. So, plus, I pay my rent. I mean, I only get so much from unemployment." The court agreed to continue the case so that the defendant could continue his efforts to retain counsel. Between December 29, 2011, and February 16, 2012, the court continued the case five additional times so that the defendant could retain counsel.[1]

On February 23, 2012, the state explained to the court, *McNamara*, *J.*, that the defendant's case had been continued several times so that the defendant could retain counsel. The court asked the defendant whether he had in fact retained an attorney. The defendant replied: "No. Um, well, I'm on unemployment. The person was my brother. I called the police. I don't believe I need a lawyer. I don't want a lawyer. I don't have the money to afford a lawyer." When the court mentioned Judge Scarpellino, the defendant interjected: "I asked him to go on the jury trial." The court asked the defendant whether he had asked for more time to retain an attorney, and the defendant indicated that he had. The defendant explained that he had been saving money over the last several weeks for an attorney, and he stated that "if I need to represent myself, I will, Your Honor, I will. . . . I don't believe I really need to . . . sacrifice . . . not paying my rent to hire an attorney for . . . for a junk case."

The court engaged in a discussion with the defendant concerning his attempts to retain counsel. The defendant stated: "They offered me forty-five days, which I

[1] Nothing in the record reflects that plea negotiations continued during this period or that any additional offers were made by the state. On December 29, 2011, the state sought to place the case on the firm trial list, but the court denied that request because the defendant was still attempting to retain counsel.

will not accept. So, the next move would have to be trial. So, if we can start picking and maybe I'll have to—if I lose trial, I'll . . . maybe I'll . . . I'll save my money for the appeal." The court asked the state whether an offer had been made, and the state responded that one had been made in December, 2011. The defendant confirmed that he was rejecting that offer. The court stated that it would place the case on the firm trial list and canvassed the defendant concerning his waiver of the right to counsel and invocation of his right to self-representation. After completing its canvass, the court found, inter alia, that the defendant knowingly, intelligently, and voluntarily waived his right to counsel.

Having reviewed the relevant factual and procedural history, we now turn to the legal principles that guide our analysis of the defendant's claims. The sixth amendment to the United States constitution, as made applicable to the states by the fourteenth amendment, embodies the right to counsel at all critical stages of a criminal prosecution, including arraignment[2] and plea negotiations. See *State* v. *Braswell*, 318 Conn. 815, 827,

[2] As our Supreme Court previously has observed, "in *Hamilton* v. *Alabama*, [368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961)] the [United States] Supreme Court stated only certain arraignments are a 'critical stage.' In *Hamilton*, the Supreme Court concluded that although an arraignment in Alabama was a 'critical stage,' it acknowledged that whether it was a 'critical stage' in other jurisdictions depended on the role of an arraignment in that particular jurisdiction. Id. It is important to note, however, that, in more recent cases, the Supreme Court has acknowledged that '[c]ritical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.' *Missouri* v. *Frye*, [566 U.S. 134, 140, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012)]. Therefore, it seems that more recent Supreme Court cases have not limited only certain arraignments to be 'critical stages.' " *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 480, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, U.S. , 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

In the present case, the state does not dispute that the defendant's arraignment constituted a critical stage. Accordingly, we assume for the purposes of our analysis that the defendant's arraignment was a critical stage.

123 A.3d 835 (2015); *State* v. *Pires*, 310 Conn. 222, 230, 77 A.3d 87 (2013); see also *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 474–84, 68 A.3d 624 (defendant's arraignment was critical stage because of presentence confinement issues that arose), cert. denied sub nom. *Dzurenda* v. *Gonzalez*, U.S. , 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013); *Mahon* v. *Commissioner of Correction*, 157 Conn. App. 246, 253, 116 A.3d 331 ("[p]retrial negotiations implicating the decision of whether to plead guilty [are] a critical stage in criminal proceedings" [internal quotation marks omitted]), cert. denied, 317 Conn. 917, 117 A.3d 855 (2015); accord *Davis* v. *Greiner*, 428 F.3d 81, 87 (2d Cir. 2005) ("[i]t is well settled a defendant's Sixth Amendment right to counsel extends to plea negotiations").

"Embedded within the sixth amendment right to assistance of counsel is the defendant's right to elect to represent himself, when such election is voluntary and intelligent. . . . [T]he right to counsel and the right to self-representation present mutually exclusive alternatives. . . . Although both rights are constitutionally protected, a defendant must choose between the two. . . . We require a defendant to clearly and unequivocally assert his right to self-representation because the right, unlike the right to the assistance of counsel, protects interests other than providing a fair trial, such as the defendant's interest in personal autonomy. . . . Put another way, a defendant properly exercises his right to self-representation by knowingly and intelligently waiving his right to representation by counsel. . . . Once the right has been invoked, the trial court must canvass the defendant to determine if the defendant's invocation of the right, and simultaneous waiver of his right to the assistance of counsel, is voluntary and intelligent." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Braswell*, supra, 318 Conn. 827–28.

"In the absence of a clear and unequivocal assertion of the right to self-representation [however], a trial court has no independent obligation to inquire into the defendant's interest in representing himself . . . . [Instead] recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court." (Internal quotation marks omitted.) *State* v. *Pires*, supra, 310 Conn. 231. "In the exercise of that discretion, the trial court must weigh into the balance its obligation to indulge in every reasonable presumption against waiver of the right to counsel." (Internal quotation marks omitted.) *State* v. *Carter*, 200 Conn. 607, 614, 513 A.2d 47 (1986).

"We ordinarily review for abuse of discretion a trial court's determination, made after a canvass . . . that a defendant has knowingly and voluntarily waived his right to counsel. . . . In cases . . . where the defendant claims that the trial court improperly failed to exercise that discretion by canvassing him after he clearly and unequivocally invoked his right to represent himself . . . whether the defendant's request was clear and unequivocal presents a mixed question of law and fact, over which . . . our review is plenary." (Citation omitted; internal quotation marks omitted.) *State* v. *Jordan*, 305 Conn. 1, 13–14, 44 A.3d 794 (2012).

A

The defendant first claims that the court deprived him of his right to counsel when it permitted him to represent himself at arraignment and during plea negotiations without being canvassed concerning his waiver of the right to counsel and invocation of the right to self-representation. That is, the defendant contends that a trial court's duty to canvass is triggered whenever a defendant appears at a critical stage of the proceeding unrepresented by counsel. The defendant's argument is predicated on the assumption that "[t]he right to

self-representation is not triggered until the court has canvassed a defendant in accordance with Practice Book § 44-3 and the defendant has effectively waived the right to counsel." The defendant misapprehends our jurisprudence concerning the invocation of the right to self-representation and a trial court's duty to canvass.

"State and federal courts consistently have discussed the right to self-representation in terms of invoking or asserting it . . . and have concluded that there can be no infringement of the right to self-representation in the absence of a defendant's proper assertion of that right. . . . The threshold requirement that the defendant clearly and unequivocally invoke his right to proceed pro se is one of many safeguards of the fundamental right to counsel. . . . Accordingly, [t]he constitutional right of self-representation depends . . . upon its invocation by the defendant in a clear and unequivocal manner. . . . *In the absence of a clear and unequivocal assertion of the right to self-representation, a trial court has no independent obligation to inquire into the defendant's interest in representing himself* . . . . [Instead] recognition of the right becomes a matter entrusted to the exercise of discretion by the trial court." (Emphasis added; internal quotation marks omitted.) *State* v. *Pires*, supra, 310 Conn. 231.

This constitutional rule "is grounded in the policy and practical consideration that, such advices [about the right to self-representation] might suggest to the average defendant that he could in fact adequately represent himself and does not need an attorney, and it would be fundamentally unwise to impose a requirement to advise of the self-representation procedure which, if opted for by the defendant, is likely to be to no one's benefit. . . . It also is consistent with well settled Connecticut law, that, [i]n the absence of a clear and unequivocal assertion of the right to self-representation, *a trial court has no independent obligation to*

inquire into the defendant's interest in representing himself, because the right of self-representation, unlike the right to counsel, is not a critical aspect of a fair trial, but instead affords protection to the defendant's interest in personal autonomy." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 248.

Accordingly, the court had no duty to canvass the defendant concerning his waiver of the right to counsel and his invocation of the right to self-representation until he clearly and unequivocally invoked his right to self-representation.

B

We next address whether and when the defendant invoked his right to self-representation. It is undisputed that the defendant did not clearly and unambiguously invoke his right to counsel at arraignment. It is also undisputed that the defendant clearly and unambiguously invoked his right to self-representation on February 23, 2012, and that the court canvassed the defendant that same day. To the extent that the defendant further claims that the court violated his right to counsel by not canvassing him prior to February 23, 2012, however, we conclude that such a claim is unreviewable.

In his opening brief, the defendant argued only that the court violated his right to counsel by permitting him to represent himself at critical stages of the proceedings without canvassing him as to his waiver of his right to counsel and invocation of his right to self-representation. In its brief, the state responded that the court was not required to canvass the defendant until he clearly and unequivocally invoked his right to self-representation. The state further observed: "The record reveals, and the defendant does not assert otherwise, that he did not clearly and unequivocally invoke his right to self-representation until February 23, 2012." The state

did not thereafter address whether the defendant clearly and unequivocally invoked his right to self-representation prior to February 23, 2012. In his reply brief, the defendant continued to maintain that because it was "obvious" that he was representing himself at arraignment and during plea negotiations, the court was required to canvass him. In the alternative, the defendant argued that, even if he was required to clearly and unequivocally invoke his right to self-representation, he did so on November 29, 2011, and February 23, 2012.[3] The defendant claimed therefore that the court violated his right to counsel by not canvassing him before he engaged in plea negotiations with the state on November 29, 2011, and rejected the state's plea offer on February 23, 2012.

"It is axiomatic that a party may not raise an issue for the first time on appeal in its reply brief. . . . Our practice requires an appellant to raise claims of error in his original brief, so that the issue as framed by him can be fully responded to by the appellee in its brief, and so that we can have the full benefit of that written argument. Although the function of the appellant's reply brief is to respond to the arguments and authority presented in the appellee's brief, that function does not

[3] We observe that when discussing facts relevant to his first claim on appeal, the defendant did not reference the language from November 29, 2011, that he claimed in his reply brief constituted a clear and unequivocal assertion of the right to counsel. He did reference his statement—"I'll represent myself, Your Honor"—in a footnote when analyzing his claim that the court's February 23, 2012 canvass was constitutionally inadequate. This footnote, however, did not analyze whether the defendant previously had invoked his right to self-representation. Instead, it analyzed whether, and to what extent, the defendant was previously advised of his "right to assigned counsel," i.e., a public defender. In particular, the footnote states: "Judge Scarpellino told defendant [on November 29, 2011] 'you can get a public defender.' . . . Defendant replied, 'I'll represent myself, Your Honor.' When the court asked him if he had applied for a public defender, defendant replied, 'I get too much unemployment.' . . . On [December 29, 2011], the state told the court that defendant did not want to apply for a public defender." (Citations omitted.)

include raising an entirely new claim of error." (Citations omitted; internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 197, 982 A.2d 620 (2009). Exceptional circumstances may persuade us to consider an issue raised for the first time in a reply brief. See, e.g., *State* v. *McIver*, 201 Conn. 559, 563, 518 A.2d 1368 (1986) (permitting defendant to raise issue for first time in reply brief because record adequately supported claim defendant had been deprived of fundamental constitutional right and fair trial); see also *Curry* v. *Burns*, 225 Conn. 782, 789 n.2, 626 A.2d 719 (1993) (permitting appellant in reply brief to join amicus curiae request to overrule prior case law); *37 Huntington Street, H, LLC* v. *Hartford*, 62 Conn. App. 586, 597 n.17, 772 A.2d 633 (addressing issue raised in reply brief where appellant had no earlier opportunity to respond to issues raised in briefs filed by amici curiae), cert. denied, 256 Conn. 914, 772 A.2d 1127 (2001).

No exceptional circumstances exist that persuade us to consider this issue, which was raised for the first time in a reply brief. Therefore, we decline to review the defendant's belated claim that he clearly and unequivocally invoked his right to self-representation on November 29, 2011, and that the court violated his right to counsel by not canvassing him on that date.

C

The defendant next claims that the court's canvass on February 23, 2012, was constitutionally inadequate because the court failed to explain to him in sufficient detail the nature of the charges and to advise him of specific dangers and disadvantages of self-representation. We disagree.

The following additional facts are relevant to the defendant's claim. On February 23, 2012, the court, *McNamara, J.*, canvassed the defendant concerning his

waiver of his right to counsel and invocation of his right to self-representation. In relevant part, the court engaged in the following colloquy with the defendant concerning the charges pending against him:

"The Court: All right. Do you understand the charges that you are facing, sir?

"[The Defendant]: Yes, I do.

"The Court: You are facing the charge of assault in the third degree—is it a victim over sixty—of a victim over sixty?

"[The Prosecutor]: It's on a disabled person. Correct.

"The Court: A disabled person.

"[The Prosecutor]: Correct.

"The Court: Interfering with an emergency call and disorderly conduct. Do you understand that?

"[The Defendant]: Yes, I do.

"The Court: Do you understand the minimum and maximum penalties of these charges?

"[The Defendant]: Do I understand the minimum—

"The Court: —and maximum penalties in these charges.

"[The Defendant]: What are they? I don't think they were told to me.

"The Court: All right. For the assault on a person, disabled person—

"[The Prosecutor]: It's a one year minimum, one year maximum.

"The Court: —is a one year minimum, mandatory minimum, which means that if you were convicted you would do a minimum time of one year in jail for that charge alone. All right. For the charge of interfering

with an emergency call, you would—that would be a [class] C mis—let me see—that would be a [class] A misdemeanor. You can get another year in jail, plus a $2000 fine. And disorderly conduct is ninety days and [a] $500 fine. So, now you understand the penalties involved. Is that right?

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

The court also canvassed the defendant concerning his education and experience with the law, as well as his obligation to educate himself on the relevant law and procedure and to comply with the same rules that govern attorneys during trial:

"The Court: And how far have you gone in school?

"[The Defendant]: I graduated high school.

"The Court: Can you read?

"[The Defendant]: Yes, Your Honor.

"The Court: All right. You know you have a right to counsel?

"[The Defendant]: Yes, Your Honor.

"The Court: All right. Have you ever been involved in a criminal trial before?

"[The Defendant]: In a trial? No, Your Honor.

"The Court: All right. Have you ever been the subject of a competency evaluation?

"[The Defendant]: No, Your Honor.

"The Court: Did you represent yourself during any cases at all?

"[The Defendant]: Criminally, no.

"The Court: Any cases at all, I said.

"[The Defendant]: Um, up at the appellate division in Hartford. Yes. Back in last year. Yes, I did. . . .

"The Court: All right. Are you familiar with the laws and rules of procedure regarding evidence, pretrial motions, voir dire for criminal trials?

"[The Defendant]: Um, no, Your Honor.

"The Court: All right. Are you familiar with the rules of discovery for criminal matters, sir?

"[The Defendant]: No, Your Honor.

"The Court: Do you realize that, if you represent yourself, the judge will be impartial and cannot advise you on the procedures, [substantive] issues in the case?

"[The Defendant]: I understand that now.

"The Court: All right. Are you familiar with plea bargaining?

"[The Defendant]: Yes, I am.

"The Court: Can you do that yourself?

"[The Defendant]: Yes. I believe I could.

"The Court: Okay. Are you—do you have access to a library to learn these things that you need to understand before you go to trial?

"[The Defendant]: Yes, I do, ma'am.

"The Court: Can you conduct yourself at a trial?

"[The Defendant]: I believe so.

"The Court: All right. So, you feel you possess the training, education, and experience and skill to represent yourself and to try the case yourself. Is that true, sir?

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

"The Court: All right.

"[The Defendant]: I believe I can.

"The Court: You understand that you can't have an attorney and represent yourself? You either represent yourself, or you have an attorney represent you. You understand that, sir?

"[The Defendant]: Yes, I do.

"The Court: All right.

"[The Defendant]: But I have one question.

"The Court: And, at trial, you will be at the counsel table all by yourself. You understand that?

"[The Defendant]: Yes.

"The Court: You'll be sitting there presenting your case on your own. Now, when you have a criminal trial, you're expected to follow the rules and procedures that we make the lawyers follow.

"[The Defendant]: Okay. Can I have one of my—if someone decides to, can I have an attorney present in the courtroom while it's being—

"The Court: —You can't have the attorney sit with you at the table.

"[The Defendant]: I can't have anyone even sit—I don't want to have my—

"The Court: He—if he—he can sit—

"[The Defendant]: I'm sorry. Okay.

"The Court: —he can sit in the courtroom—

"[The Defendant]: That's fine. That's fine.

"The Court: —if you—

"[The Defendant]: He can hear the case.

"The Court: —he can sit in the courtroom, but—

"[The Defendant]: Excellent.

"The Court: —if you decide you want the attorney to represent you, that attorney would file an appearance and be present. You understand that?

"[The Defendant]: Yeah. No. I want to represent myself.

"The Court: All right. So, is it your wish today to proceed to trial and represent yourself?

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

"The Court: Is this your decision?

"[The Defendant]: This is my decision in full.

"The Court: Are you making it voluntarily and of your own free will?

"[The Defendant]: Yes. Yes, ma'am.

"The Court: And no one has found—has threatened you or promised you. Is that right?

"[The Defendant]: That's correct."

After completing its canvass, the court found, inter alia, that the defendant knowingly, intelligently, and voluntarily waived his right to counsel.

"The United States Supreme Court has explained: [I]n order competently and intelligently to choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open. . . . That court further explained that a record that affirmatively shows that the defendant is literate, competent, and understanding, and that he [is] voluntarily exercising his informed free will is sufficient to support a finding that the defendant voluntarily and intelligently

invoked his right. . . . Practice Book § 44-3[4] serves to guide our trial courts in making this inquiry. . . . Nevertheless, [b]ecause the . . . inquiry [under § 44-3] simultaneously triggers the constitutional right of a defendant to represent himself and enables the waiver of the constitutional right of a defendant to counsel, the provision of § [44-3] cannot be construed to require anything more than is constitutionally mandated. . . . Thus, the court need not question a defendant regarding all of the . . . § 44-3 factors. . . . Instead, the analysis under that rule of practice is designed to help the court answer two questions: [W]hether a criminal defendant is minimally competent to make the decision to waive counsel, and . . . whether the defendant actually made that decision in a knowing, voluntary and intelligent fashion." (Citations omitted; footnote in original; internal quotation marks omitted.) *State* v. *Braswell*, supra, 318 Conn. 828–29.

"The fact that the defendant's decision to represent himself was misguided or based on his erroneous perceptions of . . . his own ability to defend himself and resulted in a conviction is of no consequence. We review the record to determine whether the trial court properly concluded that the defendant was competent to make the decision to waive counsel, and that his decision was

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

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

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

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

"(4) Has been made aware of the dangers and disadvantages of self-representation." *State* v. *Braswell*, supra, 318 Conn. 828–29 n.4.

made in a knowing, voluntary and intelligent fashion." (Internal quotation marks omitted.) *State* v. *Taylor*, 63 Conn. App. 386, 403, 776 A.2d 1154, cert. denied, 257 Conn. 907, 777 A.2d 687, cert. denied, 534 U.S. 978, 122 S. Ct. 406, 151 L. Ed. 2d 308 (2001).

On February 23, 2012, the court encountered, by all appearances, a competent defendant seeking to represent himself. The defendant claimed that he had been attempting for months to retain counsel without success. The defendant explained that, although he knew that he had the right to counsel, he was not financially able to retain counsel at that time, that he prioritized paying his rent over paying for an attorney, and that he would prefer to save his money to hire appellate counsel, if necessary, rather than trial counsel. The court then canvassed the defendant concerning his educational background, experience with the law, and his obligations when representing himself. The defendant confirmed that he could read. He further acknowledged that he had only a high school education, had never been involved in a criminal trial before, had never represented himself in a criminal proceeding, and was not familiar with the laws and rules of procedure regarding evidence, pretrial motions, voir dire, and discovery in criminal matters. The court admonished the defendant that "if you represent yourself, the judge will be impartial and cannot advise you on the procedures, [substantive] issues in the case . . . ." The court asked the defendant whether he had "access to a library to learn these things that you need to understand before you go to trial . . . ." The court then cautioned the defendant that "when you have a criminal trial, you're expected to follow the rules and procedures that we make the lawyers follow," and that, although he could have an attorney sit in the courtroom, he could not have the attorney sit with him at the table unless the attorney filed an appearance in the case. Finally, toward

the end of its canvass, the court advised the defendant that, if he changed his mind, he could have an attorney file an appearance in the case and be present at trial. The defendant affirmatively responded to each of these admonitions but maintained, "I want to represent myself." On the basis of this record, the court reasonably could have concluded that the defendant was literate, competent, that he possessed sufficient understanding of the duties of self-representation, and that he was voluntarily exercising his informed free will by waiving his right to counsel and invoking his right to self-representation. See *State* v. *Braswell*, supra, 318 Conn. 828–29.

The defendant nonetheless contends that his waiver of his right to counsel was not knowing and voluntary because the court did not engage in a "comprehensive discussion" with him concerning the elements of each pending charge. As we have previously stated, "the defendant need not be specifically informed of the particular elements of the crimes charged before being permitted to waive counsel and proceed pro se. In fact . . . perfect comprehension of each element of a criminal charge does not appear to be necessary to a finding of a knowing and intelligent waiver. . . . A discussion of the elements of the charged crimes would be helpful, and may be one of the factors involved in the ultimate determination of whether the defendant understands the nature of the charges against him. A description of the elements of the crime is not, however, a sine qua non of the defendant's constitutional rights in this context. Indeed, in our cases we have approved of a defendant's assertion of the right to proceed pro se where the record did not affirmatively disclose that the trial court explained the specific elements of the crimes charged to the defendant as long as the defendant understood the nature of the crimes charged. . . . In each of those cases, we concluded that the defendant had validly

waived his right to counsel, although none of those decisions indicated that the defendant had been expressly apprised of the elements of the crimes charged." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Bangulescu*, 80 Conn. App. 26, 45–46, 832 A.2d 1187, cert. denied, 267 Conn. 907, 840 A.2d 1171 (2003); accord *State* v. *Wolff*, 237 Conn. 633, 656, 678 A.2d 1369 (1996) (" 'perfect comprehension of each element of a criminal charge does not appear to be necessary to a finding of a knowing and intelligent waiver' ").

We recognize that because the defendant was never represented by counsel, the court could not appropriately presume that an attorney had explained the nature of the charges in detail to the defendant. See *State* v. *Caracoglia*, 95 Conn. App. 95, 113, 895 A.2d 810 ("[i]n general, a trial court may appropriately presume that defense counsel has explained the nature of the offense in sufficient detail" [internal quotation marks omitted]), cert. denied, 278 Conn. 922, 901 A.2d 1222 (2006). We disagree with the defendant, however, that, because he was never represented by counsel, the court was required to engage in a comprehensive discussion with him about the elements of the pending charges in order for his waiver to be valid. During the canvass, the court advised the defendant of the statutory names of the charges pending against him as well as the penalties associated with the charges. The elements of each of those charges are relatively straightforward and align with the statutory names of the offenses.[5] Cf. *State*

[5] "A person is guilty of assault of . . . [a] disabled . . . person . . . in the third degree when such person commits assault in the third degree under section 53a-61 and (1) the victim of such assault . . . [is] physically disabled . . . ." General Statutes § 53a-61a (a) (1).

"A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person; or (2) he recklessly causes serious physical injury to another person; or (3) with criminal negligence, he causes physical injury to another person by means of a deadly weapon, a dangerous instrument or an electronic defense weapon." General Statutes § 53a-61 (a).

v. *Frye*, 224 Conn. 253, 261–62, 617 A.2d 1382 (1992) (canvass inadequate where court failed to apprise defendant of complexity involved in defending himself against charge of possession of cocaine by person who is not drug-dependent because, during course of his defense, he would have to determine whether to present evidence of drug dependency, which "is a complex issue"). The defendant was also well aware of the factual underpinnings of those charges, i.e., his alleged assault of his brother, the victim, on the morning of August 3, 2011. As a result, the court reasonably could have concluded that the defendant understood the nature of the charges pending against him sufficiently to render his waiver of the right to counsel knowing and intelligent.

The defendant also claims that the court's canvass was inadequate because the court failed to apprise him of specific dangers and disadvantages associated with self-representation. To support this proposition, the defendant relies on several cases in which we have held that a canvass including an advisement about certain specific dangers or disadvantages associated with self-representation was constitutionally adequate. The fact that we held in these cases that a certain canvass was constitutionally adequate does not mean that the constitution requires all defendants to receive the same or a similar canvass as the one being examined in another

"A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior . . . ." General Statutes § 53a-182 (a) (1).

"A person is guilty of interfering with an emergency call when such person, with the intent of preventing another person from making or completing a 9-1-1 telephone call or a telephone call or radio communication to any law enforcement agency to request police protection or report the commission of a crime, physically or verbally prevents or hinders such other person from making or completing such telephone call or radio communication." General Statutes § 53a-183b (a).

case. "The defendant, however, does not possess a constitutional right to a specifically formulated canvass . . . . His constitutional right is not violated as long as the court's canvass, whatever its form, is sufficient to establish that the defendant's waiver was voluntary and knowing." (Internal quotation marks omitted.) *State* v. *Diaz*, 274 Conn. 818, 831, 878 A.2d 1078 (2005). In the present case, the court explored during its canvass the defendant's lack of familiarity with substantive law and procedural rules, and alerted him to the fact that he would be expected to educate himself on these areas of the law and procedure and to comply with the same rules that govern attorneys during trial. This discussion was sufficient to apprise the defendant of the general dangers and disadvantages associated with self-representation, as opposed to representation by an attorney trained in the law.

Accordingly, we conclude that the court did not abuse its discretion when it determined that the defendant knowingly, intelligently, and voluntarily waived his right to counsel and invoked his right to self-representation on February 23, 2012.

II

The defendant's final claim is that the trial court, *Klatt*, *J.*, abused its discretion and violated his right to present a defense when it denied his motion to open the evidence so that he could present the testimony of the battalion chief of the local fire department. In particular, the defendant contends that the denial of his motion to open violated his right to present a defense because the battalion chief was "an objective third party witness who would have been able to directly attack the credibility of the [victim] on a key point," i.e., whether an ambulance was dispatched to his and the victim's residence on August 3, 2011. The defendant

seeks *Golding* review[6] of this unpreserved federal constitutional claim. The state argues that the court properly exercised its discretion when denying the defendant's motion to open the evidence and did not violate the defendant's right to present a defense because this evidence was inadmissible and related to a collateral issue at trial. We conclude that, although the defendant's claim is reviewable under the first and second prongs of *Golding*, the defendant has failed to prove that a constitutional violation exists and deprived him of a fair trial, as required by the third prong of *Golding*.

The following additional facts are relevant to this claim. On Thursday, July 16, 2015, trial commenced. The state presented the testimony of Onofrio and the victim. Onofrio testified, inter alia, that the victim had visible injuries to his face when he met with him and that the victim identified the defendant as his assailant. Through Onofrio, the state admitted into evidence photographs Onofrio took of the victim on August 3, 2011, which showed a bloody cut on the victim's nose and blood on his face, neck, and arm.

[6] "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if all of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Internal quotation marks omitted.) *State* v. *Dixon*, 318 Conn. 495, 511, 122 A.3d 542 (2015); see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third condition). "The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim." (Internal quotation marks omitted.) *State* v. *Britton*, 283 Conn. 598, 615, 929 A.2d 312 (2007). "The appellate tribunal is free, therefore, to respond to the defendant's claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Dixon*, supra, 511.

The victim testified that on August 3, 2011, the defendant accused the victim's friend of damaging the windshield of the defendant's van with a firework and demanded to know the name of the victim's friend. The victim explained that during the course of their altercation, the defendant injured him and threw his phone while he was attempting to call 911. While discussing the sequence of events with the victim on cross-examination, the following exchange occurred:

"[The Defendant]: Did you ask them—when the police arrived, did you ask for medical attention?

"[The Victim]: Yes.

"[The Defendant]: *And you received an ambulance at the scene?*

"[The Victim]: *An ambulance came, yes.*

"[The Defendant]: *An ambulance came? Okay. I don't know. That wasn't in the* [*police*] *report.*

"[The Prosecutor]: Objection.

"The Court: Strike that comment.

"[The Defendant]: I'm sorry.

"The Court: Question only, sir." (Emphasis added.)

During his case-in-chief, the defendant first presented the testimony of his and the victim's mother, Karen Toth. Karen Toth testified that she was living with the defendant and the victim in August, 2011. She stated that on the morning of August 3, 2011, and prior to the altercation between the defendant and the victim, she noticed that the victim had a lot of bruising and scrapes on his face. Karen Toth explained that, over the years, the victim frequently fell because of his cerebral palsy and related seizures. After Karen Toth's testimony, the defendant testified, inter alia, that although he confronted the victim about whether he damaged the van's

windshield, he never hit the victim and never took the victim's phone.

When the defendant completed his testimony, the court asked him whether he intended to call any additional witnesses, and the defendant began explaining a clerical issue he had with his subpoenas. The court interrupted the defendant and asked whether he would be calling any additional witnesses that day, and he stated that he would not. Thereafter, the jury was excused and the court discussed with the defendant the issue he had with his subpoenas. After that discussion, the court asked the defendant whether he in fact intended to call any other defense witnesses. The defendant stated that he did not. The court asked the state whether it intended to call any rebuttal witnesses, and the state indicated that it did not. The court then stated: "So, we'll conclude the evidence," and the defendant agreed.

On Tuesday, July 21, 2015, trial resumed. When the court began to review the proposed jury charge with the defendant and the state, the court-appointed standby counsel for the defendant interjected that he would "like to bring something to the court's attention. When I spoke to [the defendant] this morning, he indicated that he wanted to [open the] evidence because he had new evidence to put on." The defendant explained that he wanted to present evidence to contradict the victim's testimony that "he saw an ambulance and that he had medical attention at the scene." The court then engaged in the following colloquy with the defendant:

"The Court: How do you intend to? You have a witness here?

"[The Defendant]: Yes. Yes. Well, on Friday [July 17, 2015], I, you know—I was able to—I talked to [the] Wallingford Fire Department. Was that okay, or no? And they said, okay, that there's no record that they,

[that] there was an ambulance service sent there on August 3, 2011.

"The Court: Okay. But did you subpoena anyone to come to testify?

"[The Defendant]: I just had their voice recording on my voice mail.

"The Court: All right. Here's—

"[The Defendant]: Would you like to hear it?

"The Court: No.

"[The Defendant]: It's from a chief battalion.

"The Court: All right. Can't—

"[The Defendant]: I think it would be great for an appeal.

"The Court: All right. All right. . . .

"The Court: But in terms of an additional witness, who would you call?

"[The Defendant]: The witness is, I have my voice—I have a voice mail from chief battalion of the Wallingford. I mean, this is serious business.

"The Court: All right.

"[The Defendant]: This is my life. . . .

"The Court: But the situation is, the matter was put—the matter's four years old.

"[The Defendant]: Mm-hmm. Yeah.

"The Court: You had ample time—

"[The Defendant]: Yeah, four years of my life.

"The Court: —to subpoena the witness. This is not information that was unknown to you. You were given

the opportunity to investigate and subpoena the witnesses at [the] time of trial.

"[The Defendant]: Yes.

"The Court: So, your motion to [open] the evidence is denied."

The defendant continued to argue that he only had "one day" to research this issue because he did not know that the victim asked for or received medical treatment until he testified that an ambulance came to his residence on August 3, 2011. The court acknowledged the defendant's arguments, but it stated that it was still denying the defendant's motion to open the evidence because it believed that the defendant had an adequate opportunity and sufficient resources to obtain this evidence earlier.

"The sixth amendment right to compulsory process includes the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, 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." (Internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 260–61, 796 A.2d 1176 (2002). Nevertheless, the decision to open the evidence either to present omitted evidence or to add further testimony after either party has rested is within the sound discretion of the trial court. *State* v. *Carter*, 228 Conn. 412, 420, 636 A.2d 821 (1994); *State* v. *Rodriguez*, 151 Conn. App. 120, 124, 93 A.3d 1186 (2014). In order for a trial court's denial of a motion to open the evidence to constitute a sixth amendment violation, the defendant must show that the evidence was of such importance to the achievement of a just result that the need for admitting it overrides the presumption favoring enforcement of our usual trial procedures. *State* v. *Carter*, supra, 421. That is, "[i]f the motion to [open] is

denied, we must, in determining whether the trial court has abused its discretion, look to see if an injustice has occurred by the omission of the evidence." (Internal quotation marks omitted.) Id. "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." (Internal quotation marks omitted.) *State* v. *Leconte*, 320 Conn. 500, 511, 131 A.3d 1132 (2016).

"In order to determine whether the trial court acted reasonably in denying the defendant's request to open his case, we must first determine whether [the disputed evidence] would have been admissible had the defendant sought to introduce that evidence during the presentation of his case." *State* v. *Carter*, supra, 228 Conn. 422. "The constitutional right to present a defense does not compel the admission of any and all evidence offered in support thereof. . . . The trial court retains the discretion to rule on the admissibility, under the traditional rules of evidence, regarding the defense offered." (Citations omitted; internal quotation marks omitted.) *State* v. *DeJesus*, 260 Conn. 466, 481, 797 A.2d 1101 (2002). We conclude that the court did not violate the defendant's right to present a defense because the evidence that the defendant sought to admit would not have been admissible in his case-in-chief.

As an initial matter, we observe that the defendant argues for the first time on appeal that the evidence he sought to present was *the testimony* of the battalion chief. (Emphasis added.) At trial, the defendant represented that the evidence he sought to admit was *the voice mail message* from the battalion chief. The voice mail message constitutes inadmissible hearsay; Conn. Code Evid. §§ 8-1 and 8-2; and the defendant has not identified an exception to the rule against hearsay that would have permitted its admission into evidence. Even if we were, for the sake of argument, to interpret the

defendant's statements about the voice mail as a request by the defendant to open the evidence so that he could call the battalion chief as a witness, we would still conclude that this evidence was inadmissible.

"A witness may be impeached by the introduction of contradictory evidence of other witnesses as long as the evidence is in fact contradictory . . . and that evidence does not relate to collateral matters . . . ." (Citation omitted.) *State* v. *Jose G.*, 290 Conn. 331, 344, 963 A.2d 42 (2009). It is well settled, however, that a court may properly exclude evidence that has only slight relevance due to its tendency to inject a collateral issue into the trial. *State* v. *Annulli*, 309 Conn. 482, 493, 71 A.3d 530 (2013). A matter is collateral if it is "not directly relevant and material to the merits of the case." (Internal quotation marks omitted.) *State* v. *Jose G.*, supra, 344. Stated another way, the extrinsic evidence must be "relevant to a material issue in the case *apart from its tendency to contradict the witness*" to be considered noncollateral and admissible. (Emphasis in original; internal quotation marks omitted.) *State* v. *Annulli*, supra, 493; *State* v. *West*, 274 Conn. 605, 641, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005); see also *State* v. *Dougherty*, 123 Conn. App. 872, 877, 3 A.3d 208 ("[e]vidence is material where it is offered to prove a fact directly in issue or a fact probative of a matter in issue"), cert. denied, 299 Conn. 901, 10 A.3d 521 (2010); *State* v. *Maner*, 147 Conn. App. 761, 768, 83 A.3d 1182 ("materiality turns upon what is at *issue* in the case, which generally will be determined by the pleadings and the applicable substantive law" [emphasis in original; internal quotation marks omitted]), cert. denied, 311 Conn. 935, 88 A.3d 550 (2014). "This is so even when the evidence involves untruthfulness and could be used to impeach a witness' credibility." *State* v. *Annulli*, supra, 493. Consequently,

if the witness' answer to a question on cross-examination relates to a collateral issue in the trial, that testimony is conclusive and cannot be later contradicted through extrinsic evidence. *State* v. *Jose G.*, supra, 344.

In the present case, testimony about whether an ambulance was dispatched to the victim's residence on August 3, 2011, related to a collateral matter and therefore was inadmissible. Although the question of whether an ambulance was dispatched to the victim might be relevant to the question of whether the victim was in fact injured, that was not a material issue in the present case because the defendant did not dispute at trial that the victim was injured. Instead, the defendant disputed the timing and source of the victim's injury. In particular, he argued that the victim's face was injured prior to their altercation and that he was not therefore the cause of that injury. As a result, the only value in this evidence at trial was its tendency to contradict the victim's testimony that an ambulance was dispatched to his residence on August 3, 2011, and, thereby, presumably to impeach his credibility. Indeed, the defendant has consistently and exclusively argued before this court and the trial court that this evidence should have been admitted so that he could contradict the victim's testimony about the ambulance. Under our rules of evidence, this type of impeachment on a collateral matter through extrinsic evidence is not permitted. Accordingly, the defendant has failed to prove that a constitutional violation exists and deprived him of a fair trial as required by the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JASON B.*
(AC 39287)

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

Syllabus

The defendant, who had been convicted of the crimes of sexual assault in the first degree and unlawful restraint in the first degree, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. The trial court determined that the defendant had failed to present a colorable claim that the sentence had been imposed in an illegal manner and, therefore, the trial court lacked jurisdiction over the motion. On appeal, the defendant claimed that the trial court had jurisdiction because his motion fell within the applicable rule of practice (§ 43-22) in that it alleged that the sentencing court improperly ordered his sentences to run consecutively on the basis of inaccurate information or considerations not contained in the record. *Held* that the trial court properly dismissed the motion to correct an illegal sentence, the defendant having failed to raise even the possibility that the sentencing court relied on information that was inaccurate or outside the record and, therefore, the court did not have jurisdiction to entertain the defendant's motion; although the sentencing court commented on the seriousness of the defendant's actions in driving the victim around his car for what appeared to be a period longer than was necessary to commit the sexual assault on the victim and that, had the defendant been charged with and convicted of kidnapping rather than unlawful restraint, he would have received a greater sentence, those comments were based on the facts of the case and merely served as a rhetorical admonition by the sentencing court regarding the seriousness of the defendant's actions and his failure to take responsibility for them and did not constitute facts that reasonably could be viewed as information that was inaccurate or outside the record.

Argued May 31—officially released September 5, 2017

Procedural History

Substitute information charging the defendant with the crimes of sexual assault in the first degree and unlawful restraint in the first degree, brought to the Superior Court in the judicial district of Fairfield and

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

tried to the jury before *Rodriguez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which affirmed the judgment of the trial court; thereafter, the court, *Devlin*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

Jason B., self-represented, the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Adam E. Mattei*, assistant state's attorney, for the appellee (state).

Opinion

MULLINS, J. The defendant, Jason B., appeals from the judgment of the trial court dismissing the defendant's motion to correct an illegal sentence.[1] The court dismissed the motion on the ground that the defendant failed to present a colorable claim that his sentence had been imposed in an illegal manner. The defendant

[1] The court, in the alternative, also held that the motion failed on the merits. The defendant claims this, too, was error. We conclude that because the court dismissed the case for want of jurisdiction, it had no authority to also rule on the merits of the motion. See *Fullerton* v. *Administrator, Unemployment Compensation Act*, 280 Conn. 745, 754, 911 A.2d 736 (2006) ("[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction" [internal quotation marks omitted]); *State* v. *Bozelko*, 154 Conn. App. 750, 766, 108 A.3d 262 (2015) ("[o]nce the [trial] court determined that it lacked subject matter jurisdiction, it had no authority to decide the case"). "Once it becomes clear that the trial court lacked subject matter jurisdiction . . . any further discussion of the merits is pure dicta. . . . Lacking jurisdiction, the court should not deliver an advisory opinion on matters entirely beyond [its] power to adjudicate. . . . Such an opinion is not a judgment and is not binding on anyone." (Citations omitted; internal quotation marks omitted.) *Shockley* v. *Okeke*, 92 Conn. App. 76, 85, 882 A.2d 1244 (2005), appeal dismissed, 280 Conn. 777, 912 A.2d 991 (2007). Here, because the Superior Court determined that it lacked jurisdiction, it was improper for the court to address the merits of the motion. Its alternative conclusions in that regard, therefore, are mere dicta, lacking the force and effect of a judgment, and are void.

claims this was error. We affirm the judgment of the trial court.

The following facts, which were set forth by this court in the defendant's direct appeal from his judgment of conviction of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1) and unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), inform our review. "The victim . . . and the defendant were married in September, 1999, and had a daughter . . . . [The victim] filed for divorce in October, 2005, and their divorce became final in February, 2006.

"On February 21, 2006, the defendant repeatedly contacted [the victim] and requested to meet with her. They . . . eventually met at a Borders bookstore at about 8:30 p.m. They later walked to a nearby Boston Market for dinner, where the defendant asked [the victim] to have sex with him. She refused, and he asked her to join him in his car for a cigarette. She got into the car, where the defendant renewed his requests for sex, which [the victim] continued to turn down. She tried to get out of the car at least once, but the defendant pulled her back in by the arm. The defendant then informed [the victim] that he had withdrawn all of the money from their joint bank account, approximately $6000, which was all of [the victim's] savings. He also told her that he was going to make her life very difficult, that he was going to take [their daughter], that she would never see [her] again and that he was going to hurt everyone that she knew. He told [the victim] that if she slept with him, he would give back the money and leave her alone. [The victim] again tried to get out of the car, but the defendant pulled her back in.

"The defendant then drove off with [the victim] in the car, and [the victim] began screaming out the window; at some point, he had locked all of the doors. He

eventually stopped the car in a dark, wooded area with no houses nearby. He climbed from the driver's side to the passenger's side of the car, where [the victim] was sitting, and began touching her between her legs. [The victim] testified that she tried to fight him off but that she was unable to because he had her left arm pinned behind her head and he was stronger than she was. At one point, he also took her [cell phone] from her and threw it in the backseat. He also repeatedly put his hand over her mouth to the point where she could not breathe, and he stopped only when she told him she would not fight him anymore.

"The defendant eventually climbed off of [the victim], started the car and told her he would bring her home. Instead, while he was driving, he unzipped his pants, removed his penis and ordered [the victim] to perform fellatio. She began to do so but began to feel sick and . . . asked the defendant to stop the car. He stopped the car, and she opened the car door and vomited on the side of the road. The defendant started the car again and continued to drive; [the victim] did not know where she was or what town she was in. [The victim] asked to use a bathroom, and the defendant stopped the car again and she got out to urinate. [The victim] returned to the car and the defendant instructed her to lie down as he reclined the seat. The defendant then began touching [the victim's] vagina, asking her if she liked it. She told him she wanted him to stop, and he said: 'No you don't. He took off his belt, flexed it and ordered her into the backseat of the car. They both got into the backseat, and the defendant penetrated the victim's vagina and anus with his penis. After he stopped, the defendant returned to the driver's seat of the car and drove away. He eventually returned to the Boston Market, where [the victim] had left her car, and dropped her off. [The victim] got into her car and drove home. [The victim's] mother, who was at home, called 911,

and, after [the victim] was taken to a hospital, she told the emergency room physician that her former husband had forced her to have sex with him." (Footnote omitted.) *State* v. *Jason B.*, 111 Conn. App. 359, 360–62, 958 A.2d 1266 (2008), cert. denied, 290 Conn. 904, 962 A.2d 794 (2009).

After a jury trial, the court, in accordance with the jury's verdict, rendered a judgment of conviction of sexual assault in the first degree and unlawful restraint in the first degree. At the sentencing hearing, the state requested that the court impose lengthy sentences and that the court order the sentences to run consecutively. Defense counsel argued in relevant part: "I disagree with the consecutive sentences. However, Your Honor, that would be up to Your Honor . . . . I just think that consecutive sentences are . . . inappropriate at this point . . . and I think that there would be *no need to do that in light of the charges*." (Emphasis added.)

Addressing the defendant, the sentencing court stated: "Mr. [B.], I believe that your [former] wife is rightfully afraid of you, and it is clear to me that you are a person who shows no respect for your [former] wife, nor for your daughter based upon your conduct during the months [that] preceded the sexual assault . . . . You also appear to have a significant problem with self-control and a compulsion for the control of others.

"The unlawful restraint, *in my opinion*, *given the facts of this case*, was a lesser included offense of kidnapping in the first or second degree, which would expose you to a greater sentence. And, when your lawyer . . . makes note of his objection to the state's request in light of the charges for that reason, because kidnapping in the first or second degree would have exposed you to a greater period of incarceration for that conduct when you were driving around, lost in the

dark, against her wishes in your truck, and forcing her to engage in sexual contact with you . . . .

"You refuse to take responsibility for your conduct, as far as the court is concerned. You attempted to make this a case of consent. It's never been about consent. This . . . incident with your [former] wife was sexual assault." (Emphasis added.)

As a result, on the sexual assault count, the court sentenced the defendant to twenty years incarceration, execution suspended after ten years, with thirty-five years of probation and lifetime sex offender registration. On the unlawful restraint count, the court sentenced the defendant to five years incarceration. The court ordered that each count would run consecutive with each other, for a total effective sentence of twenty-five years incarceration, execution suspended after fifteen years, with thirty-five years of probation and lifetime sex offender registration. The judgment of conviction was affirmed on direct appeal. *State* v. *Jason B.*, supra, 111 Conn. App. 368. The record reveals that, since his direct appeal, the defendant has filed various petitions for a writ of habeas corpus, appeals from judgments denying his petitions, a motion to correct an illegal sentence, an appeal from the denial of that motion, and a request for sentence review.

On February 2, 2016, nearly ten years after the court sentenced the defendant on the underlying charges, the defendant filed a second motion to correct an illegal sentence. In that motion, he claimed that his sentence had been imposed in an illegal manner because the court sentenced him to consecutive, rather than concurrent, terms of imprisonment and did so for improper reasons. He argued that the sentencing court mentioned a charge of kidnapping, which was outside of the record and not something with which he had been charged,

and that the court ordered his sentence to run consecutively on that basis. The defendant requested that the trial court grant his motion to correct and order that his sentences run concurrently. The trial court dismissed the defendant's motion for lack of subject matter jurisdiction on the ground that the defendant had not presented a colorable claim that his sentence had been imposed in an illegal manner. This appeal followed.

On appeal, the defendant claims that the court improperly held that it did not have jurisdiction to consider the defendant's motion. He argues that his motion sufficiently alleged that the sentencing court relied on inaccurate information and information that was not part of the record when it sentenced him to consecutive prison terms, and, therefore, it imposed his sentence in an illegal manner. Specifically, the defendant cites to the sentencing court's statements that the charge of "unlawful restraint . . . was a lesser included offense of kidnapping in the first or second degree, which would expose you to a greater sentence" and that "kidnapping in the first or second degree would have exposed you to a greater period of incarceration . . . ."

The state argues that, although the defendant is correct in stating that a sentencing court's reliance on inaccurate information at sentencing *can form* a proper basis for a motion to correct an illegal sentence, "in this case, the sentencing court's comments to which the defendant points as evidence of the court's reliance on inaccurate and outside the record information, *on their face*, refute his claim." (Emphasis in original.) Therefore, the state argues, "the defendant has failed to raise a colorable claim that his sentence was imposed in an illegal manner, and the trial court properly determined that it did not have jurisdiction to entertain his motion." We agree with the state.

We first set forth our standard of review. Because "the defendant's [claim] pertain[s] to the subject matter

jurisdiction of the trial court, [it] . . . present[s] a question of law subject to the plenary standard of review. . . .

"The Superior Court is a constitutional court of general jurisdiction. In the absence of statutory or constitutional provisions, the limits of its jurisdiction are delineated by the common law. . . . It is well established that under the common law a trial court has the discretionary power to modify or vacate a criminal judgment before the sentence has been executed. . . . This is so because the court loses jurisdiction over the case when the defendant is committed to the custody of the commissioner of correction and begins serving the sentence. . . . Because it is well established that the jurisdiction of the trial court terminates once a defendant has been sentenced, a trial court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . .

"[Practice Book] § 43-22 embodies a common-law exception that permits the trial court to correct an illegal sentence or other illegal disposition. . . . *Thus, if the defendant cannot demonstrate that his motion to correct falls within the purview of § 43-22, the court lacks jurisdiction to entertain it.* . . . [I]n order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding [itself] . . . must be the subject of the attack." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Robles*, 169 Conn. App. 127, 131–32, 150 A.3d 687 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017).

"[A]n illegal sentence is essentially one [that] either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. By contrast . . . [s]entences imposed in an illegal manner have been

defined as being within the relevant statutory limits but . . . imposed in a way [that] violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . *or his right to be sentenced by a judge relying on accurate information or considerations solely in the record*, or his right that the government keep its plea agreement promises . . . . These definitions are not exhaustive, however, and the parameters of an invalid sentence will evolve . . . as additional rights and procedures affecting sentencing are subsequently recognized under state and federal law." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Cruz*, 155 Conn. App. 644, 649, 110 A.3d 527 (2015); see *State* v. *Parker*, 295 Conn. 825, 839–40, 922 A.2d 1103 (2010).

Recently, our Supreme Court explained, in addressing the trial court's dismissal on jurisdictional grounds of a motion to correct an illegal sentence that "[t]he subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal. . . . *State* v. *Taylor*, 91 Conn. App. 788, 791, 882 A.2d 682, cert. denied, 276 Conn. 928, 889 A.2d 819 (2005). *At issue is whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence.* Id., 793. *In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence.* See id., 793–94." (Emphasis added; internal quotation marks omitted.) *State* v. *Delgado*, 323 Conn. 801, 810, 151 A.3d 345 (2016).

Therefore, as made clear by our Supreme Court in *Delgado*, for the trial court to have jurisdiction over a defendant's motion to correct a sentence that was imposed in an illegal manner, the defendant must put

forth a colorable claim that his sentence, in fact, was imposed in an illegal manner. A colorable claim is "[a] claim that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." Black's Law Dictionary (10th Ed. 2014), p. 302. For jurisdictional purposes, to establish a colorable claim, a party must demonstrate that there is a possibility, rather than a certainty, that a factual basis necessary to establish jurisdiction exists; see *State* v. *Patel*, 174 Conn. App. 298, 310–11, A.3d (2017); such as, in the present context, that the sentencing court relied on inaccurate information or considerations that were outside of the record.

In the present case, the defendant claims that the court improperly dismissed his motion to correct a sentence that was imposed in an illegal manner. He argues that the motion clearly fell within Practice Book § 43-22, in that he properly alleged that the sentencing court violated his right to be sentenced by a judge relying on accurate information or considerations solely in the record. We disagree and conclude that the defendant's motion, on its face, does not fall within the limited circumstances under which the trial court has jurisdiction to correct a sentence imposed in an illegal manner. See *State* v. *Delgado*, supra, 323 Conn. 816 (if defendant fails to allege claim that, if proven, would require resentencing, sentencing court has no jurisdiction to consider motion to correct). In other words, because the court's statements cannot reasonably be viewed as relying on inaccurate facts or facts outside the record, the defendant's claim does not raise even the possibility that the sentencing court relied on inaccurate or extrarecord facts. Thus, his claims fell outside the purview of a sentence imposed in an illegal manner. Accordingly, we conclude that the trial court properly concluded that

it did not have subject matter jurisdiction to entertain the motion.

Here, the record establishes that the sentencing court commented on the seriousness of the defendant's actions and the court gave its opinion that the defendant refused to take responsibility for his actions. As set forth previously in this opinion, the sentencing court commented specifically to the defendant that, on the basis of the facts of this case, the unlawful restraint conviction was separate and apart from the sexual assault conviction, that the facts supporting the unlawful restraint conviction demonstrated that it was akin to a lesser included offense to a kidnapping charge, and that, had the defendant been charged with and convicted of kidnapping, he would have received a greater sentence.

Those comments were based *on the facts of the case*, however, not on anything outside the record. Also, given the facts of this case, where the defendant detained the victim in the car for what appeared to be a longer period than necessary to commit the sexual assault, the court's comments were not inaccurate. See *Farmer* v. *Commissioner of Correction*, 165 Conn. App. 455, 459, 139 A.3d 767 ("[A] defendant may be convicted of both kidnapping and another substantive crime if, at any time prior to, during or after the commission of that other crime, the victim is moved or confined in a way that had independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime. Whether the movement or confinement of the victim is merely incidental to and necessary for another crime will depend on the particular facts and circumstances of each case." [Internal quotation marks omitted.]), cert. denied, 323 Conn. 905, 105 A.3d 685 (2016). Accordingly, we agree with the trial court's assessment that the sentencing court merely was using a rhetorical device to

try to convey to the defendant the seriousness of his actions and the fact that, had additional charges been brought by the state, based solely on the evidence presented at the defendant's trial, the defendant could have been convicted of more serious offenses[2] and also subject to greater penalties.

Thus, the defendant's allegation that the sentencing court imposed his sentence in an illegal manner by referencing and relying on information that was not in the record simply has no basis in fact. Indeed, a review of the statements to which the defendant specifically cites reveal nothing more than a rhetorical admonition by the sentencing court regarding the facts of the case, the opinion of the judge regarding the seriousness of the defendant's criminal actions, and the defendant's failure to take responsibility for those actions. The defendant did not allege anything that reasonably could be viewed, on its face, as inaccurate or outside of the record. Thus, we agree with the trial court that it was

[2] Following its attempts to explain to the defendant that the facts of his case were serious, the sentencing court then proceeded to sentence the defendant to a permissible term of imprisonment on the specific crimes for which he had been charged and convicted. Then, in accordance with General Statutes § 53a-37, the court ordered those sentences to run consecutively.

General Statutes § 53a-37 provides: "When multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms in such manner as the court directs at the time of sentence. The court shall state whether the respective maxima and minima shall run concurrently or consecutively with respect to each other, and shall state in conclusion the effective sentence imposed. When a person is sentenced for two or more counts each constituting a separate offense, the court may order that the term of imprisonment for the second and subsequent counts be for a fixed number of years each. The court in such cases shall not set any minimum term of imprisonment except under the first count, and the fixed number of years imposed for the second and subsequent counts shall be added to the maximum term imposed by the court on the first count."

without jurisdiction to consider the defendant's motion to correct an illegal sentence.

The judgment is affirmed.

In this opinion the other judges concurred.