ABIN BRITTON *v.* COMMISSIONER OF CORRECTION (AC 39407)

Lavine, Keller and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of the crimes of manslaughter in the first degree, kidnapping in the first degree and robbery in the first degree, filed a second petition for a writ of habeas corpus. The petitioner claimed, inter alia, that his trial counsel and his first habeas counsel, D, had rendered ineffective assistance, and that he was denied due process because the trial court did not instruct the jury, in accordance with *State* v. *Salamon* (287 Conn. 509), that he could not be found guilty of the two kidnapping charges against him if his confinement or movement of the victim was merely incidental to the commission of the other crimes charged. The petitioner and two other men, P and S, had beaten the victim to death after the victim sought to purchase crack cocaine from the petitioner. After a struggle in the victim's car, the petitioner, P and S pulled the victim from the car and beat him until he lay motionless on the ground, and then the petitioner put the victim in the backseat of the car. The petitioner, P and S then drove the victim to a park, removed him from the car and beat him again before they dragged his body into the park and covered it with dirt and plastic bags. The petitioner, P and S also took an imitation watch and cash from the victim during the incident. C, who was a former coworker of the petitioner, gave a statement to the police in which he told them, inter alia, that the petitioner had told him that the victim was still alive when the petitioner put the victim in the car. The trial court did not instruct the jury in accordance with *Salamon*, which had not been decided at the time of the petitioner's criminal trial and direct appeal. The first habeas court denied the petitioner's first habeas petition, in which he alleged that his trial counsel had rendered ineffective assistance. The second habeas court denied the second habeas petition, concluding, inter alia, that the petitioner's claim of ineffective assistance of trial counsel was successive and, thus, barred by the doctrine of res judicata. The habeas court further concluded that a jury instruction pursuant to *Salamon* was not warranted and that even if the petitioner had been entitled to a *Salamon* instruction, the absence of such an instruction was harmless error. The habeas court thereafter denied the petition for certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court abused its discretion in denying the petition for certification to appeal from the judgment denying the habeas petition; given the underlying facts, the criminal charges, and the relative newness of *Salamon* and its retroactive application, the petitioner's *Salamon* claim

was adequate to deserve encouragement to proceed further, as the issues it raised had not been entirely settled by our Supreme Court.

2. The habeas court properly determined that the petitioner was not denied his statutory and constitutional rights to due process and to the effective assistance of his first habeas counsel:

a. The petitioner could not prevail on his claim that he was denied his constitutional right to due process when he was convicted of kidnapping without the jury having been given a *Salamon* instruction, as the second habeas court properly determined that the trial court's failure to give a *Salamon* instruction was harmless beyond a reasonable doubt: the evidence demonstrated that the petitioner engaged in several offenses during which he restrained and moved the victim in a manner that was not merely incidental to or necessary for the commission of assault or robbery, as no reasonable juror could have concluded that the restraint or movement imposed on the victim after he was beaten and lying motionless on the ground of the parking lot was necessary for the commission of the robbery, and driving the victim to the park was not necessary to inflict physical injury on him; moreover, the offenses were separated by distinct periods of time and by more movement or restraint of movement, and the omitted element was uncontested and supported by overwhelming evidence such that the jury's verdict would have been the same absent the trial court's error.

b. The habeas court properly determined that the petitioner's claim of ineffective assistance of trial counsel in his second habeas petition was successive and, therefore, barred by the doctrine of res judicata; because the claim alleged no new facts that were not known at the time of the first habeas trial, it was not an abuse of discretion for the habeas court to deny the petition for certification to appeal with respect to that claim, which did not concern an issue that was debatable among jurists of reason that a court could resolve in a different manner, nor did it deserve encouragement to proceed further.

c. The habeas court properly determined that the petitioner's statutory and constitutional rights to the effective assistance of his first habeas counsel, D, were not violated: the petitioner failed to demonstrate that D was ineffective with respect to his investigation of trial counsel's assistance regarding the suppression of the petitioner's statement to the police, or that D was ineffective by failing to investigate and subpoena witnesses to demonstrate that the first responders to the crime scene mishandled the victim's body, and the petitioner's claim that D was ineffective by failing to introduce exculpatory evidence to show the contradiction between C's statement to the police and C's trial testimony was unavailing, as the petitioner presented no evidence that the habeas court considered exculpatory, the jury was apprised of the contradiction between C's statement to the police and his trial testimony, and our Supreme Court previously rejected a similar claim made by P in his direct appeal from his conviction in which he challenged the admission

of C's statement to the police; moreover, D was not ineffective for failing to raise a *Salamon* claim in the first habeas petition, as the movements and restraints of the victim had independent criminal significance and, thus, the underlying facts would not have warranted a *Salamon* instruction.

Argued March 8—officially released October 16, 2018

Procedural History

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

Michael W. Brown, assigned counsel, for the appellant (petitioner).

Michael L. Regan, state's attorney, for the appellee (respondent).

Opinion

LAVINE, J. The petitioner, Abin Britton, appeals following the second habeas court's denial of his petition for certification to appeal from that court's denial of his second petition for a writ of habeas corpus. On appeal, the petitioner claims that the second habeas court, *Fuger*, *J.*, (1) abused its discretion by denying his petition for certification to appeal, and (2) improperly concluded that he was not denied the constitutional right to due process because the jury was not instructed pursuant to *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), to the effective assistance of trial counsel and to the effective assistance of first habeas counsel. Although we agree that the second habeas court abused its discretion by denying the petitioner certification to appeal, we disagree that the court improperly denied his second petition for a writ of habeas corpus and, therefore, affirm the judgment of the second habeas court.

The present appeal has its factual roots in the brutal murder of the victim, James Connor, in the early morning hours of August 23, 1998.[1] See *State* v. *Britton*, 283 Conn. 598, 600, 929 A.2d 312 (2007). Pursuant to our plenary review of the petitioner's claims, we have reviewed the entire record, which includes the transcript of the petitioner's criminal trial that was held in November and December, 2004. On the basis of the evidence in the record, we conclude that the jury reasonably could have found that on the night of August 22, 1998, the victim visited his parents on their boat in the Essex Marina and left at approximately 11:30 p.m. to go the Black Seal, an Essex restaurant and bar. Sometime after midnight, he drove his father's Saab to Lucky's Café (Lucky's) in New London in search of cocaine. The petitioner, Gregory Pierre, Jeffrey Smith (perpetrators) and their friend, Junito Jarvis, were present at Lucky's when the victim arrived. The victim approached the petitioner and asked him if he had any crack cocaine. The petitioner did not have any crack "on [him]," but he knew where to get some. The victim drove himself and Pierre to a New London apartment complex where Pierre lived and parked in the parking lot. Jarvis drove the petitioner and Smith to a spot on Michael Road that was adjacent to the parking lot. Jarvis was able to see the Saab and observe the perpetrators from where he was parked.

The victim remained in the Saab, but Pierre went to his apartment. When he returned, Pierre walked to the driver's side of the Saab, where the petitioner and Smith joined him some minutes later. Thereafter, all three of the perpetrators got into the Saab where a struggle

[1] When Jeffrey Smith, another of the perpetrators, was sentenced, the sentencing court, *Schimelman*, *J.*, "found that the incident was 'vicious' and it was done for 'a few dollars and a fake wristwatch.' " *State* v. *Smith*, Superior Court, judicial district of New London, Docket No. KNLCR-99-250704, 2012 WL 5278688, *1 (October 10, 2012) (sentence review division).

ensued. The perpetrators got out of the Saab, and pulled the struggling victim out of the vehicle and beat him until he lay motionless on the ground. Jarvis remained in his car, witnessed the beating and saw the petitioner pick up the victim and put him on the backseat of the Saab. The petitioner told Norman L. Carr that the victim was still alive when he put him in the Saab. The perpetrators got back into the Saab and drove to a parking lot in Bates Woods, a New London park.[2] At Bates Woods, the perpetrators removed the victim from the Saab and beat him again. The petitioner took a pipe from the Saab, rammed it into the victim's mouth and twisted it.[3] The perpetrators dragged the victim's body into Bates Woods and covered it with dirt and plastic bags. During the incident, the perpetrators took an imitation Rolex watch and $90 from the victim.

[2] Jarvis testified at trial that he remained in his vehicle and witnessed the perpetrators assault the victim in the apartment parking lot. When the perpetrators drove away from the apartment parking lot, Jarvis was unable to follow them and went home. Several days later, he visited Smith at his home. When Jarvis asked, Smith told him that the victim died at Bates Woods.

[3] On February 16, 1999, Carr gave a written statement to the state police. Carr stated in part that in the summer of 1998, the perpetrators helped him get a job with a cleaning company. Company employees traveled together in a van to and from work sites. As they were being driven home one day, Carr overheard the petitioner and Pierre talking about the victim's murder. Carr asked them what they were talking about. The petitioner told Carr how the victim had come to Lucky's, how the perpetrators and the victim drove to Pierre's, how the perpetrators beat the victim and drove him to Bates Woods and beat him again. Carr also stated that the petitioner "started to brag and said that he took a pole and placed it into the [victim's] mouth. [The petitioner] said that he really jammed the pole down his throat and then twisted the pole to break his neck. [The petitioner] said that prior to doing this with the pole, the [victim] was still alive but after he did this, the [victim] died immediately." At the petitioner's criminal trial, Carr did not remember his conversation with the petitioner and could not testify about it.

Prior to the start of the petitioner's criminal trial, Carr was interviewed by an investigator from the chief public defender's office, Ligia Werner. In her interview report, Werner indicated that Carr had no recollection of his conversation with the petitioner or the contents of his statement. See part III of this opinion.

At approximately 6:30 a.m. on August 23, 1998, the Waterford police discovered the Saab partially submerged in a duck pond behind the police station. They used the license plate number to identify the Saab's owner, the victim's father, Donald Connor. Members of the New London Police Department impounded the Saab, and, along with the state police, conducted an investigation. During their investigation, the police discovered two palm prints on the door posts of the Saab. The windshield of the Saab was cracked and the rearview mirror was missing. In addition, investigators found red and brown stains inside the Saab, including on the rear seat, the door panels, and the visor over the driver's seat, which led the police to believe that someone had been injured.

In January, 1999, a badly decomposed human body was found in Bates Woods. Harold Wayne Carver II, the state's chief medical examiner, identified the remains as those of the victim and classified the manner of his death as a homicide.[4] The police identified the petitioner, Pierre and Smith as suspects. At the request of the police, the petitioner accompanied the New London police to the station, provided them with his palm prints and gave them a statement regarding his involvement in the victim's death. He subsequently was arrested, as were Smith and Pierre, and charged in connection with the victim's murder.

On July 10, 2001, the state filed a substitute information, charging the petitioner with six crimes: capital felony in violation of General Statutes § 53a-54b (5), murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c, kidnapping in the first degree in violation of General

[4] During the course of his autopsy of the victim, Carver discovered that the victim had suffered several broken ribs and that his jaw and facial bones had been fractured.

Statutes § 53a-92 (a) (2) (A), kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (B), and robbery in the first degree in violation of General Statutes § 53a-134 (a) (1).[5] Following the presentation of evidence,[6] a jury of twelve found the petitioner guilty of one count of felony murder, one count of manslaughter in the first degree in violation of General Statutes § 53a-55 (a) (1), two counts of kidnapping in the first degree, and one count of robbery in the first degree. See *Britton* v. *Commissioner of Correction*, 141 Conn. App. 641, 645, 61 A.3d 1188, cert. denied, 308 Conn. 946, 67 A.3d 290 (2013).

The trial court, *Schimelman*, *J.*, merged the petitioner's manslaughter conviction with the felony murder

[5] With respect to the capital felony charge, the state's attorney alleged that the petitioner, with intent to cause the death of the victim, whom he had kidnapped, did cause the death of the victim during the course of the kidnapping.

In count four of the substitute information, the state's attorney accused the "[petitioner] of kidnapping in the first degree and charge[d] that at the city of New London and the town of Waterford on or about the 23rd day of August, 1998, [the petitioner] did abduct [the victim] and restrained [the victim] with intent to inflict physical injury upon [the victim] in violation of § 53a-92 (a) (2) (A) of said statutes."

In count five of the substitute information, the state's attorney accused the "[petitioner] of kidnapping in the first degree and charge[d] that at the city of New London and the town of Waterford on or about the 23rd day of August, 1998, the [petitioner] did abduct [the victim] and [restrained] the victim with intent to accomplish and advance the commission of a robbery in violation of [§] 53a-92 (a) (2) (B) of said statutes."

In count six of the substitute information, the state's attorney accused the "[petitioner] of robbery in the first degree and charge[d] that at the city of New London and the town of Waterford on or about the 23rd day of August, 1998, the [petitioner], in the course of the commission of the crime of robbery and of immediate flight therefrom, the [petitioner, Smith and Pierre] caused serious physical injury to [the victim], who was not a participant in the crime, in violation of [§] 53a-134 (a) (1) of said statutes."

[6] The petitioner's theory of defense was that he could not be guilty of capital murder because he did not have the intent to cause the death of the victim and that he was not the one who killed the victim. He argued that the incident was a drug deal gone badly and that the victim died in a manner that was not planned. The petitioner conceded, however, that he

conviction and rendered judgment in accordance with the jury's verdict. Id. The court sentenced the petitioner to sixty years in prison on the manslaughter conviction, twenty-five years on each of the kidnapping counts and twenty years on the robbery conviction. The kidnapping and robbery sentences were to be served concurrently and consecutive to the manslaughter conviction, resulting in an effective term of eighty-five years in prison. The petitioner's conviction was affirmed on direct appeal to our Supreme Court.[7] *State* v. *Britton*, supra, 283 Conn. 598.

After our Supreme Court affirmed the petitioner's conviction, the self-represented petitioner filed a petition for a writ of habeas corpus in November, 2007 (first habeas petition). Appointed habeas counsel amended the first habeas petition, alleging that the petitioner was denied the effective assistance of trial counsel.[8] See *Britton* v. *Commissioner of Correction*, supra, 141 Conn. App. 646. The first habeas court, *Schuman*, *J.*, denied the first habeas petition and the petition for certification to appeal. Id. The petitioner appealed to this court. This court dismissed the appeal; id., 669; and our Supreme Court denied certification to appeal. See *Britton* v. *Commissioner of Correction*, 308 Conn. 946, 67 A.3d 290 (2013).

was involved in the incident and that the state had proved that he assaulted and robbed the victim.

[7] On direct appeal, the petitioner claimed that the trial court improperly denied his motion to suppress the statements he gave to the police, and denied him a fair trial and an impartial jury by explaining to the jury that if it found him guilty of capital felony, it would hear evidence regarding aggravating factors during the penalty phase of the trial. See *State* v. *Britton*, supra, 283 Conn. 600–601.

[8] The petitioner alleged that his trial counsel "rendered ineffective assistance by failing (1) to adequately advise him regarding a plea offer, (2) to offer the petitioner's testimony on the circumstances of his giving a statement to police about his involvement in the victim's death and (3) to object to the trial court's preliminary instructions to the venire panel." *Britton* v. *Commissioner of Correction*, supra, 141 Conn. App. 646.

The self-represented petitioner filed the present petition for a writ of habeas corpus in October, 2011. On March 24, 2016, appointed counsel filed the second revised amended petition (second habeas petition) alleging that the petitioner's constitutional rights were violated because he was denied (1) the effective assistance of trial counsel,[9] (2) the effective assistance of first habeas counsel[10] and (3) a fair trial because the trial court's jury instruction with respect to the kidnapping charges did not comply with *Luurtsema* v. *Commissioner of Correction*, 299 Conn. 740, 12 A.3d 817 (2011), *State* v. *Sanseverino*, 287 Conn. 608, 949 A.2d 1156 (2008),[11] and *State* v. *Salamon*, supra, 287 Conn. 509. With respect to his claim pursuant to *Salamon*, the petitioner alleged that if the jury had been charged pursuant to *Salamon*, it would not have found him guilty of either of the counts of kidnapping in the first degree.

The second habeas court denied the second habeas petition in a memorandum of decision issued on June 23, 2016. The court found that (1) the petitioner's claim of ineffective assistance of trial counsel was successive and, therefore, was barred by the doctrine of res judicata; (2) that the petitioner had failed to demonstrate

[9] Attorney Kevin Barrs and Attorney M. Fred DeCaprio represented the petitioner at his criminal trial. In his second habeas petition, the petitioner alleged that his trial counsel rendered ineffective assistance with respect to (1) the motion to suppress his statement to the police, (2) the investigation of first responders' handling of the victim's body, and (3) contradictions between Carr's statement to the police and his trial testimony.

[10] Attorney Christopher Duby represented the petitioner at the first habeas trial. The petitioner alleged that Duby's representation was ineffective with respect to (1) the motion to suppress the petitioner's statement to the police, (2) the investigation of the first responders' handling of the victim's body, (3) contradictions between Carr's statement to the police and his trial testimony, and (4) the failure to raise a *Salamon* claim.

[11] *Sanseverino* was overruled in part by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), and superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 579, 969 A.2d 710 (2009).

that his first habeas counsel rendered ineffective assistance by failing to prove that trial counsel's performance was ineffective; and (3) a reasonable fact finder clearly could have determined that the petitioner's restraint or movement of the victim was not merely incidental to the other offenses[12] and, therefore, a *Salamon* instruction was not warranted. The second habeas court denied the petitioner certification to appeal.

The petitioner appealed to this court, claiming that the second habeas court abused its discretion by denying certification to appeal. He also claimed that his constitutional right to due process was violated because he was convicted of kidnapping without the jury having been instructed "to determine whether the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crimes." See *State* v. *Salamon*, supra, 287 Conn. 542. In addition, the petitioner claims that his constitutional right to the effective assistance of trial counsel was violated, and that his statutory and constitutional rights to the effective assistance of habeas counsel were violated. We agree that the second habeas court abused its discretion by denying the petition for certification to appeal, but we disagree that the court erred by denying the second petition for a writ of habeas corpus.

[12] The court's conclusion is an inaccurate statement of the standard governing *Salamon* claims raised in a collateral proceeding. The standard set forth in *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 136 A.3d 596 (2016), is whether "a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) Id., 77–78.

I

We first consider the petitioner's claim that the second habeas court abused its discretion by denying his petition for certification to appeal. Although we agree that the court should have granted the petition for certification to appeal, the petitioner cannot prevail on the merits of his claims.

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

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Wright* v. *Commissioner of Correction*, 111 Conn. App. 179, 181–82, 958 A.2d 225 (2008), cert. denied, 290 Conn. 904, 962 A.2d 796 (2009).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more

of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Duncan* v. *Commissioner of Correction*, 171 Conn. App. 635, 645, 157 A.3d 1169, cert. denied, 325 Conn. 923, 159 A.3d 1172 (2017).

In determining whether the second habeas court abused its discretion by denying the petitioner certification to appeal, we have reviewed the records of the petitioner's criminal and second habeas trials and the second habeas court's memorandum of decision. Given the underlying facts, the criminal charges against the petitioner, and the relative newness of *Salamon* and its retroactive application, we conclude that the petitioner's *Salamon* claim is adequate to deserve encouragement to proceed further, as the issues it raises are not entirely settled by our Supreme Court.[13] On the basis of our review of the petitioner's *Salamon* claim, however, we conclude that he cannot prevail on its merits.

II

The petitioner claims that the second habeas court improperly determined that he was not denied certain constitutional and statutory rights. We disagree.

We are mindful that "[t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony.

[13] Although we conclude that the petitioner's claims of ineffective assistance of trial and habeas counsel are frivolous, they are interwoven with his *Salamon* claim.

. . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Thomas* v. *Commissioner of Correction*, 141 Conn. App. 465, 470, 62 A.3d 534, cert. denied, 308 Conn. 939, 66 A.3d 881 (2013).

A

The petitioner claims that the habeas court improperly concluded that his constitutional right to due process was not violated when he was convicted of kidnapping without the jury being instructed to determine whether the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crimes charged. We do not agree, given the particular facts of the present case.

We first set forth the law applicable to the petitioner's *Salamon* claim. "[I]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that a jury verdict would have been the same absent the error . . . . The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element . . . and thus gives rise to constitutional error." (Citations omitted; internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, 321 Conn. 56, 77–78, 136 A.3d 596 (2016).

Our kidnapping law has changed substantially since the petitioner was convicted of kidnapping in violation of § 53a-92 (a) (2) (A) and (B) in 2005.[14] At that time, our Supreme Court had established that "all that is required under the [kidnapping] statute is that the defendant have abducted the victim and restrained [the victim] with the requisite intent. . . . Under the aforementioned definitions, the abduction requirement is satisfied when the defendant restrains the victim with the intent to prevent her liberation through the use of physical force. . . . Nowhere in this language is there a requirement of movement on the part of the victim. Rather, we read the language of the statute as allowing the restriction of movement alone to serve as the basis for kidnapping. . . . [O]ur legislature has not seen fit to merge the offense of kidnapping with other felonies, nor impose any time requirements for restraint, nor distance requirements for asportation, to the crime of kidnapping. . . . Furthermore, any argument that attempts to reject the propriety of a kidnapping charge on the basis of the fact that the underlying conduct was integral or incidental to the crime of sexual assault also must fail." (Internal quotation marks omitted.) *Pereira* v. *Commissioner of Correction*, 176 Conn. App. 762, 768, 171 A.3d 105, cert. denied, 327 Conn. 984, 175 A.3d 43 (2017).

In 2008, however, our Supreme Court reinterpreted our kidnapping statutes in *State* v. *Salamon*, supra, 287 Conn. 542. "Our legislature, in replacing a single, broadly worded kidnapping provision with a gradated scheme that distinguishes kidnappings from unlawful restraints by the presence of an intent to prevent a

[14] The petitioner was convicted of the underlying crimes in January, 2005; *Salamon* was decided in 2008. Our Supreme Court made its holding in *Salamon* retroactive with respect to collateral attacks on a kidnapping conviction in *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740.

victim's liberation, intended to exclude from the scope of the more serious crime of kidnapping and its accompanying severe penalties those confinements or movements of a victim that are merely incidental to and necessary for the commission of another crime against that victim. Stated otherwise, to commit a kidnapping in conjunction with another crime, a defendant must intend to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime." Id.

"Our Supreme Court further noted that [w]hen that confinement or movement is merely incidental to the commission of another crime, however, the confinement or movement must have exceeded that which was necessary to commit the other crime. [T]he guiding principle is whether the [confinement or movement] was so much the part of another substantive crime that the substantive crime could not have been committed without such acts . . . . In other words, the test . . . to determine whether [the] confinements or movements involved [were] such that kidnapping may also be charged and prosecuted when an offense separate from kidnapping has occurred asks whether the confinement, movement, or detention was merely incidental to the accompanying felony or whether it was significant enough, in and of itself, to warrant independent prosecution. . . . Conversely, *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 has independent criminal significance, that is, the victim was restrained to an extent exceeding that which was necessary to accomplish or complete the other crime*." (Emphasis added; internal quotation marks omitted.) *Robles* v. *Commissioner of Correction*, 169 Conn. App. 751, 755, 153 A.3d 29 (2016), cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017).

"[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 has 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. Consequently, when the evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime, the ultimate factual determination must be made by the jury. For purposes of making that determination, the jury should be instructed to consider the various relevant factors, including the nature and duration of the victim's movement or confinement by the [perpetrator], whether that movement or confinement occurred during the commission of the separate offense, whether the restraint was inherent in the nature of the separate offense, whether the restraint prevented the victim from summoning assistance, whether the restraint reduced the [perpetrator's] risk of detection and whether the restraint created a significant danger or increased the victim's risk of harm independent of that posed by the separate offense." (Emphasis in original; footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 547–48; see also *White* v. *Commissioner of Correction*, 170 Conn. App. 415, 428–29, 154 A.3d 1054 (2017) ("if the evidence regarding the perpetrator's intent—that is, whether he or she intended to prevent the victim's liberation for a longer period of time or to a greater degree than that which is necessary to commit the other crime—is susceptible to more than one interpretation, that question is one for the jury" [internal quotation marks omitted]).

In its memorandum of decision,[15] the second habeas court noted that the state had charged the petitioner in a substitute information with two separate counts of kidnapping: kidnapping in the first degree in violation of § 53a-92 (a) (2) (A) for abducting and restraining the victim with the intent to inflict physical injury upon him, and kidnapping in the first degree in violation of § 53a-92 (a) (2) (B) for abducting and restraining the victim with attempt to accomplish and advance the commission of a robbery.

The court then set forth the facts as the jury reasonably may have found them, as stated in our Supreme Court's decision affirming the petitioner's conviction. To wit: "[t]he victim bought two small bags of crack cocaine in exchange for $20, and he and the [petitioner], with Pierre and Smith following in a separate vehicle, drove to Pierre's apartment complex in New London so that the victim could use the drugs he had just purchased. Once they arrived at the apartment complex, Pierre, Smith and the [petitioner] pulled the victim out of the Saab and beat him. When this attack ceased, the victim was badly injured but still alive. The three men then put the victim into the backseat of the Saab and brought him to a nearby parking lot abutting Bates Woods, a park in New London. They pulled the victim out of the car once more, and this time beat him to death. Pierre, Smith and the [petitioner] then dragged the victim's body into Bates Woods, where they covered the body with dirt and plastic bags. The [petitioner] disposed of the victim's Saab by pushing it into a small pond behind the Waterford police department. *State* v.

[15] The second habeas court addressed the substance of the petitioner's *Salamon* claim in association with the petitioner's claim that his first habeas counsel rendered ineffective assistance by failing to raise a *Salamon* claim in the first habeas petition. The court incorporated its *Salamon* analysis when it addressed the petitioner's stand-alone *Salamon* claim.

Britton, supra, 283 Conn. 601–602." (Internal quotation marks omitted.)

In its memorandum of decision, the second habeas court quoted the prosecutor's argument to the jury, which contended that there were two kidnappings. The prosecutor stated, in relevant part: "Now, the kidnapping in the first degree; there's actually two counts, the fourth and fifth counts [of the substitute information]. One kidnapping is distinguished from the other because one is that [the victim] was restrained with the intent, that is, the intent from not letting him [get free], and they restrained him with the intent to inflict physical injury upon him. The state asserts that this actually happened on several occasions, this kidnapping. The [perpetrators] restrained [the victim] when they got into his Saab, when they got into his car at Michael Road, he was restrained there. In fact, the evidence is as [Jarvis] told us, that he was pulled out of the car and, as he was being pulled [out of the car, he was kicking as if he was trying to stay in] the car. The state would assert that the evidence says that that's one particular kidnapping. Then [the victim] is put back into his own car and driven to Bates Woods. . . .

"Now, the other kidnapping . . . is that a kidnapping, which is, as I indicated, a restraining with . . . the intent of a felony, and the felony, the state would assert in this case, was robbery, and the evidence of the robbery in this case actually comes from several sources, two of which come from the [petitioner]." (Internal quotation marks omitted.)

The second habeas court noted that the trial court charged the jury extensively with respect to kidnapping, both as a predicate for the capital felony[16] and felony

[16] Judge Schimelman charged the jury with respect to capital felony, in part, as follows: "The first count of the information accuses [the petitioner] of capital felony and charges that at the city of New London and town of Waterford on or about the twenty-third day of August, 1998, the [petitioner], with intent to cause the death of [the victim], whom he had kidnapped, did

murder charges,[17] as well as for the separate kidnapping

cause the death of [the victim] during the course of the kidnapping and before [the victim] was able to return and be returned to safety . . . .

"The second essential element of the crime of capital felony . . . is that the [petitioner] kidnapped another person . . . [the victim]. For purposes of this first count, our Penal Code provides [that] a person is guilty of kidnapping when he abducts another person. . . .

"Abduct means to restrain a person with intent to prevent his liberation by either A, secreting or holding him in a place where he is not likely to be found or, B, using or threatening to use physical force or intimidation.

"Restrain means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty, by moving him from one place to another or by confining him in the place where either the restriction began or in a place to which he had been moved without consent. Without consent includes but is not limited to deception. The abduction and the restraining must be intentional. There must be an intent to interfere substantially with the alleged victim's liberty either by, one, secreting or hiding him in a place where he is not likely to be found or, two, by using or threatening to use physical force or intimidation."

[17] Judge Schimelman charged the jury with respect to felony murder, in part, as follows: "There are three essential elements, each of which the state must prove beyond a reasonable doubt for you to find [the petitioner] guilty of felony murder. One, the [petitioner], acting with one or more persons, committed the crime of kidnapping or the crime of robbery; two, the death of [the victim] was caused by the [petitioner] or another participant, and that person whose death was caused was not a participant in the predicate crime of robbery or kidnapping; and three, the [petitioner] or another participant caused the death of [the victim] in the course of or in furtherance of the commission of the crime of kidnapping or robbery or of flight therefrom. . . .

"First, with respect to the predicate crime of kidnapping for the purpose of [felony murder], a person is guilty of kidnapping when he abducts another person. [The court repeated its instruction regarding abduction and restraint.] . . . Kidnapping is a continuing crime that commences once a person is wrongfully deprived of freedom and continues for as long as that unlawful detention lasts. The law which makes kidnapping criminal punishes interference with personal liberty and restricting the alleged victim's freedom of movement. You cannot convict the [petitioner] of kidnapping unless you first find that there was a restriction of movement and that it was done intentionally, that it was done without right or authority of law, and that it had the effect of interfering substantially with the alleged victim's liberty. . . .

"With respect to the other predicate crime of robbery for purposes of [felony murder], a person commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after

counts,[18] and robbery in the first degree,[19] but that the

the taking or compelling the owner of such property to deliver up the property or to engage in other conduct which aids in the commission of the larceny. . . .

"A larceny is a theft or stealing. A person commits larceny when, with intent to deprive another person of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains, or withholds such property from an owner."

[18] Judge Schimelman charged the jury with respect to the kidnapping counts, in relevant part, as follows:

"For you to find the [petitioner] directly committed the crime of kidnapping in the first degree, § 53a-92 (a) (2) (A), as a principal, the state must prove each of the following essential elements beyond a reasonable doubt: One, the [petitioner] abducted the alleged victim, two, the [petitioner] unlawfully restrained the person he abducted and, three, he did so with intent to inflict physical injury on the alleged victim. [The court iterated its instructions regarding abduction, restraint, and kidnapping.] . . .

"Again, the term physical force has its everyday meaning. It includes any violence or superior physical strength against the alleged victim. It is for you to decide whether the evidence proves that physical force was used by the [petitioner], and whether it actually produced and resulted in the accomplishment of the restraint which is charged here.

"The third essential element of kidnapping in the first degree in violation of § 53a-92 (a) (2) (A) is that the [petitioner] abducted and restrained the alleged victim . . . with the intent to inflict physical injury upon him. Physical injury means an impairment of physical condition or pain. . . .

"The fifth count of the information accuses [the petitioner] of the crime of kidnapping in the first degree and charges . . . that [the petitioner] did abduct [the victim] and restrained [the victim] with intent to accomplish and advance the commission of a robbery in violation of § 53a-92 (a) (2) (B) . . . . [T]he state must prove each of the following essential elements beyond a reasonable doubt: One, the [petitioner] abducted the alleged victim, two, the [petitioner] unlawfully restrained the person he abducted and, three, he did so with the intent to accomplish or advance the commission of a felony, here, the crime of robbery."

[19] With respect to robbery in the first degree, Judge Schimelman charged the jury in relevant part: "The sixth . . . count of the information accuses [the petitioner] of robbery in the first degree and . . . [charges that] in the course of the commission of the crime of robbery and of immediate flight therefrom, [the perpetrators] caused serious physical injury to [the victim], who was not a participant in the crime. . . . In order to find the [petitioner] guilty of this crime . . . the state must prove beyond a reasonable doubt, one, the [petitioner] committed a robbery and, two, in the course of the commission of that robbery or immediate flight therefrom, the [petitioner] or another participant in the crime caused serious physical injury to a person who was not a participant in the crime. . . .

instructions did not comport with *Salamon*. The second habeas court stated that it was not disputed that the jury found that the victim was moved or restrained at least two separate times, as alleged in the kidnapping counts: once to facilitate injury to the victim and once to rob him. According to the second habeas court, these movements or restrictions of the victim had a clearly defined and distinct significance from each other and from the other charged offenses. The court also concluded that "a reasonable fact finder could clearly determine that the restraint and/or movement of the victim [were] not merely incidental to the other offenses. That is, the movements and/or confinements had independent criminal significance."[20] The court, therefore, denied the petitioner's *Salamon* claim because the underlying facts would not have warranted a *Salamon* instruction. Moreover, the court stated, even if the petitioner were entitled to a *Salamon* instruction, the absence of such an instruction was harmless error.[21] We agree with the second habeas court that the failure to give a *Salamon* instruction was harmless beyond a reasonable doubt.

In addition to the two kidnapping charges, the petitioner was charged with capital felony, murder, felony murder and robbery. In such circumstances, *State* v. *Fields*, 302 Conn. 236, 247, 24 A.3d 1243 (2011), instructs that ordinarily a *Salamon* instruction should have been

"Serious physical injury means physical injury which creates a substantial risk of death or which causes serious impairment of health or serious loss or impairment of any function of any bodily organ for purposes of this sixth count."

[20] But see footnote 12 of this opinion regarding the proper standard governing *Salamon* claims.

[21] In support of its conclusion that the error in failing to give a *Salamon* instruction, if any, was harmless, the second habeas court cited *State* v. *Hampton*, 293 Conn. 435, 455–64, 988 A.2d 167 (2009) (lack of *Salamon* instruction harmless error given particular facts), and *State* v. *Nelson*, 118 Conn. App. 831, 834–36, 856, 986 A.2d 311 (same), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010).

given. At his criminal trial, the petitioner all but conceded that the perpetrators robbed and assaulted the victim. See footnote 6 of this opinion. Given his concession, his defense focused on the capital felony and murder charges.[22]

If a reviewing court determines that a *Salamon* instruction on incidental restraint should have been given, it must then determine whether the failure to give the instruction was harmful. In *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, our Supreme Court stated that "the proper standard to [determine whether a petitioner's kidnapping conviction requires reversal due to the omission of a *Salamon* instruction] would be the harmless error standard applied on direct appeal. . . . On direct appeal, [i]t is well established that a defect in a jury charge which raises a constitutional question is reversible error if it is reasonably possible that, considering the charge as a whole, the jury was misled. . . . [T]he test for determining whether a constitutional error is harmless . . . is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . . A jury instruction that improperly omits an essential element from the charge constitutes harmless error [only] if a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . . The failure to charge in accordance with *Salamon* is viewed as an omission of an essential element . . . and thus gives rise to constitutional error." (Citations omitted; internal

[22] The record contains no evidence as to precisely when the perpetrators took the victim's watch and money. The robbery, therefore, is central to our analysis of the petitioner's *Salamon* claim. Robbery generally may be defined as larceny by force. See *State* v. *Townsend*, 206 Conn. 621, 626, 539 A.2d 114 (1988). As such, the petitioner contends that the perpetrators' restraint and movement of the victim was incidental to the crime of robbery.

quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78.

On appeal, the petitioner argues that the two kidnapping charges were based on (1) the alleged restraint of the victim during the robbery, and (2) the alleged abduction of the victim from the parking lot to Bates Woods. The petitioner's argument assumes that the robbery occurred in the Saab or parking lot where the victim was first beaten. He analyzed the *Salamon* risk factors as follows: With respect to the events that took place in the parking lot, the petitioner contends that the state did not allege that the perpetrators confined the victim at any time during which they were not attacking him. He argues that the perpetrators restrained the victim only when they were attacking him. As a matter of law and as recited in the court's instruction on robbery,[23] the use or threatened use of

[23] The court instructed the jury [with respect to felony murder] in relevant part as follows: "In order for you to find the [petitioner] directly committed the predicate crime of robbery as a principal, the state must prove that the [petitioner], in the course of committing a larceny, used or threatened the immediate use of physical force upon another person, that is, [the victim], to prevent or overcome resistance to the taking of the property or to its retention or compelling [the victim] to deliver up the property or to engage in other conduct which aided in the commission of the alleged larceny. . . .

"The gist of the crime of robbery is the act of committing a larceny by physical force or threat of immediate use of physical force. Like the intent element of larceny, the remaining essential elements of the offense of robbery must be done intentionally, as I have explained that. Physical force or the threat of its immediate use is a common, readily understandable expression having its ordinary meaning. It means the application or threat of external physical power to another person. Physical force or its immediate threat must be for the purpose of committing the larceny. Such physical force must be used or threatened for the purpose of preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking or for the purpose of compelling the owner of the property to deliver up the property or to engage in other conduct which aids in the commission of the larceny. Robbery requires proof of larceny by force or the threat of use of force, and proof of larceny requires proof of a taking of property with the specific intent to deprive the owner of its possession permanently."

physical force is inherent in the crime of robbery. The evidence, however, demonstrates that the petitioner moved the victim when he was not being attacked. Jarvis testified that the perpetrators dragged the victim from the Saab and beat him motionless. The state contended that the robbery occurred at that point. The petitioner picked up the motionless victim, put him on the backseat of the Saab, transported him to Bates Woods, beat him again and murdered him. Putting the victim back into the Saab, transporting him to Bates Woods, and the ensuing violence was not necessary to the crime of robbery.[24] Simply put, abducting and moving the motionless body of the victim exceeded what was necessary to commit the crime of robbery.

Moreover, it does not matter at exactly which point in time the perpetrators took the victim's money and watch. The taking could have occurred at any number of points: during the struggle inside the Saab; when the victim was lying motionless on the ground of the parking lot; while he was lying on the backseat of the Saab; after he was driven to Bates Woods; or when he was again pulled from the Saab at Bates Woods. Each of those potential points of taking are separated in time and by distinct movements. If the taking occurred during the struggle inside the Saab, at a minimum, pulling the victim from the Saab, beating him, putting him back in the Saab after he had been beaten motionless was not incidental to or necessary to the taking. If the taking occurred when the victim was placed on the backseat of the Saab after he had been beaten motionless, the initial struggle in the Saab preceded the taking and was not incidental or necessary to it, nor was the asportation to Bates Woods. If the taking occurred after the victim was dead, restraining the victim in and pulling him from

[24] On appeal, the petitioner argues that the victim may have been dead when he was put in the backseat of the Saab. That argument is belied by the petitioner's statement to the police that the victim was alive at that time.

the Saab on two occasions was not incidental to or necessary to the commission of the taking. Under any scenario, no reasonable juror could conclude that the restraint or movement imposed on the victim after he was beaten and lying motionless on the ground of the parking lot was *necessary* for the commission of robbery.

With respect to the kidnapping charge alleging that the petitioner restrained the victim with the intent to inflict physical injury upon him, the evidence demonstrated that the perpetrators restrained the victim in the Saab and assaulted him, causing him physical injury. The victim's blood was detected in the blood splatters on the visor above the driver's seat. After restraining the victim and causing him physical injuries, the perpetrators exceeded what was necessary to commit assault with the intent to cause physical injury by removing the struggling victim from the Saab and beating him motionless. As to the kidnapping charge that the petitioner abducted and restrained the victim in order to inflict physical injury, the evidence demonstrates that the victim was placed in the backseat of the Saab, after he had been beaten and rendered motionless, transported to Bates Woods, beaten and murdered. Driving the victim to Bates Woods was not necessary to inflict physical injury on the victim. That was accomplished initially during the struggle in the Saab and again when he was beaten while he was lying motionless on the parking lot.

In *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 430–31, this court noted that in *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 92–93, our Supreme Court categorized *Salamon* incidental restraint cases depending on the degree of confinement and movement. "Although no minimum period of restraint or degree of movement is necessary for the crime of kidnapping, an important facet of cases where

the trial court has failed to give a *Salamon* instruction and that impropriety on appellate review has been deemed harmless error is that longer periods of restraint or greater degrees of movement demarcate separate offenses. See *State* v. *Hampton*, [293 Conn. 435, 463–64, 988 A.2d 167 (2009)] (defendant confined victim in car and drove her around for approximately three hours before committing sexual assault and attempted murder); *State* v. *Jordan*, [129 Conn. App. 215, 222–23, 19 A.3d 241 (2011)] (evidence showed the defendant restrained the victims to a greater degree than necessary to commit the assaults even though assaultive behavior spanned entire forty-five minute duration of victims' confinement) [cert. denied, 302 Conn. 910, 23 A.3d 1248 (2011)]; *State* v. *Strong*, [122 Conn. App. 131, 143, 999 A.2d 765] (defendant's prolonged restraint of victim while driving for more than one hour from one town to another not merely incidental to threats made prior to the restraint) [cert. denied, 298 Conn. 907, 3 A.3d 73 (2010)]; and *State* v. *Nelson*, [118 Conn. App. 831, 860–62, 986 A.2d 311] (harmless error when defendant completed assault and then for several hours drove victim to several locations) [cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010)]. Thus, as these cases demonstrate, multiple offenses are more readily distinguishable—and, consequently, more likely to render the absence of a *Salamon* instruction harmless—when the offenses are separated by greater time spans, or by more movement or restriction of movement." (Internal quotation marks omitted.) *White* v. *Commissioner of Correction*, supra, 430–31; see also *Pereira* v. *Commissioner of Correction*, supra, 176 Conn. App. 773–74 (habeas court properly concluded restraint and confinement of victim occurred separately from and was completed prior to murder).

The second habeas court cited the *Hampton* and *Nelson* cases in support of its conclusion that the failure

to give a *Salamon* instruction in the present case was harmless error, if any. We agree with the second habeas court's conclusion that the failure to give the *Salamon* charge in the present case was harmless. The evidence demonstrates that the petitioner, along with the other perpetrators, engaged in several offenses during which he restrained and moved the victim in a manner not merely incidental to or necessary for the commission of assault or robbery, and that the offenses were separated by distinct periods of time and by more movement or restraint of movement. Accordingly, with respect to both charges of kidnapping, we conclude, beyond a reasonable doubt, that the "omitted element was uncontested and supported by overwhelming evidence such that the jury verdict would have been the same absent the error . . . ." (Internal quotation marks omitted.) *Hinds* v. *Commissioner of Correction*, supra, 321 Conn. 77–78. We thus conclude that the "evidence reasonably supports a finding that the restraint was *not* merely incidental to the commission of some other, separate crime . . . ." (Emphasis in original.) *State* v. *Salamon*, supra, 287 Conn. 547–48.[25]

[25] Even though we conclude, on the basis of the facts of this particular case, that the petitioner's intent is not susceptible to more than one interpretation; see *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 429; we have undertaken an analysis of the six *Salamon* jury instruction factors; *State* v. *Salamon*, supra, 287 Conn. 547–48; which supports our conclusion that the petitioner's restraint and movement of the victim was more than was necessary to complete the crimes of assault and robbery.

The petitioner's restraint of the victim was extensive: it began inside the Saab, continued at the apartment parking lot where he beat him, and continued when he put the injured victim back in the Saab and drove him to Bates Woods where he put a pipe in the victim's mouth and twisted it, resulting in the victim's death. The restraint and movement that occurred after the petitioner beat the victim at the apartment parking lot was unnecessary to complete the crimes of assault and robbery and, therefore, had independent significance. The crimes could have been completed prior to returning the victim to the Saab and driving him to Bates Woods. The petitioner's restraint and movement of the badly injured victim from the apartment parking lot to Bates Woods prevented the victim from summoning assistance. The petitioner's moving the victim obviously reduced the petitioner's risk of detection. Finally, the petitioner's restraint and movement of the victim

For the foregoing reasons, although the second habeas court should have granted the petitioner certification to appeal, the court did not improperly deny his petition for a writ of habeas corpus with regard to his allegation that he was denied due process because the jury was not instructed pursuant to *Salamon*.

B

The petitioner claims that the habeas court improperly concluded that his claim of ineffective assistance of trial counsel was barred by the doctrine of res judicata. We disagree.

In its memorandum of decision, the second habeas court found that the petitioner alleged in the first count of his second habeas petition that his trial counsel rendered deficient performance in that Attorneys Kevin Barrs and M. Fred DeCaprio (1) presented inadequate evidence during the hearing on the motion to suppress the petitioner's statement to the police, (2) failed to investigate and demonstrate that the victim's body was mishandled by first responders, and (3) failed to introduce exculpatory evidence regarding the contradiction between Carr's statement to the police, and a public defender's investigation report and his trial testimony. The respondent, the Commissioner of Correction, denied the allegations and averred that the ineffective assistance of counsel claim was successive because it was raised in the first habeas petition. The petitioner replied that the claim in the second habeas petition does not present the same ground as presented in the first habeas petition.

The second habeas court cited *Carter* v. *Commissioner of Correction*, 109 Conn. App. 300, 950 A.2d 619

greatly increased the risk of harm to the victim, who was murdered. Under the circumstances of this case, we conclude that the jury was not misled by the failure to give the *Salamon* charge and, therefore, the failure was harmless beyond a reasonable doubt.

(2008), for the law concerning successive petitions. "[A] petitioner may bring successive petitions on the same legal grounds if the petitions seek different relief. . . . But where successive petitions are premised on the same legal grounds and seek the same relief, the second petition will not survive a motion to dismiss unless the petition is supported by allegations and facts not reasonably available to the petitioner at the time of the original petition." (Internal quotation marks omitted.) Id., 306. The second habeas court also noted that Connecticut courts repeatedly have applied the doctrine of res judicata to claims duplicated in successive habeas petitions. See *Moody* v. *Commissioner of Correction*, 127 Conn. App. 293, 297–98, 14 A.3d 408, cert. denied, 300 Conn. 943, 17 A.3d 478 (2011).

The court further determined that the petitioner's first habeas petition was premised on four alleged deficiencies of trial counsel. The petitioner requested that the first habeas court vacate his conviction and sentence, and remand the matter to the criminal court for further proceedings. The claim of ineffective assistance of trial counsel in the petitioner's second habeas petition is identical to the one in the first habeas petition. The court stated that unless the petitioner presented newly discovered evidence that was not reasonably available at the time of the first habeas trial, the petitioner is barred from relitigating a claim of ineffective assistance of trial counsel. In addition, the court found that all of the witnesses at the second habeas trial either testified at the first habeas trial or were available to testify at that trial. Moreover, the documentary evidence the petitioner offered at the second habeas trial contained no new evidence, let alone evidence that was not reasonably available at the time of the first habeas trial. The court concluded that the claim of ineffective assistance of trial counsel alleged in the second habeas

petition was successive and was therefore barred by the doctrine of res judicata.

The petitioner's claim of ineffective assistance of trial counsel centers on the admission into evidence of Carr's February 16, 1999 statement to the police regarding a conversation he had had with the petitioner about the victim's death. Carr testified at the petitioner's criminal trial, but he could not remember his conversation with the petitioner and could not testify about it. He remembered signing the statement he gave to the police, but he claimed that the police made it up. Carr's statement to the police was admitted into evidence as a prior inconsistent statement 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).

On appeal, the petitioner claims that his trial counsel were deficient in failing to present evidence that Carr's trial testimony that he had no recollection of the conversation with the petitioner was consistent with a report generated by Ligia Werner, an investigator with the Office of the Chief Public Defender, who interviewed him on June 25, 2001. Werner's report indicates that when she spoke with Carr, he had no recollection of the conversation with the petitioner or its contents. At the criminal trial, Carr testified that he had no memory of Werner's interview of him. At the second habeas trial, the petitioner argued that Werner's report should have been offered into evidence as Carr's prior consistent statement.

At the second habeas trial, the petitioner argued that his trial counsel's performances were deficient because they failed to place the facts regarding Werner's interview with Carr before the jury or to call her as a witness to substantiate his lack of memory regarding his conversation with the petitioner. The petitioner claims that trial counsel should have called Werner to testify. The

second habeas court, however, found that the petitioner's claim was based on the same legal ground asserted in his first habeas petition. Moreover, Werner's report was known to trial counsel, and Werner was available to testify at the first habeas trial. The court concluded, therefore, that the petitioner's claim was successive.

"The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding." (Internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, 113 Conn. App. 223, 233, 965 A.2d 608 (2009).

Our Supreme Court has "recognized only one situation in which a court is not legally required to hear a habeas petition. In *Negron* v. *Warden*, [180 Conn. 153, 158, 429 A.2d 841 (1980), the court] observed that pursuant to Practice Book § . . . [23-29], [i]f a previous application brought on the same grounds was denied, the pending application may be dismissed without hearing, *unless it states new facts or proffers new evidence not reasonably available at the previous hearing.*" (Emphasis in original; internal quotation marks omitted.) *Kearney* v. *Commissioner of Correction*, supra, 113 Conn. App. 234.

Given the facts of the present matter and the law regarding successive petitions, we conclude that the second habeas court properly determined that the petitioner's claim of ineffective assistance of trial counsel was successive and therefore was barred by the doctrine of res judicata. The second habeas petition is grounded in the claim of ineffective assistance of trial counsel and alleges no new facts that were not known at the time of the first habeas trial. The second habeas court, therefore, did not abuse its discretion by denying the petitioner certification to appeal on his claim of ineffective assistance of trial counsel, as it is not an issue debatable among jurists of reason that a court could resolve it in a different manner, nor is it deserving of encouragement to proceed further.

C

The petitioner claims that the habeas court improperly determined that his statutory and constitutional rights to the effective assistance of first habeas counsel were not violated. In his second habeas petition, the petitioner alleged that the performance of his first habeas counsel, Christopher Duby, was deficient because he failed to allege that the petitioner's trial counsel rendered ineffective assistance by (1) failing to present evidence and testimony during the hearing on the motion to suppress the petitioner's statement to the police, (2) failing to investigate defense witnesses to demonstrate that first responders mishandled the victim's body, and (3) failing to introduce exculpatory evidence through witnesses to show the contradiction between Carr's statement to the police, and his statement to an investigator from the public defender's office and his trial testimony, and (4) failing to raise the *Salamon* jury instruction issue in the first habeas petition. He concedes, however, that the second habeas court properly subsumed his claim of ineffective assistance

of trial counsel into his claim of ineffective assistance of first habeas counsel.

To prevail on a claim of ineffective assistance of habeas counsel that is predicated on the ineffective assistance of trial counsel, a petitioner must demonstrate that both trial and habeas counsel were ineffective. See *Stanley* v. *Commissioner of Correction*, 164 Conn. App. 244, 254, 134 A.3d 253, cert. denied, 321 Conn. 913, 136 A.3d 1274 (2016). "[When] applied to a claim of ineffective assistance of prior habeas counsel, the *Strickland* [v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] standard requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding. . . . [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial . . . ." (Emphasis omitted; internal quotation marks omitted.) *Harris* v. *Commissioner of Correction*, 108 Conn. App. 201, 209–10, 947 A.2d 435, cert. denied, 288 Conn. 911, 953 A.2d 652 (2008). A petitioner who claims ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must satisfy *Strickland* twice; that is, he must show that his appointed habeas counsel and his trial counsel were ineffective. *Lozada* v. *Warden*, 223 Conn. 834, 842, 613 A.2d 818 (1992).

With respect to the motion to suppress the petitioner's statement to the police, the second habeas court found that the petitioner's motion to suppress was unsuccessful prior to trial, on appeal, and at his first habeas trial. At the second habeas trial, DeCaprio and Barrs testified, but the court found that neither of them

offered any evidence of what could have been done to make their representation on the motion to suppress at trial more effective. The petitioner told Duby that he believed that he was in custody and not free to leave when the police were questioning him. Duby interviewed some of the police officers involved. The first habeas court concluded that even if the petitioner had testified at the suppression hearing as he testified at the habeas trial, the trial court would not have granted the motion to suppress and, therefore, the petitioner was not prejudiced by counsel's decision not to offer his testimony. In resolving the habeas appeal, this court stated that the petitioner's testimony at the first habeas trial did not establish any credible new or additional facts for a court to find that the petitioner was in custody, thus triggering his *Miranda*[26] rights. *Britton* v. *Commissioner of Correction*, supra, 141 Conn. App. 651–57. This court thus affirmed the finding of the habeas court that the petitioner was not prejudiced by his attorney's failure to offer his testimony at the suppression hearing. On the basis of the foregoing history of litigation and appeals, the second habeas court found that the petitioner failed to demonstrate that Duby was ineffective with respect to his investigation of ineffective assistance of trial counsel regarding the suppression of the petitioner's statement.

With regard to the petitioner's claim that Duby provided ineffective assistance because he failed to investigate and subpoena witnesses to demonstrate that first responders to the crime scene mishandled the victim's body, the second habeas court found that Duby spoke with Carver and hired a medical expert because he was not convinced that the cause of death was accurate, and that the petitioner believed that the victim's body had been moved by the police. The expert's testimony

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

was not particularly helpful to the petitioner because the expert was of the opinion that if the victim's body had been moved, it did not affect the autopsy results, and his opinions were consistent with Carver's. The second habeas court concluded that the evidence the petitioner presented failed to demonstrate that Duby's performance was ineffective to demonstrate that first responders at the crime scene mishandled the victim's body.

As to the petitioner's claim that Duby failed to introduce adequate exculpatory evidence to show the contradiction between Carr's statement to the police and his statement to Werner, and his trial testimony, DeCaprio testified that Carr's testimony at the criminal trial was adverse to the statement he gave to the police on February 16, 1999. After he gave the statement to the police, but prior to testifying at the petitioner's criminal trial in 2004, Carr testified at Pierre's criminal trial. Werner testified at the second habeas trial that she interviewed Carr on June 27, 2001, and prepared a summary of the interview. Carr's interview with Werner, and his testimony at Pierre's criminal trial and at the petitioner's criminal trial were consistent, but contradicted his February 16, 1999 statement to the police. At both criminal trials, Carr testified that he could not remember anything he said to the police. His police statement was admitted at both criminal trials as a prior inconsistent statement pursuant to *State* v. *Whelan*, supra, 200 Conn. 753.

The second habeas court reviewed all of Carr's criminal trial testimony and found that he repeatedly testified that he had no memory of what he said to the police.[27] Although the trial court admitted Carr's police statement pursuant to *Whelan*, the petitioner did not challenge the evidentiary ruling on direct appeal. Pierre,

[27] Carr died and was not available to testify at the second habeas trial.

however, did challenge the admission of Carr's police statement in his direct appeal. Our Supreme Court rejected Pierre's claim. *State* v. *Pierre*, 277 Conn. 42, 53–86, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). The second habeas court stated that it failed to see how a similar claim raised at the petitioner's first habeas trial would have reached a different outcome. The petitioner presented no evidence at the second habeas trial that the court considered exculpatory. The jury was apprised of the contradiction between Carr's statement to the police and his trial testimony. The second habeas court, therefore, concluded that the third alleged basis of ineffective assistance of first habeas counsel failed.

The petitioner also alleged that Duby was ineffective for failing to raise a *Salamon* jury instruction claim in the first habeas petition. On the basis of Duby's testimony at the second habeas trial, the court found that Duby was aware of *Salamon* and its progeny at the time he was filing the amended petition, but that *Luurtsema* v. *Commissioner of Correction*, supra, 299 Conn. 740, had not yet been decided. Duby had considered raising a *Salamon* claim but ultimately decided that the trial court's jury instructions on kidnapping were not defective.

In considering this claim of ineffective assistance of first habeas counsel, the second habeas court cited the relevant law. "[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 has 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." (Footnote omitted.) *State* v. *Salamon*, supra, 287 Conn. 547. "Connecticut courts ultimately assess the importance of a *Salamon* instruction by scrutinizing how a reasonable jury would perceive the defendant's restraint of the victim, particularly with respect to when, where, and how the defendant confined or moved the victim." *Wilcox* v. *Commissioner of Correction*, 162 Conn. App. 730, 745, 129 A.3d 796 (2016).

The court reviewed the two kidnapping charges against the petitioner, i.e., kidnapping in the first degree for abducting and restraining the victim with intent to inflict physical injury, and abducting and restraining the victim with the intent to accomplish and advance the commission of a robbery. The court quoted the facts reasonably found by the jury pursuant to our Supreme Court's decision in *State* v. *Britton*, supra, 283 Conn. 601–602. It also examined the prosecutor's closing argument and the relevant portions of the trial court's jury instruction.

The second habeas court found that the parties did not dispute that the jury found that the victim had been moved and/or restrained on at least two separate occasions as alleged in the two kidnapping counts: "[o]nce to facilitate injury to him, another time to rob him." The movements and/or restrictions had a clearly defined and distinct significance from each other, and exceeded that which was necessary to commit assault and robbery. In other words, the movements or restraints had independent criminal significance. The court, therefore, concluded that the underlying facts would not have warranted a jury instruction pursuant to *Salamon*, but that if such a charge were warranted, the absence of a *Salamon* charge was harmless. See, e.g., *State* v. *Hampton*, supra, 293 Conn. 455–64 (lack

of *Salamon* instruction harmless impropriety given particular facts of case). The second habeas court concluded, therefore, that Duby was not ineffective for failing to raise a *Salamon* claim in the first habeas petition. On the basis of our plenary review of the record and the law, we agree with the conclusion of the second habeas court.

For the foregoing reasons, we conclude that the second habeas court abused its discretion by failing to grant the petition for certification to appeal, but properly denied the petitioner's second petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion the other judges concurred.

LUIS MARTINEZ *v.* PREMIER MAINTENANCE, INC.
(AC 40188)

Lavine, Alvord and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, religious discrimination in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) following the termination of his employment. The plaintiff was employed by the defendant as a cleaner/porter at certain apartments. After the plaintiff was promoted to acting supervisor of a cleaning crew, he recommended that the defendant hire A, who was the pastor of the plaintiff's church. C, who was the plaintiff's supervisor and who knew that the plaintiff was a chaplain at the same church, informed the plaintiff that if the defendant hired A, the plaintiff, while at work, could not refer to A as pastor or give A the respect ordinarily afforded a pastor. After A was hired, members of the cleaning crew complained that the plaintiff assigned easy jobs to A while they were assigned more demanding jobs, and that the plaintiff allowed A to take extra breaks and spend time talking with residents during work hours. C thereafter issued written warnings to the plaintiff and to A about their work performance. Neither the plaintiff nor A wrote anything in the employee remarks section of the warning forms they received as

to why they disagreed with the warnings. H, the manager of the apartments, then requested that C remove the plaintiff from his position after H was told of complaints from tenants about the plaintiff and A. When C, in the presence of the plaintiff, discharged A from his employment, the plaintiff referred to A as pastor. The plaintiff alleged that C then became angry and admonished him for having referred to A as pastor, and immediately discharged him as well. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, concluding, inter alia, that the plaintiff had failed to establish a prima facie case of employment discrimination in violation of statute ([Rev. to 2011] § 46a-60 [a] [1]) or a prima facie case of retaliation in violation of statute ([Rev. to 2011] § 46a-60 [a] [4]). On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly granted the defendant's motion for summary judgment when it applied the pretext model of analysis under *McDonnell Douglas Corp.* v. *Green* (411 U.S. 792) and *Texas Dept. of Community Affairs* v. *Burdine* (450 U.S. 248), rather than the mixed-motive model of analysis under *Price Waterhouse* v. *Hopkins* (490 U.S. 228) in determining whether he established a prima facie case of employment discrimination; the plaintiff did not allege that he was fired for legitimate and illegitimate reasons but, rather, alleged that the defendant's reason for termination was a pretext for religious discrimination, and, therefore, the pretext model of analysis applied.
2. The trial court properly determined that there were no genuine issues of material fact as to whether the defendant harbored bias or discriminatory intent on the basis of the plaintiff's religion: the plaintiff did not point to any facts from which it could be inferred that the defendant discriminated against him on the basis of his religion and church membership prior to the hiring of A, the plaintiff presented no evidence that the defendant treated others more favorably than it treated him or A, as it was the plaintiff who gave A more favorable treatment than other members of the cleaning crew, and C's conduct in firing the plaintiff did not raise an inference of discrimination, as C stated that he told the plaintiff and A that they were terminated due to conduct and performance issues, and neither the plaintiff nor A referenced in the employee remarks section of the written warnings they received that C became angry when the plaintiff referred to A as pastor when C discharged A.
3. The trial court properly granted summary judgment on the plaintiff's retaliation claim: although the plaintiff claimed that he alleged that he engaged in a protected activity when he referred to A as pastor despite having been told that he should not do so while the two were working, he did not allege that he participated in a protected activity by formally or informally protesting the defendant's alleged religious discrimination, and a generous reading of the plaintiff's allegations of retaliation did not put the defendant or the court on notice that he engaged in a

protected activity under § 46a-60 (a) (4); moreover, the plaintiff failed to raise a genuine issue of material fact that his reference to A as pastor when C fired A constituted an informal complaint, as the plaintiff did not document his protest in the employee remarks section of the defendant's employee warning record or attest in his affidavit in opposition to the defendant's motion for summary judgment to having lodged an informal protest.

Argued April 17—officially released October 16, 2018

Procedural History

Action to recover damages for, inter alia, alleged religious discrimination, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the court, *Brazzel-Massaro*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

James F. Sullivan, with whom was *Jake A. Albert*, for the appellant (plaintiff).

Angelica M. Wilson, with whom, on the brief, was *Glenn A. Duhl*, for the appellee (defendant).

Opinion

LAVINE, J. The plaintiff, Luis Martinez, appeals from the trial court's grant of summary judgment in favor of the defendant, Premier Maintenance, Inc., on all three counts of the plaintiff's second revised complaint alleging religious discrimination in violation of the Connecticut Fair Employment Practices Act (act), General Statutes § 46a-51 et seq. On appeal, the plaintiff claims that the trial court improperly (1) utilized the pretext/*McDonnell Douglas-Burdine* model; *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 252–56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); rather than the mixed-motive/*Price Waterhouse* model of analysis; *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 246, 109 S. Ct.

1775, 104 L. Ed. 2d 268 (1989);[1] when adjudicating the motion for summary judgment, (2) concluded that there was no genuine issue of material fact as to whether he had demonstrated a prima facie case of employment discrimination, and (3) concluded that there was no genuine issue of material fact that he was not engaged in a protected activity under the act. We disagree and affirm the judgment of the trial court.

The plaintiff commenced the present action against the defendant in November, 2013, alleging that he and the defendant were employee and employer, respectively, within the meaning of the act. His second revised complaint alleged three counts, namely, employment discrimination in violation of General Statutes (Rev. to 2011) § 46a-60 (a) (1), employer retaliation in violation of General Statutes (Rev. to 2011) § 46a-60 (a) (4), and aiding and abetting discrimination in violation of General Statutes (Rev. to 2011) § 46a-60 (a) (5). The plaintiff alleged the following facts in the operative complaint. The plaintiff was employed by the defendant as a cleaner/porter at the Enterprise-Schoolhouse Apartments (apartments) in Waterbury, which were managed by the defendant's customer, WinnResidential. During the time he was employed by the defendant, the plaintiff's supervisor, Sandino Cifuentes, knew that the plaintiff was a chaplain at Tabernacle of Reunion Church. Prior to the plaintiff's termination from employment, Cifuentes had informed him that while he was at work, the plaintiff could not refer to a coworker, Ismael Agosto, as "pastor" or give Agosto the respect ordinarily afforded a pastor.

The plaintiff also alleged that on June 22, 2012, Carolyn Hagan, manager of the apartments, relayed information to Cifuentes that during church services, Agosto

[1] See *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 104–109, 671 A.2d 349 (1996) (differentiating disparate employment treatment models).

had read the names of tenants who were in jeopardy of being evicted from the apartments. Hagan learned of the incident from Daisy Alejandro, assistant manager of the apartments, who heard of the incident from tenants Enrique Cintron and his wife, Jorge Cintron. Hagan also relayed to Cifuentes a complaint from Jorge Cintron that the plaintiff was telling tenants of the apartment that the "office does not do anything and that is why nothing gets done . . . ." Moreover, Hagan relayed that the plaintiff informed nonresidents who were in the apartments, when anyone from the office was entering the apartments, so that they could leave before the staff arrived. Hagan also reported that the plaintiff was on his phone constantly, not working, and spent work time "hanging out" with a woman who lived across the street from the apartments.

The plaintiff further alleged that on or about June 26, 2012, Hagan requested that Cifuentes remove the plaintiff from his position. On August 3, 2012, Cifuentes discharged Agosto from his employment in the presence of the plaintiff. During the discharge meeting, the plaintiff referred to Agosto as "pastor . . . ." Cifuentes admonished the plaintiff and immediately discharged him as well.

The plaintiff alleged that he had no performance or conduct issues and that the quality of his work was excellent. He denied helping to compile the list of names of tenants in jeopardy of eviction. On December 14, 2011, Charles Riddle, maintenance director for CMM WinnResidential, had sent Hagan a message stating that the plaintiff was a great choice for temporary supervisor. In addition, the plaintiff alleged that the Cintrons' complaint against him was made in retaliation for an incident at church when Agosto admonished them for playing music at an inappropriate time. The plaintiff alleged that despite the unsubstantiated nature of the Cintrons' complaint and despite the fact that his job

performance was satisfactory, the defendant discharged him from employment.

In count one, the plaintiff alleged that the defendant discriminated against him on the basis of his religion in such a way that it adversely affected his status as an employee, that the defendant warned and disciplined the plaintiff and terminated the plaintiff's employment on account of his religion in violation of § 46a-60 (a) (1), and that the defendant's unequal treatment of the plaintiff was arbitrary and unreasonably discriminatory in violation of the statute. Moreover, he alleged that the defendant exhibited ill will, malice, improper motive, and indifference to the plaintiff's civil rights.

In count two, the plaintiff alleged that he held a bona fide religious belief and was the chaplain at the Tabernacle of Reunion Church. The defendant, through its agents, servants and employees, was aware of the plaintiff's position in the church and that Agosto was the pastor of the church. The plaintiff alleged that the defendant's agents discriminated against him on the basis of his religion and discharged him for practicing his religious beliefs. The defendant retaliated against him for using the term "pastor" and "chaplain," despite knowing the plaintiff's religious beliefs and customs associated with the use of such terms. He claimed damages.

In count three, the plaintiff alleged that the defendant, through its agents, servants, and employees, was aware of his religious beliefs, customs and practices, and aided and abetted the unlawful conduct of its supervisors and employees by permitting one of its agents to discriminate against him on the basis of his religious beliefs in violation of the act. The plaintiff again alleged damages.

The defendant denied the material allegations of the second revised complaint and alleged nine special defenses. In particular, the defendant alleged as its

fourth special defense to all counts in the complaint: "All actions taken by [the defendant] with respect to [the] plaintiff and [the] plaintiff's employment were undertaken for legitimate, nondiscriminatory business reasons."

On July 8, 2016, the defendant filed a motion for summary judgment in which it claimed that there were no genuine issues of material fact such that the plaintiff could not establish a prima facie violation of the act. Furthermore, the defendant claimed that it had a legitimate, nondiscriminatory, nonretaliatory reason to terminate the plaintiff's employment and that the plaintiff could not demonstrate that the reason was false or a pretext. Also, the plaintiff could not establish a cause of action for aiding and abetting because, first, he could not establish that the defendant had discriminated or retaliated against him, and second, a defendant cannot be liable for aiding and abetting employees who are not parties to the action. The plaintiff filed an objection to the defendant's motion for summary judgment on the grounds that there were genuine issues of material fact and that he had established a prima facie case of employment discrimination, retaliation, and aiding and abetting on the basis of religion. In its reply to the plaintiff's objection, the defendant argued that the plaintiff had failed to present evidence that could persuade a rational fact finder that the defendant's legitimate, nondiscriminatory reason for terminating the plaintiff's employment was false or a pretext.

The parties appeared at short calendar on November 7, 2016, to argue the motion for summary judgment. The court issued its memorandum of decision granting the motion for summary judgment in favor of the defendant on February 15, 2017.[2] After stating the legal standards and principles regarding a motion for summary

[2] The court considered all of the exhibits submitted by both of the parties, even though they may not have been authenticated, because there was no objection to them.

judgment and employment discrimination law, the court found that the defendant was entitled to summary judgment on each count of the second revised complaint and that the defendant had carried its burden of proving the absence of a genuine issue of material fact.[3]

The court cited the controlling statute: "It shall be a discriminatory practice in violation of this section . . . (1) [f]or an employer . . . to discharge from employment any individual . . . because of the individual's . . . religious creed . . . ." General Statutes (Rev. to 2011) § 46a-60 (a). The court found that the plaintiff had alleged that he is a member of a protected class, was qualified for his position, and was terminated from his employment due to his use of the term "pastor" when referring to Agosto, his coworker, in the presence of Cifuentes, his supervisor. The plaintiff alleged that because the defendant disapproved of his use of religious terms such as "pastor" when he was working and was aware that he was a chaplain in Agosto's church, his employment termination occurred under circumstances giving rise to an inference of religious discrimination. The court found, however, that the plaintiff had failed to allege facts that the defendant harbored any bias that would create an inference of discrimination. The court concluded, therefore, that the plaintiff had failed to establish a prima facie case of employment discrimination under the act and that the defendant had demonstrated the absence of any genuine issues of material fact in this regard.

With respect to count two, a retaliation claim, the court cited § 46a-60 (a), which provides in relevant part that "[i]t shall be a discriminatory practice . . . (4) [f]or any . . . employer . . . to discharge, expel or

[3] On appeal, the plaintiff takes issue with the court's finding that there were no genuine issues of material fact, but he does not take issue with the court's summary of the underlying facts.

otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . .'' The court found that the plaintiff had alleged that he had engaged in a protected activity when he openly called Agosto ''pastor'' in Cifuentes' presence. The court concluded that the plaintiff's use of the term pastor in defiance of Cifuentes' request that he not do so at work, however, was neither a formal nor informal protest of discrimination, but a continuation of behavior that Cifuentes had advised him against. The court concluded that because the plaintiff's acts did not fall under the category of protected activity, he had failed to establish a prima facie case of retaliation in violation of the act and that there were no genuine issues of material fact in that regard.

In count three, the plaintiff had alleged that the defendant aided and abetted the unlawful conduct of its supervisors and employees by permitting more than one of its agents to discriminate against him on the basis of his religious beliefs. Section 46a-60 (a) provides in relevant part that ''[i]t shall be a discriminatory practice in violation of this section . . . (5) [f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so . . . .'' The court noted that in Connecticut, ''an individual employee may be held liable for aiding and abetting his employer's discrimination; an employer [however] cannot be liable for aiding and abetting its own discriminatory conduct.'' (Internal quotation marks omitted.) *Farrar* v. *Stratford*, 537 F. Supp. 2d 332, 356 (D. Conn. 2008), aff'd, 391 Fed. Appx. 47 (2d Cir. 2010). The court concluded that the defendant could not have aided and abetted illegal discrimination

because the plaintiff could not establish a prima facie case of discrimination against the defendant. Moreover, merely mentioning "supervisors and employees [who] assisted the alleged illegal, discriminatory conduct in the complaint" is not sufficient to sustain a claim of aiding and abetting against the defendant. The defendant cannot have discriminated against the plaintiff and at the same time aided and abetted its discrimination against him. The court concluded that the plaintiff had failed to state an aiding and abetting claim against the defendant.[4]

We now set forth the standard of review and the principles that guide our analysis of appeals from the rendering of summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Internal quotation marks omitted.) *Rivers* v. *New Britain*, 288 Conn. 1, 10, 950 A.2d 1247 (2008). "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 seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under the applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Altfeter* v. *Naugatuck*, 53 Conn. App. 791, 800, 732 A.2d 207 (1999).

[4] The plaintiff's brief on appeal fails to address the court's granting of summary judgment with respect to his claim of aiding and abetting. We, therefore, consider any claim that the court improperly granted summary judgment as to count three abandoned. See, e.g., *Charles* v. *Mitchell*, 158 Conn. App. 98, 102 n.4, 118 A.3d 149 (2015) (failure to brief claim).

"A material fact is a fact that will make a difference in the result of the case." (Internal quotation marks omitted.) *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 193, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). "It is not enough for the moving party merely to assert the absence of any disputed factual issue; the moving party is required to bring forward . . . evidentiary facts, or substantial evidence outside the pleadings to show the absence of any material dispute. . . . The party opposing summary judgment must present a factual predicate for his argument to raise a genuine issue of fact. . . . Once raised, if it is not conclusively refuted by the moving party, a genuine issue of fact exists, and summary judgment is inappropriate." (Internal quotation marks omitted.) Id. "[A] party opposing summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Internal quotation marks omitted.) *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 202, 663 A.2d 1001 (1995). Demonstrating a genuine issue "requires the parties to bring forward before trial evidentiary facts, or substantial evidence outside the pleadings, from which the material facts alleged in the pleadings can warrantably be inferred." *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 378–79, 260 A.2d 596 (1969).

"The burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at the prima facie stage is de minim[i]s. . . . Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory

motive." (Citation omitted; internal quotation marks omitted.) *Chambers* v. *TRM Copy Centers Corp.*, 43 F.3d 29, 37–38 (2d Cir. 1994).

"On appeal, [an appellate court] must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . [Appellate] review of the trial court's decision to grant [a] defendant's motion for summary judgment is plenary." (Internal quotation marks omitted.) *Rivers* v. *New Britain*, supra, 288 Conn. 10.

I

The plaintiff claims that in ruling on the defendant's motion for summary judgment, the court improperly applied the pretext/*McDonnell Douglas-Burdine* model of analysis rather than the mixed-motive/*Price Waterhouse* model in determining whether he established a prima facie case of employment discrimination. We conclude that the court applied the appropriate model.

"Connecticut statutorily prohibits discrimination in employment based upon race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation, and learning disability or physical disability. General Statutes § 46a-60 (a) (1)." *Levy* v. *Commission on Human Rights & Opportunities*, 236 Conn. 96, 102, 671 A.2d 349 (1996). Our courts look to federal precedent for guidance in applying the act. *Miko* v. *Commission on Human Rights & Opportunities*, 220 Conn. 192, 202, 596 A.2d 396 (1991).

Generally, there are four theories of employment discrimination under federal law. *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 103. In the present case, we are concerned with a claim of

disparate treatment. "Under the analysis of the disparate treatment theory of liability, there are two general methods to allocate the burdens of proof: (1) the mixed-motive/*Price Waterhouse* model . . . and (2) the pretext/*McDonnell Douglas-Burdine* model." (Citation omitted.) Id., 104–105.

"The legal standards governing discrimination claims involving adverse employment actions are well established." *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015). "A mixed-motive [*Price Waterhouse*] case exists when an employment decision is motivated by both legitimate and illegitimate reasons. . . . In such instances, a plaintiff must demonstrate that the employer's decision was motivated by one or more prohibited statutory factors. Whether through direct evidence or circumstantial evidence, a plaintiff must submit enough evidence that, if believed, could reasonably allow a [fact finder] to conclude that the adverse employment consequences resulted because of an impermissible factor. . . .

"The critical inquiry [in a mixed-motive case] is whether [a] discriminatory motive was a factor in the [employment] decision at the moment it was made. . . . Under this model, the plaintiff's prima facie case requires that the plaintiff prove by a preponderance of the evidence that he or she is within a protected class and that an impermissible factor played a motivating or substantial role in the employment decision." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 105–106.

"Often, a plaintiff cannot prove directly the reasons that motivated an employment decision. Nevertheless, a plaintiff may establish a prima facie case of discrimination through inference by presenting facts [that are] sufficient to remove the most likely bona fide reasons

for an employment action . . . .'' (Internal quotation marks omitted.) Id., 107. ''From a showing that an employment decision was not made for legitimate reasons, a fact finder may infer that the decision was made for illegitimate reasons. It is in these instances that the *McDonnell Douglas-Burdine* model of analysis must be employed.'' Id.

The plaintiff claims that the court should have applied the mixed-motive/*Price Waterhouse* model of analysis because he established a prima facie case that the defendant's employment action was motivated by an improper reason, namely, religious discrimination. The trial court disagreed, as stated in a footnote in its memorandum of decision: ''In [his] objection to the defendant's motion for summary judgment, the plaintiff argues that his employment discrimination claim is entitled to the *Price Waterhouse* mixed-motive analysis. 'A mixed motive case exists when an employment decision is motivated by both legitimate and illegitimate reasons.' [Id.], 105. In his complaint and affidavit submitted with the objection to the motion for summary judgment, however, the plaintiff does not allege that his termination was the result of legitimate and illegitimate reasons, but rather alleges facts which demonstrate that the defendant's reason for termination was a pretext for illegal religious discrimination. Thus, the *McDonnell Douglas-Burdine* pretext model of analysis, instead of the *Price Waterhouse* mixed-motive analysis, applies.'' On the basis of our plenary review of the plaintiff's second revised complaint and his affidavit in opposition to the defendant's motion for summary judgment, we conclude that the plaintiff did not allege that he was fired for both legitimate and illegitimate reasons. We therefore agree with the trial court that the pretext/*McDonnell Douglas-Burdine* model of analysis applied.

II

The plaintiff's second claim is that even if the court properly determined that the pretext/*McDonnell Douglas-Burdine* model of analysis was appropriate, the court improperly found that the defendant had demonstrated the absence of any genuine issue of material fact as to whether the circumstances under which he was fired gave rise to an inference of discrimination. We do not agree.

Under the pretext/*McDonnell Douglas-Burdine* analysis, "the employee must first make a prima facie case of discrimination. . . . In order for the employee to first make a prima facie case of discrimination, the plaintiff must show: (1) the plaintiff is a member of a protected class; (2) the plaintiff was qualified for the position; (3) the plaintiff suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances that give rise to an inference of discrimination. . . . The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. . . . This burden is one of production, not persuasion . . . . The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias." (Citations omitted; internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 142 Conn. App. 756, 769–70, 66 A.3d 911 (2013), rev'd in part on other grounds, 316 Conn. 65, 111 A.3d 453 (2015); see also *Craine* v. *Trinity College*, 259 Conn. 625, 636–37, 791 A.2d 518 (2002).Circumstances contributing to a permissible inference of discriminatory intent under the fourth *McDonnell Douglas-Burdine* factor include (1) the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; (2) the employer's criticism of the plaintiff's

performance in ethnically degrading terms or invidious comments about others in the employee's protected group; (3) the more favorable treatment of employees not in the protected group; or (4) the sequence of events leading to the plaintiff's discharge or the timing of the discharge. See *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37.

The defendant set forth the following facts in support of its motion for summary judgment.[5] The plaintiff was employed by the defendant from September, 2010, through August 3, 2012, to perform services at the apartments that are managed by WinnResidential. WinnResidential is a long-standing client of the defendant for which it provides cleaning and maintenance services at numerous locations. Initially, the plaintiff was hired as a cleaner/porter, but he was promoted to acting supervisor of a four person cleaning crew in September, 2011. He reported to Cifuentes, the defendant's operations manager for the Hartford area. Cifuentes was responsible for ensuring that the defendant's employees delivered superior services to its clients. He visited employees at their job sites one to three times a month. He also served as the liaison between the defendant and its clients with respect to complaints.

During the time that he was employed by the defendant, the plaintiff was the chaplain of his church, and Cifuentes knew of that affiliation. In March, 2012, the plaintiff recommended that the defendant hire Agosto, the pastor of the plaintiff's church. Cifuentes informed the plaintiff that if the defendant hired Agosto, the plaintiff could not treat him any differently than he treated other members of the cleaning crew, explaining that as a supervisor, the plaintiff had to treat all of the cleaners

[5] Attached to the memorandum of law were numerous exhibits, including some of the plaintiff's employment records and affidavits from Cifuentes, Hagan, Daisy Alejandro and Joseph Deming of WinnResidential.

whom he supervised fairly and equally and not give any one of them preferential treatment, even if they were friends outside of work.

In May or early June, 2012, Cifuentes received complaints from members of the plaintiff's cleaning crew that the plaintiff was not distributing work assignments fairly. According to members of the crew, the plaintiff frequently assigned " 'easy' " jobs to Agosto and more demanding work to them. In addition, they complained that the plaintiff allowed Agosto to take extra breaks and to spend time talking with residents during work hours.[6] After Cifuentes learned of the complaints, he informed the plaintiff of them and reminded him that as a supervisor, he was responsible for keeping Agosto focused on work and minimizing his interaction with residents during work hours. Moreover, Cifuentes reminded the plaintiff that he should not treat Agosto more favorably than the other members of his crew.

In June, 2012, Cifuentes learned that Daisy Alejandro, assistant manager of the apartments, on a number of occasions had observed Agosto standing in the lobby talking with residents when he should have been working, and that he was talking to the residents about church and God. Alejandro also heard complaints from members of the cleaning crew that the plaintiff assigned Agosto " 'easy' " jobs, while they were assigned more demanding work. John Deming, WinnResidential's superintendent for the apartments, witnessed similar conduct. According to Deming, the plaintiff and Agosto were not performing to WinnResidential's standards and their work was not being completed in a timely manner. Deming thought that the plaintiff was losing control over his crew and that he lacked the character to ensure that his crew was performing as it should.

[6] To ensure the delivery of efficient, reliable and high quality services, Cifuentes attested, the defendant instructed its employees to limit their interaction with the tenants and employees of clients at work sites.

In June, 2012, Alejandro, Deming, and Hagan met to discuss the performance of the defendant's employees. Hagan noted that the plaintiff was giving preferential treatment to Agosto by giving him easier tasks and allowing him to speak with residents rather than work. She was of the opinion that the plaintiff's treatment of Agosto was not conducive of a good working environment because a supervisor should treat each of his subordinates fairly and equally. The fact that the plaintiff was not treating the members of the crew fairly and equally led three members of the crew to complain to Alejandro. Hagan also was concerned about fair housing laws, which, she stated, do not permit religion to be discussed.

On June 14, 2012, Cifuentes met with the plaintiff alone to address Hagan's concerns about his performance as a supervisor. He gave the plaintiff a verbal warning and repeated his instructions that the plaintiff was to treat all members of his crew equally and to limit Agosto's nonwork-related interaction with residents. Cifuentes then met with the plaintiff and Agosto together. Cifuentes instructed Agosto to focus on work and minimize his interaction with residents during working hours and issued a written warning to Agosto. The warning form contained a space where an employee could state reasons why he disagreed with the warning received.[7] Agosto did not make a written statement and left the space blank.

On June 21, 2012, the plaintiff returned to his position as a cleaner. On June 22, 2012, Hagan sent an e-mail to Cifuentes about an incident involving Agosto and the plaintiff. Several tenants had complained that during a church service, Agosto read the names of residents who

[7] That section of the form states that "[t]he absence of any statement on the part of the EMPLOYEE indicates his/her agreement with the report as stated."

were in danger of being evicted due to poor housekeeping, nonpayment of rent, or were "bad" tenants. The plaintiff had helped Agosto compile the list of names. Hagan was concerned that the plaintiff and Agosto had accessed and misused private and confidential information that they saw in the management office. Hagan informed Cifuentes that the misuse of the information violated WinnResidential's professional conduct policy and its restrictions on the use of information by the defendant's employees that they viewed or obtained while they were working. In addition, Alejandro had received complaints that the plaintiff had been "bad-mouthing" WinnResidential by telling residents that the "office doesn't do anything, and that's why nothing gets done . . . ." He also was warning nonresidents who were in the apartments when staff was planning to enter the apartments so that the nonresidents could leave before the staff arrived. In addition, the plaintiff was hanging out with a female who lives across the street from the apartments. Hagan subsequently requested that the defendant remove Agosto and the plaintiff from their positions at the apartments.[8] WinnResidential also did not want them to work at any of its other properties. Cifuentes confirmed Hagan's request on July 26, 2012.

[8] In her affidavit that was submitted with the defendant's motion for summary judgment, Hagan attested in part: "In or about June of 2012, staff performance was discussed among . . . Deming . . . Alejandro . . . and me. It was brought to my attention that [the plaintiff] gave preferential treatment to Agosto. He called him pastor in the workplace. We did not want him to do that because it was a title of respect and authority while [the plaintiff] was to be the supervisor. It was also not conducive to a good working environment because the supervisor should be treating each of his subordinates fairly and equally—it was creating a problem as the other three workers were complaining to [Alejandro]. I also was concerned about Fair Housing Laws where religion was not to be discussed at all. It was also brought to my attention that Agosto engaged in excessive interaction [apartment] residents during working hours when he should be working, not socializing. . . . It was also reported to me that Agosto was talking to residents about church, religion and God when he was to be working."

On the basis of Hagan's request, as well as Cifuentes' continuing concerns about the plaintiff's and Agosto's job performance, Cifuentes determined that it was necessary to replace both men as soon as the defendant was able to hire qualified replacements. In his affidavit, Cifuentes attested that the defendant strives to provide the best possible service to its clients. It is the custom and practice of the defendant to comply, as soon as practicable, with any client's legitimate request to remove one of the defendant's employees from a job site. As a consequence of the defendant's hiring requirements,[9] it took the defendant approximately six weeks to hire qualified replacements for the plaintiff and Agosto.

On August 3, 2012, Cifuentes met with both Agosto and the plaintiff and terminated their employment. The employment warning notice that Cifuentes issued to the plaintiff on August 3, 2012, stated that the plaintiff had been warned several times regarding not only his own conduct as supervisor, but also the conduct of the crew members for whom he was responsible. The warning notice stated that the plaintiff's employment was terminated due to his ongoing conduct and performance issues, particularly on "[June 7, 2012, June 19, 2012, and July 30, 2012]." The plaintiff did not make a statement objecting to the warning or termination on the form in the space provided. See footnote 7 of this opinion.

Cifuentes attested that it is very important to the defendant that WinnResidential be satisfied with the quality of the defendant's employees. The defendant was concerned that by failing to accommodate Hagan's request that the plaintiff and Agosto be removed, the

[9] The defendant requires potential employees to undergo drug testing and background checks.

whole WinnResidential account could be put in jeopardy, which could have "cost [five] other people to lose their jobs."

The plaintiff opposed the defendant's motion for summary judgment by putting forth facts that are for the most part consistent with those presented by the defendant. The plaintiff attested that when the defendant hired Agosto, Cifuentes told the plaintiff that, while at work, he could not refer to Agosto as "pastor" or give him the respect ordinarily given to a pastor. Also, Hagan initiated a meeting with Agosto and the plaintiff because she had been advised by members of the plaintiff's cleaning crew that he was assigning Agosto easier work. On June 14, 2012, Hagan told the plaintiff that he needed to treat Agosto the same way he treated other workers and not treat him with the respect of a pastor when they were at work. Hagan brought Agosto into the meeting and gave him a warning about speaking to residents while at work and using terms such as "God bless." The plaintiff acknowledged that Hagan sent Cifuentes an e-mail about information she had received from Alejandro concerning Agosto's reading the names of residents at church. Hagan assumed that the plaintiff had given Agosto confidential information. The plaintiff denied that Agosto read any names of residents at church or that he had access to confidential information that he gave to Agosto.

The plaintiff further attested that the Cintrons made false complaints to Alejandro that the plaintiff had told residents that the office "doesn't do anything, and that's why nothing gets done," and that the plaintiff spends time on his phone talking to female residents. The plaintiff denied the complaints. He accused the Cintrons of making the false complaints in retaliation for Agosto's having reprimanded them for playing music at an inappropriate time during church. The plaintiff, however,

acknowledged that Hagan requested that Cifuentes remove him from his position as a cleaner/porter.

With respect to the August 3, 2012 meeting when Cifuentes fired him, the plaintiff attested: "Cifuentes called a meeting to officially [terminate] Mr. Agosto from his position as cleaner/porter while I was present as his supervisor. When I referred to Mr. Agosto as 'pastor' during this meeting, Mr. Cifuentes got immediately angry and immediately removed me from my position as well." Finally, the plaintiff denied that he had any performance issues during the time of his employment with the defendant and stated that Riddle previously had praised his appointment as a temporary supervisor.

In applying the pretext/*McDonnell Douglas-Burdine* model to the facts presented by the parties, the court noted that the plaintiff alleged that he was a member of a protected class, was qualified for his position and was fired from his position due to his use of the term "pastor" when referring to Agosto, his coworker, in the presence of Cifuentes. The plaintiff asserted that because the defendant disapproved of its employees using religious terms such as "pastor" to refer to one another while they were at work and because the defendant was aware of the plaintiff's status as chaplain in Agosto's church, the plaintiff's termination from employment occurred under circumstances giving rise to an inference of religious discrimination. The court, however, found that the facts failed to establish that the defendant harbored any bias that created an inference of discrimination and that there were no genuine issues of material fact in that regard.

On appeal, the plaintiff argues that the court erred in concluding that there were no genuine issues of material fact because trial courts should be cautious when granting summary judgment in employment discrimination cases when an employer's intent is in question. See

Miller v. *Edward Jones & Co.*, 355 F. Supp. 2d 629, 636 (D. Conn. 2005) (United States Court of Appeals for the Second Circuit cautioned district courts that direct evidence of intent rarely found). He argues that evidence of an employer's discriminatory intent will rarely be found and that affidavits must be carefully scrutinized for circumstantial proof, which, if believed, shows discrimination. Id. Moreover, intent raises an issue of material fact that cannot be decided on a motion for summary judgment. *Picataggio* v. *Romeo*, 36 Conn. App. 791, 794, 654 A.2d 382 (1995). He concedes, however, that the quantum of evidence produced by the defendant outweighed his evidence, but he insists that he put forth some evidence that gives rise to an inference of religious discrimination on the part of the defendant.

In its brief on appeal, the defendant countered the plaintiff's claim of prima facie discrimination with a number of nondiscriminatory reasons it had to terminate the plaintiff's employment, none of which had anything to do with his religion or church membership: (1) as supervisor of a cleaning crew, the plaintiff elevated Agosto above his coworkers, which created morale problems; (2) WinnResidential reasonably believed and communicated to the defendant that the plaintiff helped Agosto obtain confidential information about the status of certain residents that Agosto then published in his church, (3) the plaintiff disparaged WinnResidential to its tenants; and (4) WinnResidential asked the defendant to replace the plaintiff who, as a supervisor, elevated Agosto above his fellow workers, helped Agosto obtain confidential information that he published, and disparaged WinnResidential.

On appeal, the plaintiff argues that he presented sufficient evidence from which a reasonable fact finder could conclude that the basis of the defendant's motivation to terminate his employment was his religion. The plaintiff's argument is founded on his view of the time

and manner in which Cifuentes fired him. In the plaintiff's mind, Cifuentes met with the plaintiff and Agosto on August 3, 2012, for the purpose of firing only Agosto. Thereafter, when the plaintiff referred to Agosto as pastor, Cifuentes became angry and fired him as well. In other words, religion was Cifuentes' motivating factor at the time he fired the plaintiff. See *Levy* v. *Commission on Human Rights & Opportunities*, supra, 236 Conn. 106 (critical fact whether impermissible motive was factor at time termination decision was made). The plaintiff contends that Cifuentes' action directly reflects discrimination on the basis of the plaintiff's religion and permits the fact finder to conclude that the adverse employment consequence was the result of an impermissible factor. He also argues that there is nothing in the record indicating that he was warned several times about his own behavior and that of members of his crew, and there is nothing in the record to confirm that he gave Agosto easier work assignments or that he permitted him to socialize with residents rather than work.

To bolster his position that he established a prima facie case of discrimination, the plaintiff cites Hagan's affidavit, in which she attests that she had heard reports that in the workplace, the plaintiff referred to Agosto as "pastor." She attested to her belief that the use of such terms is not conducive to a good working environment. Hagan's attestations, however, go to her reasons for not wanting the plaintiff and Agosto to work at the apartments or any site managed by WinnResidential. Significantly, Hagan was employed by WinnResidential, not by the defendant. She, therefore, was not the defendant's agent.

"[R]emarks made by someone other than the person who made the decision adversely affecting the plaintiff may have little tendency to show that the decision-maker was motivated by the discriminatory sentiment

expressed in the remark." *Tomassi* v. *Insignia Financial Group, Inc.*, 478 F.3d 111, 115 (2d Cir. 2007), abrogated in part on other grounds by *Gross* v. *FBL Financial Services, Inc.*, 557 U.S. 167, 177–78, 129 S. Ct. 2343, 174 L. Ed. 2d 119 (2009). Cifuentes was requested and motivated to fire both the plaintiff and Agosto in June, 2012, when he learned that WinnResidential did not want either man to work at the apartments because the plaintiff gave Agosto preferential treatment, they took confidential information from the office and published it, the plaintiff denigrated WinnResidential, and he helped nonresidents avoid detection. Cifuentes' job was to ensure that the defendant's employees performed to the satisfaction of its clients. If WinnResidential was not happy with the plaintiff and Agosto, the defendant risked losing the account if it did not fire them.

In responding to the plaintiff's arguments on appeal, the defendant has undertaken an analysis of the *Chambers* factors. "Circumstances contributing to a permissible inference of discriminatory intent may include [1] criticism of the plaintiff's performance in [discriminatory] terms . . . invidious comments about others in the employee's protected group . . . [2] the more favorable treatment of employees not in the protected group . . . or [3] the sequence of events leading to the plaintiff's discharge . . . or the timing of the discharge . . . ." (Citations omitted.) *Chambers* v. *TRM Copy Centers Corp.*, supra, 43 F.3d 37. "Since the court, in deciding a motion for summary judgment, is not to resolve issues of fact, its determination of whether the circumstances giv[e] rise to an inference of discrimination must be a determination of whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive." (Internal quotation marks omitted.) Id., 38. "In the absence of any affirmative

evidence of a causal connection between [the defendant's agent's] discriminatory animus toward the plaintiff and the defendant's termination of her employment, no inference of the defendant's discriminatory intent can be made." *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 80, 111 A.3d 453 (2015).

As to the first *Chambers* factor, the defendant represents that Cifuentes was the only agent of the defendant who interacted with the plaintiff and did so in a professional manner. In his affidavit, Cifuentes attested that he informed the plaintiff of the complaints he had received regarding the plaintiff's preferential treatment of Agosto, that the plaintiff needed to treat all members of the crew equally, and that it was his responsibility to keep Agosto focused on work and to minimize his interactions with tenants. There are no religious references in Cifuentes' interaction with the plaintiff. In objecting to the motion for summary judgment, the plaintiff did not take issue with Cifuentes' affidavit or otherwise produce countervailing facts. The plaintiff also did not take issue with Cifuentes' description of the June 14, 2012 meeting with the plaintiff and Agosto together and when Cifuentes gave Agosto a written warning. Even if, as the plaintiff claims, Cifuentes told Agosto not to talk to residents about religion, that admonishment is in keeping with the defendant's policy that employees limit their interaction with residents during working time. Analysis of this factor does not tip in the plaintiff's favor.

The second *Chambers* factor is whether the defendant treated employees who are not members of the plaintiff's protected group more favorably. The plaintiff presented no evidence that the defendant treated others more favorably than it treated the plaintiff or Agosto. It was the plaintiff who gave Agosto more favorable treatment than other members of the cleaning crew he supervised. This factor weighs against the plaintiff.

As to the sequence of events leading to the plaintiff's employment termination, Cifuentes made the decision to fire him on June 26, 2012, two weeks after Cifuentes met with the plaintiff and Agosto to discuss their deficient performances. Cifuentes made the decision to fire them after he heard from Hagan that residents had reported that the names of residents were read in church, and that the plaintiff was telling tenants that the "office doesn't do anything, and that's why nothing gets done." Hagan requested that the defendant remove the plaintiff and Agosto from the apartments and not place them at any location managed by WinnResidential. On June 26, 2012, Cifuentes clarified with Hagan that he should replace the men as soon as qualified employees were found.

The plaintiff's assertion that Cifuentes' conduct when he fired him and Agosto raised an inference of discrimination is unsupported by the record. "A mere assertion of fact in the affidavit of the party opposing summary judgment is not enough to establish the existence of a material fact that, by itself, defeats a claim for summary judgment." *Campbell* v. *Plymouth*, 74 Conn. App. 67, 83, 811 A.2d 243 (2002). In his affidavit, Cifuentes stated that he met with the plaintiff and Agosto on August 3, 2012, "and told them that they were terminated due to ongoing conduct and performance issues." By contrast, the plaintiff stated that during the meeting "[w]hen I referred to Mr. Agosto as 'pastor' during this meeting, Mr. Cifuentes got immediately angry and immediately removed me from my position as well." Neither Agosto nor the plaintiff referenced Cifuentes having gotten angry in the employee's remarks section of their August 3, 2012 warning records. This factor does not weigh in favor of an inference of a discriminatory motive.

Finally, the defendant argues that the "same-actor inference" negates any inference of discrimination because Cifuentes hired and fired Agosto within a short

period of time. "[W]here the person who made the decision to fire was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire." (Internal quotation marks omitted.) *Schnabel* v. *Abramson*, 232 F.3d 83, 91 (2d Cir. 2000). "The premise underlying this inference is that if the person who fires an employee is the same person that hired him, one cannot logically impute to that person an invidious intent to discriminate against the employee. Such an inference is strong where the time elapsed between the events of hiring and firing is brief. . . . [T]he same-actor inference is permissive, not mandatory, [but] it applies with greatest force where the act of hiring and firing are not significantly separated in time . . . ." (Citations omitted; internal quotation marks omitted.) *Saliga* v. *Chemtura Corp.*, Docket No. 12-cv-832 (VAB), 2015 U.S. Dist. LEXIS 133135, *26 (D. Conn. October 1, 2015). At the time Cifuentes hired Agosto, he knew of his religion and relationship to the plaintiff. He hired and fired Agosto within approximately five months. What happened in the interim is that Cifuentes received reports from WinnResidential personnel that the plaintiff gave Agosto preferential treatment on the cleaning crew, provided him with confidential information about tenants from the apartment office, and talked negatively about WinnResidential. The defendant argues that these are reasons not to draw an inference of religious discrimination on the defendant's part when it terminated the plaintiff's employment.

We find the defendant's analysis of the underlying facts and *Chambers* analysis persuasive that the trial court properly determined that there were no genuine issues of material fact that the defendant harbored bias or a discriminatory intent on the basis of the plaintiff's religion. We emphasize the fact that the defendant hired the plaintiff as a cleaner/porter in 2010 and promoted

him to acting crew supervisor in 2011. The plaintiff has not pointed to any facts by which one could infer that the defendant discriminated against him on the basis of his religion and church membership prior to the hiring of Agosto, the plaintiff's pastor. The defendant's complaints about the plaintiff's performance arose when he gave Agosto preferential treatment at the expense of other members of the cleaning crew and permitted Agosto to interact with tenants during working hours. For all of the foregoing reasons, the plaintiff's claim fails.

III

The plaintiff's third claim is that the court improperly granted summary judgment on his retaliation claim because the defendant failed to meet its burden to show that there were no genuine issues of material fact as to whether the plaintiff engaged in a protected activity. We disagree.

In count two of his second revised complaint, the plaintiff alleged that the defendant retaliated against him in violation of § 46a-60 (a) (4). In count two the plaintiff realleged his claims of employment discrimination and, among other things, that he held a bona fide religious belief and was chaplain at the Tabernacle of Reunion Church where Agosto was the pastor. He alleged that the defendant's agents were aware of his religious beliefs and relationships and discriminated against him on the basis of his religion and "retaliated against [him] by discharging him for practicing his religious beliefs as more fully" alleged in his complaint.

Section 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . . (4) [f]or any . . . employer . . . to discharge . . . or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed

a complaint or testified or assisted in any proceeding under section 46a-82, 46a-83 or 46a-84 . . . ."

The trial court found that the plaintiff alleged that he had engaged in protected activity when he openly called Agosto "pastor" in Cifuentes' presence. The court concluded that the use of the term "pastor" in defiance of the defendant's request that he not do so at work is neither a formal nor informal protest of discrimination, but rather a continuation of a behavior that the defendant advised the plaintiff against. The plaintiff's actions, therefore, do not fall under the category of activity protected by § 46a-60 (a) (4), and he failed to establish a prima facie case of retaliation under the act.

A prima facie case of retaliation requires a plaintiff to show (1) that he or she participated in a protected activity that was known to the defendant, (2) an employment action that disadvantaged the plaintiff, and (3) a causal relation between the protected activity and the disadvantageous employment action. See *Hebrew Home & Hospital, Inc.* v. *Brewer*, 92 Conn. App. 762, 770, 886 A.2d 1248 (2005). "The term protected activity refers to action taken to protest or oppose statutorily prohibited discrimination." (Internal quotation marks omitted.) *Jarrell* v. *Hospital for Special Care*, 626 Fed. Appx. 308, 311 (2d Cir. 2015). "The law protects employees in the filing of formal charges of discrimination as well as in the making of informal protests of discrimination, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support of coworkers who have filed formal charges." (Internal quotation marks omitted.) *Matima* v. *Celli*, 228 F.3d 68, 78–79 (2d Cir. 2000).

On appeal, the plaintiff claims that he alleged that he participated in a protected activity by continuing to refer to Agosto as "pastor" despite having been told

that he should not do so while the two were working. The plaintiff, however, did not allege that he participated in a protected activity by formally or informally protesting the defendant's alleged religious discrimination.

As previously stated, Practice Book § 17-49 provides that summary judgment "shall be rendered forthwith if the *pleadings*, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) "[I]t [is] incumbent upon the party opposing summary judgment to establish a factual predicate from which it can be determined, as a matter of law, that a genuine issue of material fact exists." (Internal quotation marks omitted.) *Dinnis* v. *Roberts*, 35 Conn. App. 253, 260, 644 A.2d 971, cert. denied, 231 Conn. 924, 648 A.2d 162 (1994). "[M]aterial facts are those that will make a difference in the case, and they must be pleaded." *McCann Real Equities Series XXII, LLC* v. *David McDermott Chevrolet, Inc.*, 93 Conn. App. 486, 511, 890 A.2d 140, cert. denied, 277 Conn. 928, 895 A.2d 798 (2006). "The purpose of a complaint . . . is to limit the issues at trial, and it is calculated to prevent surprise. . . . It must provide adequate notice of the facts claimed and the issues to be tried." (Citation omitted; internal quotation marks omitted.) *New Milford Savings Bank* v. *Roina*, 38 Conn. App. 240, 244, 659 A.2d 1226, cert. denied, 235 Conn. 915, 665 A.2d 609 (1995). Even a generous reading of the plaintiff's allegations of retaliation do not put the defendant or the court on notice that he engaged in a protected activity under § 46a-60 (a) (4). We agree with the trial court that the facts alleged by the plaintiff in his retaliation claim do not rise to the level of a protected activity.

Moreover, the plaintiff failed to raise a genuine issue of material fact. The plaintiff acknowledges that he did

not formally protest the defendant's telling him not to refer to Agosto as "pastor." He claims on appeal, however, that his reference to Agosto as "pastor" at the time Cifuentes fired Agosto constituted an informal complaint. The plaintiff, however, did not document his protest in the employee's remarks section of the employee warning record. He also did not attest to lodging an informal protest in his affidavit filed in opposition to the defendant's motion for summary judgment.

"[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A party opposing a motion for summary judgment must substantiate its adverse claim by showing that there is a genuine issue of material fact together with the evidence disclosing the existence of such an issue." (Citation omitted; internal quotation marks omitted.) *Altfeter* v. *Naugatuck*, supra, 53 Conn. App. 801. Because he did not allege that he had engaged in a protected activity or present evidence that he formally or informally protested the defendant's alleged religious discrimination, his claim on appeal fails. The court, therefore, properly granted summary judgment on count two of the second revised complaint.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

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[10] To be clear, the resolution of the religious discrimination claim in this case is limited to the alleged facts. The plaintiff's claim does not turn on the use of religious titles and honorifics in the workplace, and we offer no opinion in that regard.

CAROL WALENSKI *v.* CONNECTICUT STATE EMPLOYEES RETIREMENT COMMISSION ET AL.
(AC 40603)

Lavine, Moll and Bishop, Js.

Syllabus

The plaintiff appealed to the trial court from the decision of the defendant Connecticut State Employees Retirement Commission denying her claim for certain spousal retirement benefits pursuant to the State Employees Retirement Act (§ 5-152 et seq.). The plaintiff's husband, W, a former state employee, had elected a retirement benefit option that reduced his retirement benefits during his lifetime and provided spousal benefits to his surviving spouse after his death. At the time of his retirement, W was married to his first wife. Following his divorce from his first wife but before he had married the plaintiff, W attempted to change the beneficiary of his surviving spouse benefits, but he was informed that he could not do so. Thereafter, W and the plaintiff were married and remained so until W's death, after which the plaintiff contacted the retirement services division of the Office of the State Comptroller to discuss her claim that she was entitled to receive spousal retirement benefits. The assistant director of the division sent the plaintiff a letter that advised her that the letter was an administrative denial of her request for spousal benefits and informed her of her right to make a written claim to the commission requesting review of the administrative denial. In response, the plaintiff made a written request for review and for a full hearing before the commission but did not receive a response. The plaintiff then appealed to the trial court, and the commission filed a motion to dismiss on the ground that the court lacked subject matter jurisdiction because the plaintiff failed to exhaust her administrative remedies. During the hearing on the motion to dismiss, the commission expressed a willingness to reach a final decision in the case by waiving the fifth step of its administrative process but asked that the plaintiff complete the fourth step by requesting reconsideration of the denial of her claim for benefits. Relying on the commission's representation, the trial court ordered that the case be remanded to the commission for a hearing and a final decision on the plaintiff's claim, and it retained jurisdiction over the matter. Thereafter, the commission held an informal hearing, denied the plaintiff's request for reconsideration and indicated in a letter to the plaintiff that the act did not allow for a change in election or beneficiary after benefits had been provided to a member. Following the reinstatement of the plaintiff's appeal, the court, sua sponte, questioned its subject matter jurisdiction over the matter and ordered supplemental briefing. Thereafter, the court rendered judgment

dismissing the appeal, concluding that it lacked subject matter jurisdiction because the plaintiff had not appealed from a final decision and had failed to exhaust her administrative remedies. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on her claim that the trial court had subject matter jurisdiction over her appeal because the commission agreed that the court had jurisdiction and because the court's order remanding the case to the commission and its decision to exercise jurisdiction over the appeal at that time constituted the law of the case; it is well settled that parties cannot, by waiver or agreement, confer subject matter jurisdiction on the court, and, under the law of the case doctrine, one judge of the Superior Court is not bound by a prior judge's decision regarding the court's subject matter jurisdiction.
2. The plaintiff's claim that the dismissal of her appeal was improper because she appealed from a final decision by an administrative agency in accordance with the applicable statute (§ 4-166 [5] [A] and [C]) was unavailing, as the plaintiff did not possess a statutory or regulatory right to have the commission decide her rights or privileges in a hearing and, thus, did not appeal from an agency determination in a contested case, which is a proceeding in which the legal rights, duties or privileges of a party are required by statute or regulation to be determined by an agency after an opportunity for a hearing; even if this court assumed that the plaintiff's legal rights or privileges were at issue before the commission, neither the governing statutes nor the applicable regulations required the commission to hold a hearing to determine her rights or privileges in a hearing, and neither the letter the plaintiff received from the division's assistant director notifying her that her request for spousal benefits had been administratively denied, nor the commission's denial of her claim following the trial court's remand order were agency determinations in a contested case as defined by the act, and the fact that a hearing was in fact held before the commission did not render the plaintiff's appeal as having been taken from a final decision under the act.

Argued May 16—officially released October 16, 2018

Procedural History

Appeal from the decision by the named defendant denying the plaintiff's claim for certain survivor benefits, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Schuman*, *J.*, granted in part the defendants' motions to dismiss; thereafter, the court, *Huddleston*, *J.*, rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. *Affirmed.*

Harold J. Geragosian, for the appellant (plaintiff).

Cindy M. Cieslak, with whom, on the brief, was *Michael J. Rose*, for the appellee (named defendant).

Alayna M. Stone, assistant attorney general, with whom, on the brief, was *George Jepsen*, for the appellees (defendant state of Connecticut et al.).

Robert J. Kor, with whom was *Marialta Sparagna*, for the appellee (defendant Arlene M. Walenski).

Opinion

LAVINE, J. The sole issue in this appeal is whether the trial court properly dismissed the administrative appeal filed by the plaintiff, Carol Walenski, for lack of subject matter jurisdiction due to her failure to obtain a final decision from, or to otherwise exhaust her administrative remedies with, the named defendant, the Connecticut State Employees Retirement Commission (commission).[1] On appeal, the plaintiff claims that the trial court, *Huddleston, J.*, improperly dismissed her appeal because (1) the commission and a prior judge of the Superior Court concluded that the court had subject matter jurisdiction, and (2) she appealed from a final decision by an administrative agency pursuant to General Statutes § 4-166 (5) (A) and (C).[2] We affirm the judgment of the trial court.

The present appeal involves a rather tangled procedural history that arose when the plaintiff, the second wife of a former state employee, Walter Walenski (Walter), was denied certain spousal retirement benefits in accordance with the State Employees Retirement Act (act), General Statutes § 5-152 et seq. At the root of the appeal was Walter's decision to elect a retirement

[1] The state of Connecticut, the Connecticut state comptroller and Arlene M. Walenski also were named as defendants.

[2] It is undisputed that the commission is an "agency" under § 4-166 (1).

benefit option that reduced his retirement benefits during his lifetime and provided spousal benefits to his surviving spouse after his death. See General Statutes § 5-165 (a).

The trial court's memorandum of decision and the record reveal the following undisputed facts and procedural history that are relevant to this appeal. Walter retired from state employment in 1989. At the time he retired, Walter was married to his first wife the defendant Arlene M. Walenski (Arlene).[3] On September 30, 1997, Walter and Arlene divorced and, in their separation agreement, agreed that each of them would retain his or her own pension free and clear of any claims from the other. In 1997, sometime after he was divorced from Arlene, but before he married the plaintiff, Walter attempted to change the beneficiary of his surviving spouse benefits. He was informed that he could not do so. On April 18, 1998, approximately seven months after he was divorced from Arlene, Walter married the plaintiff. Walter and the plaintiff remained married until Walter passed away on May 20, 2015.

The plaintiff subsequently contacted the retirement services division of the Office of the State Comptroller (retirement services) after Walter's death to discuss receiving spousal retirement benefits.[4] Cindy Wilson, a representative of retirement services, sent the plaintiff a letter, dated June 4, 2015, indicating that she was "entitled to receive 50 [percent] of [Walter's retirement] benefits . . . ." After the plaintiff received this correspondence, however, another representative from

[3] Walter and Arlene were married on July 4, 1959.

[4] Pursuant to the act, the commission is an independent entity within retirement services that administers the state employees retirement system. See General Statutes § 5-155a (a) ("[t]he State Employee Retirement Commission shall be within the Retirement Division of the office of the Comptroller for administrative purposes only"); see also General Statutes § 5-155a (c) ("[t]he [State Employees] Retirement Commission shall administer this retirement system").

retirement services verbally told her that the information in the letter she received from Wilson was incorrect and that her application for benefits was denied. In a follow up letter, dated July 14, 2015, Bonnie Price, the assistant director of retirement services, "advised [the plaintiff] that [the letter was] an administrative denial [of her request for spousal benefits]" and informed her that she "[had] the right to make a written claim to the [commission] requesting review of [the] administrative denial."[5] Thereafter, on July 30, 2015, the plaintiff made a written request for review and for a full hearing "before the commission to exhaust available remedies . . . ." She did not receive a response to her July 30, 2015 letter.

On March 31, 2016, the plaintiff commenced the underlying action and, in an amended complaint, alleged four counts: (1) an administrative appeal from the commission pursuant to General Statutes § 4-183; (2) breach of an agreement; (3) various common-law claims against Arlene; and (4) a request for declaratory judgment.[6] On May 20, 2016, the commission filed a motion to dismiss. The commission argued, among other grounds, that the court lacked subject matter

[5] The July 14, 2015 letter stated in relevant part: "Please be advised that this is an administrative denial for the reasons noted below:

"[1] Pursuant to [§ 5-165] an election or change of election must be filed before retirement payments [begin].

"[2] Specifically, in the event of remarriage after retirement, Option 'A' is not transferable to the new spouse and the retiree continues to receive the reduced retirement allowance. The benefit is based on the age of the retiree and spouse at the time of election.

"[3] Additionally, the State Employees Retirement System (SERS) Plan rules are not subject to subsequent divorce judgments.

"Notwithstanding the information contained herein, you have the right to make a written claim to the [commission] requesting review of our administrative denial."

[6] The first, second, and fourth counts of her amended complaint were each directed against the commission, the state comptroller, and the state of Connecticut. See footnote 1 of this opinion.

jurisdiction over the claims alleged against it because the plaintiff failed to exhaust her administrative remedies. According to the commission, the plaintiff failed to exhaust its "five-step administrative process."[7] On June 22, 2016, the defendant state of Connecticut and the defendant Connecticut state comptroller filed a joint motion to dismiss. See footnotes 1 and 6 of this opinion. Among other grounds, they, too, argued that the court lacked subject matter jurisdiction over the counts directed against them because the plaintiff failed to exhaust her administrative remedies. The plaintiff opposed the motions to dismiss.

Notwithstanding the arguments regarding the plaintiff's alleged failure to exhaust her administrative remedies, during a hearing on the motions to dismiss, the commission "expressed a willingness to reach a final decision in [the] case by October 20, 2016." More specifically, the commission indicated that it would "waive the fifth step of its administrative process"—i.e., a declaratory ruling—in an effort to avoid further delay, but asked that the plaintiff obtain a "final decision" from the commission by requesting reconsideration (step four of administrative process). See footnote 7 of

[7] The five step administrative process is as follows: (1) a final agency decision from retirement services; (2) review of a claimant's appeal by a subcommittee within the commission, which makes a recommendation to the full commission; (3) the full commission's review of the subcommittee's recommendation, which the full commission will decide to accept or reject; (4) reconsideration of the commission's decision in one of two ways, either (a) reconsideration based upon the record and information before the commission or (b) a hearing in front of the full commission; and (5) a petition for a declaratory ruling, with "the declaratory ruling itself [being] considered the final decision of the commission for purposes of appeal to [the] Superior Court."

On July 20, 2016, prior to the commission filing its motion to dismiss, the subcommittee on purchase of service related matters—a subcommittee within the commission—reviewed the plaintiff's request for spousal benefits and recommended denying her request (step two of administrative process). The commission approved the subcommittee's recommendation on August 18, 2015 (step three of administrative process).

this opinion. Relying on the commission's representation, the court, *Schuman*, *J.*, remanded count one—the administrative appeal—to the commission. Judge Schuman's September 1, 2016 order addressing the motions to dismiss provided in relevant part: "[T]he court remands count one to the full commission to hear, decide, and reach a final decision on the plaintiff's claim by October 20, 2016. The court retains jurisdiction. In the event of a commission decision adverse to the plaintiff, the plaintiff may return to court by motion to reinstate the appeal." The court dismissed counts two and four of the amended complaint due to a lack of subject matter jurisdiction; it stayed count three.[8]

On September 15, 2016, in response to Judge Shuman's order, the plaintiff filed a substitute complaint (operative complaint). The operative complaint sounded in two counts: (1) an administrative appeal from the commission pursuant to § 4-183 and (2) a single count directed against Arlene, which alleged various common-law claims.

On October 20, 2016, the commission held an informal hearing and denied what it considered "[the plaintiff's] request for reconsideration of [retirement services'] denial of a spousal benefit." The commission further indicated in a letter, also dated October 20, 2016, that it "agree[d] that [§] 5-165 (a) does not allow for a change in election or beneficiary after benefits have been provided to the member." On October 27, 2016, the plaintiff filed a motion to reinstate the appeal in the Superior Court, which Judge Huddleston granted absent objection.

[8] With respect to count three of the amended complaint, which was directed against Arlene, the court noted that it could not adjudicate that count until the commission made a final ruling on the distribution of Walter's retirement benefits. Thus, the court stayed count three pending disposition of count one.

Following the reinstatement of the plaintiff's appeal, a dispute arose between the parties regarding the proper record before the court. During oral argument addressing the parties' dispute about the record, Judge Huddleston, sua sponte, questioned the court's subject matter jurisdiction. The court ordered supplemental briefing, and in their memoranda of law, both the plaintiff and the commission argued that the court had subject matter jurisdiction.[9] The plaintiff relied primarily on Judge Schuman's September 1, 2016 order and contended that the hearing before the commission on October 20, 2016, was a contested case under § 4-166 (4) and (5). The commission argued that it was futile to remand the case to it and that it had waived the fifth step of its usual administrative procedure. Relying principally on *Derwin* v. *State Employees Retirement Commission*, 234 Conn. 411, 661 A.2d 1025 (1995), and *Ahern* v. *State Employees Retirement Commission*, 48 Conn. App. 482, 710 A.2d 1366, cert. denied, 245 Conn. 911, 718 A.2d 16 (1998), Judge Huddleston disagreed, concluding that the plaintiff had not appealed from a "final decision"; see General Statutes § 4-166 (5); and had failed to exhaust her administrative remedies. See General Statutes § 4-183 (a). This appeal followed.[10]

We begin by setting forth the principles of law governing our standard of review. "In an appeal from the granting of a motion to dismiss on the ground of subject matter jurisdiction, this court's review is plenary. A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally

[9] The state, the comptroller, and Arlene did not file memoranda of law regarding the court's subject matter jurisdiction.

[10] Following the court's dismissal of the administrative appeal, the court, in response to a motion filed by the plaintiff, transferred the remaining count of the operative complaint against Arlene to the regular civil division of the Superior Court.

and logically correct and find support in the facts that appear in the record. . . . It is a familiar principle that a court which exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Berka* v. *Middletown*, 181 Conn. App. 159, 163, 185 A.3d 596, cert. denied, 328 Conn. 939, 184 A.3d 268 (2018).

"When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015).

We quickly can dispose of the plaintiff's first claim on appeal. She first argues that the court had subject matter jurisdiction over her appeal because the commission, in response to Judge Huddleston's supplemental briefing order, agreed that the court had jurisdiction. Second, she argues that Judge Schuman's September 1, 2016 order, and his decision to exercise jurisdiction over the appeal, constituted the "law of the case." As to the first argument, it is well settled that parties cannot, by waiver or agreement, confer subject matter jurisdiction on the court. See *Kleen Energy Systems, LLC* v. *Commissioner of Energy & Environmental Protection*,

319 Conn. 367, 380–81, 125 A.3d 905 (2015). As to the second argument, one judge of the Superior Court, under the law of the case doctrine, is not bound by a prior judge's decision regarding the court's subject matter jurisdiction.[11] See *Lewis* v. *Gaming Policy Board*, 224 Conn. 693, 698–99, 620 A.2d 780 (1993). Accordingly, we are unpersuaded by the plaintiff's contention that Judge Huddleston improperly determined that the court lacked subject matter jurisdiction over her administrative appeal due to the commission's agreement that the court had subject matter jurisdiction or on the basis of Judge Schuman's order of September 1, 2016.

We now turn to the plaintiff's remaining claim on appeal, namely, that she appealed from a final decision by an administrative agency pursuant to § 4-166 (5) (A) and (C).[12] It is well settled that "[t]here is no absolute

[11] Judge Schuman's September 1, 2016 order did not expressly conclude that the court had subject matter jurisdiction. Nonetheless, insofar as his order directed the commission to "reach a final decision" on the plaintiff's claim regarding her entitlement to spousal retirement benefits, the court asserted jurisdiction over the plaintiff's administrative appeal.

The commission argues, as an alternative ground to affirm, that the trial court lacked jurisdiction on September 1, 2016, because, at that point, the plaintiff had failed to exhaust her administrative remedies. We acknowledge this argument and question whether the trial court had jurisdiction to enter its September 1, 2016 order. Given the procedural irregularities of the present case and because the alternative ground to affirm does not affect the outcome of this appeal, we decide whether the trial court lacked subject matter jurisdiction as framed by the plaintiff's arguments on appeal.

[12] The plaintiff does not claim that she has appealed from a declaratory ruling issued by an agency pursuant to General Statutes § 4-176. See General Statutes § 4-166 (5) (B). We therefore do not address whether the plaintiff has appealed from such a ruling. Nonetheless, in *Ahern*, Judge Lavery observed in his concurring opinion that "it appears that the only way to get a 'final decision' from the . . . commission that is appealable to the Superior Court is by seeking a declaratory judgment pursuant to § 4-176 (a)." *Ahern* v. *State Employees Retirement Commission*, supra, 48 Conn. App. 492 n.2 (*Lavery, J.*, concurring); see also *LoPresto* v. *State Employees Retirement Commission*, 234 Conn. 424, 432 n.15, 662 A.2d 738 (1995) ("[t]he commission's declaratory ruling [pursuant to § 4-176 (a)] constituted a 'final decision' for purposes of appeal under § 4-183").

right of appeal to the courts from a decision of an administrative agency. . . . The [Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq.] grants the Superior Court jurisdiction over appeals of agency decisions only in certain limited and well delineated circumstances. . . . Judicial review of an administrative decision is governed by . . . § 4-183 (a) of the UAPA, which provides that [a] person who has exhausted all administrative remedies . . . and who is aggrieved by a final decision may appeal to the superior court . . . .'' (Internal quotation marks omitted.) *Ferguson Mechanical Co.* v. *Dept. of Public Works*, 282 Conn. 764, 771, 924 A.2d 846 (2007). ''Accordingly, [courts] have consistently held that the Superior Court has jurisdiction only over appeals from a 'final decision' of an administrative agency.'' *Derwin* v. *State Employees Retirement Commission*, supra, 234 Conn. 418.

Section 4-166 provides in relevant part: ''As used in this chapter. . . (5) 'Final decision' means (A) the agency determination in a contested case, (B) a declaratory ruling issued by an agency pursuant to section 4-176, or (C) an agency decision made after reconsideration. The term does not include a preliminary or intermediate ruling or order of an agency, or a ruling of an agency granting or denying a petition for reconsideration . . . .''

''A contested case is defined in § 4-166 [4] as a proceeding . . . in which the legal rights, duties or privileges of a party are *required by state statute or regulation* to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . . .[13] Not every matter or issue determined by

[13] Section 4-166 was amended by No. 14-187, § 1, of the 2014 Public Acts (P.A. 14-187), which added additional subdivisions to the statute. Prior to the enactment of P.A. 14-187, a ''contested case'' was defined in § 4-166 (2). A ''contested case'' is now defined in § 4-166 (4). The material portions of § 4-166 remain the same for purposes of this appeal.

Additionally, ''[i]n 2004, the legislature amended the statutory definition of a contested case in § 4-166 [4] to its current form by adding the phrase

an agency qualifies for contested case status. . . . [Our Supreme Court has] determined that even in a case where a hearing is in fact held, in order to constitute a contested case, a party to that hearing must have enjoyed a statutory [or regulatory] right to have his legal rights, duties or privileges determined by that agency holding the hearing. . . . In the instance where no party to a hearing enjoys such a right, the Superior Court is without jurisdiction over any appeal from that agency's determination. . . .

"A party seeking review of a state agency's action, therefore, must establish more than aggrievement (injury in fact); [she] must establish that the injury resulted from a final decision in a contested case . . . . Our courts have had ample opportunity to construe the definition of contested case. The test for determining contested case status has been well established and requires an inquiry into three criteria, to wit: (1) whether a legal right, duty or privilege is at issue, (2) and is statutorily [or regulatorily] required to be determined by the agency, (3) through an opportunity for hearing or in which a hearing is in fact held." (Citations omitted; emphasis in original; footnote added; footnotes omitted; internal quotation marks omitted.) *Ferguson Mechanical Co.* v. *Dept. of Public Works*, supra, 282 Conn. 771–72; see also *Summit Hydropower Partnership* v. *Commissioner of Environmental Protection*, 226 Conn. 792, 800–801, 629 A.2d 367 (1993).

The plaintiff claims that she has, in fact, appealed from a final decision in accordance with § 4-166 (5) (A) and (C). More specifically, she first appears to claim that the letter she received from retirement services on July 14, 2015, which notified her that it was "an administrative denial" of her request for spousal benefits and also informed her of her "right to make a written

'or regulation . . . .' Public Acts 2004, No. 04-94, § 1." *Ferguson Mechanical Co.* v. *Dept. of Public Works*, supra, 282 Conn. 771 n.8.

claim to the [commission] requesting review of [retirement services'] administrative denial," was a "final agency decision." Second, she argues that the October 20, 2016 decision by the commission, which Judge Schuman prompted by his September 1, 2016 order, was "the date of exhaustion of administrative remedies with the [commission] as well as the date of the final decision . . . ." Additionally, she argues that the court had subject matter jurisdiction pursuant to General Statutes § 5-155a (k).[14] We are unpersuaded by the plaintiff's arguments and agree with Judge Huddleston's well reasoned decision that the court lacked subject matter jurisdiction.

As defined by § 4-166 (5) (A), a "final decision" is "the agency determination in a contested case . . . ." Section 4-166 (4), in turn, defines a "contested case" as "a proceeding . . . in which the legal rights, duties or privileges of a party *are required by state statute or regulation* to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . . ." (Emphasis added.) Even if we assume that the plaintiff's legal right or privilege was at issue before the commission, neither the governing statutes nor the

[14] General Statutes § 5-155a (k) provides: "If any claim [for retirement benefits] is denied, a claimant may request that the decision be reviewed and reconsidered by the commission. *Thereafter, any such case shall be decided as a contested case in accordance with chapter 54* [*of the UAPA*]." (Emphasis added.)

We are unpersuaded that the italicized language of § 5-155a (k) transforms the plaintiff's appeal into a "contested case"; see General Statutes § 4-166 (4); and she therefore appealed to the Superior Court from a "final decision." See General Statutes § 4-166 (5) (A). This court previously noted in *Ahern* v. *State Employees Retirement Commission*, supra, 48 Conn. App. 485–86, that § 5-155a (k) was amended during a special session in May, 1994; see Public Acts, Spec. Sess., May 1994, No. 94-1, § 68; to add that "any such case *shall be decided as a contested case in accordance with* [*the UAPA*]." (Emphasis added.) This court held "that the amendment was technical and created no new substantive right to appeal." *Ahern* v. *State Employees Retirement Commission*, supra, 487. Accordingly, "the phrase may not be interpreted to create the right to appeal." Id.

applicable regulations *requires* the commission to hold a hearing to determine her right or privilege in a hearing. See *Ferguson Mechanical Co.*v. *Dept. of Public Works*, supra, 282 Conn. 778 ("because the department was not under a statutory or regulatory mandate to conduct a hearing with respect to the plaintiff's allegations, there was no agency determination in a contested case").

Section 5-155a (g) provides in relevant part: "The commission *may* hold hearings when deemed necessary in the performance of its duty. . . ." (Emphasis added.) Thus, the commission is not required by statute to hold a hearing to determine the plaintiff's right or privilege. See *Derwin* v. *State Employees Retirement Commission*, supra, 234 Conn. 419 n.12 (rejecting plaintiff's claim that he appealed from "contested case" pursuant to § 4-166 (3) (A) [now § 4-166 (5) (A)] "[b]ecause the hearing was not statutorily mandated" under § 5-155a [g]); *Ahern* v. *State Employees Retirement Commission*, supra, 48 Conn. App. 488 (*Lavery, J.*, concurring) ("The statutes governing the state employees retirement commission, General Statutes §§ 5-152 through 5-156f, do not require that a hearing be held to determine a party's legal rights or privileges. Therefore, in any matter brought before this agency, it appears that there can never be a 'contested case' as defined in § 4-166 [4].").

Additionally, the applicable regulations adopted by the commission pursuant to General Statutes § 5-155b do not *require* that a hearing be held.[15] Section 5-155-9 (c) of the Regulations of Connecticut State Agencies

[15] General Statutes § 5-155b provides: "The State Employees Retirement Commission shall adopt regulations, in accordance with the provisions of chapter 54 [of the UAPA], which establish the standards and criteria used by the commission (1) to review and reconsider decisions to deny claims submitted to the commission and (2) to decide contested cases."

Notwithstanding the fact that General Statutes § 5-155 was repealed by No. 83-533, § 53, of the 1983 Public Acts, §§ 5-155-1 through 5-155-13 of the Regulations of Connecticut State Agencies were revised in 2015. Section 5-155-1 of the Regulations of Connecticut State Agencies provides in relevant

provides in relevant part: "Subject to any directives of the commission, all applications to . . . obtain any benefit authorized by law . . . are processed by the retirement division *as routine business*." (Emphasis added.) A claimant has a right to petition the commission for review of an application, but the regulations simply provide that the claim will be placed on the commission's agenda, with the claimant being scheduled to appear "if warranted," and do not explicitly provide for a hearing. See Regs. Conn. State Agencies § 5-155-10. Finally, § 5-155-11 of the Regulations of Connecticut State Agencies provides: "All hearings conducted in the state employees' retirement commission are conducted *in accordance with the requirements of and procedures suggested in sections 4-177 through 4-182 inclusive* of the 1971 Supplement to the General Statutes as the same may be amended from time to time. Conferences, interviews, and informal hearings conducted or held as a part of the administrative processes of the state employees' retirement commission are conducted on an informal basis, in accordance with standards designed to meet the purposes to be accomplished by the proceeding." (Emphasis added.)

By their plain terms, the applicable regulations do not *require* that a hearing be held;[16] rather, consistent

part: "The State Employees' Retirement Commission derives its duties and authority from the following chapters of the General Statutes: Chapter 66—State Employees Retirement System . . . ." General Statutes § 5-155b is within chapter 66 of the General Statutes and directs the commission to adopt regulations to review and reconsider decisions denying claims for retirement benefits. Accordingly, §§ 5-155-1 through 5-155-13 of the Regulations of Connecticut State Agencies apply to claims for retirement benefits before the commission.

[16] Sections 5-155a-1 and 5-155a-2 of the Regulations of Connecticut State Agencies, which apply to petitions for a declaratory ruling before the commission, do not require the commission to hold a hearing to determine a claimant's right or privilege; see Regs. Conn. State Agencies § 5-155a-1 (a) (2) ("[p]etitions for declaratory rulings may be filed on . . . (2) the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision . . . on a matter within the jurisdiction of the commission"); Regs. Conn. State Agencies § 5-155a-1 (e) (1) ("after the

with § 5-155b, they establish a *procedure* in which a hearing may be held and provide that such hearings "are conducted in accordance with the requirements of and procedures" set forth in §§ 4-177 through 4-182. Regs. Conn. State Agencies § 5-155-11. Section 4-177 (a), in turn, provides: "*In a contested case*, all parties shall be afforded an opportunity for hearing after reasonable notice." (Emphasis added.); see also General Statutes §§ 4-177a through 4-181a (referencing procedures "in a contested case"). As previously stated, § 4-166 (4) defines a "contested case" as "a proceeding . . . in which the legal rights, duties or privileges of a party are *required by state statute or regulation* to be determined by an agency after an opportunity for hearing or in which a hearing is in fact held . . . ." (Emphasis added.) Simply put, the regulations promulgated by the commission, although convoluted, do not *require* that a hearing be held before the commission to determine a party's rights or privileges.

Under the circumstances presented, neither the letter the plaintiff received from retirement services on July 14, 2015, nor the commission's October 20, 2016 denial is an agency determination in a contested case as defined by the UAPA. In addition, the fact that a hearing "was in fact held"; General Statutes § 4-166 (4); before the commission on October 20, 2016, following Judge Schuman's remand order, does not render the plaintiff's appeal to the Superior Court as having been taken from a "final decision" under the UAPA. See, e.g., *Ferguson Mechanical Co.* v. *Dept. of Public Works*, supra, 282 Conn. 772 ("where a hearing is in fact held, in order to constitute a contested case, a party to that hearing must

filing of a complete petition for a declaratory ruling . . . the commission shall do *one* of the following, in writing"; regulation lists five options, one of which is "order that the matter be the subject of a hearing as a contested case" [emphasis added]); nor do §§ 5-165-1 through 5-165-4 of the Regulations of Connecticut State Agencies, which generally describe a state employee's ability to select an optional form of retirement salary.

have enjoyed a statutory [or regulatory] right to have his legal rights, duties or privileges determined by that agency holding the hearing" [internal quotation marks omitted]); *Derwin* v. *State Employees Retirement Commission*, supra, 234 Conn. 419 n.12 (fact that commission actually held hearing does not convert plaintiff's case into "contested case" under § 4-166 (2) [now § 4-166 (4)]). Accordingly, the plaintiff did not appeal to the Superior Court from an agency determination in a contested case because she did not possess a statutory or regulatory right to have the commission decide her rights or privileges in a hearing. See General Statutes § 4-166 (5) (A).

A "final decision" under § 4-166 (5) (C) is defined as "an agency decision made after reconsideration . . . ." With respect to the plaintiff's contention under this statutory subsection, *Derwin* v. *State Employees Retirement Commission*, supra, 234 Conn. 411, controls. In *Derwin*, the commission denied John T. Derwin's request to include prior municipal service in its calculation of his retirement benefits, granted his request for reconsideration under § 5-155a (k), and affirmed its original denial of his claim. See id., 416–17. Derwin appealed, and the trial court sustained the appeal and remanded the case to the commission. Id., 417. On appeal to our Supreme Court, Derwin argued "that the trial court correctly concluded that it had [subject matter] jurisdiction over [his] appeal because the commission's denial of his request constituted 'an agency decision made after reconsideration' within the meaning of § 4-166 (3) (C) [now § 4-166 (5) (C)]." Id., 419.

Our Supreme Court rejected Derwin's claim. The court observed that: "In determining the proper scope of § 4-166 (3) (C), we look first to General Statutes § 4-181a, which governs the reconsideration of agency decisions pursuant to the UAPA. Under § 4-181a (a)

(1), an agency is authorized to reconsider only final decisions in contested cases. Thus, an agency decision is subject to reconsideration under the UAPA only if the decision already is a final decision for purposes of appeal. The plaintiff, however, urges an interpretation of § 4-166 (3) (C) that would convert a nonfinal decision for purposes of appeal into an appealable final decision, a construction that is inconsistent with the dictates of § 4-181a. In the absence of a clear legislative mandate to do so, we will not construe § 4-166 (3) (C) so as to render it incompatible with another provision of the same statutory scheme." Id., 420–22. After reviewing the relevant legislative history for § 4-166 (3) (C), the court further noted: "As understood by its drafters . . . § 4-166 (3) (C) was not intended to create a new category of appealable decisions for noncontested cases but, rather, to clarify that a party in a contested case may appeal *either* from a final decision of an agency under § 4-166 (3) (A) *or* from an agency decision rendered after reconsideration pursuant to § 4-181a." (Emphasis in original.) Id., 422–23. The court stated: "When read in the proper statutory and historical context, § 4-166 (3) (C) may fairly be construed only to include decisions after reconsideration in contested cases." Id., 424.

Indeed, this court described the judicial gloss provided by *Derwin* as follows: "[I]n any matter brought before [the commission], there can never be a 'contested case' as defined by § 4-166 [4] because decisions of the commission are not final for purposes of the UAPA." *Ahern* v. *State Employees Retirement Commission*, supra, 48 Conn. App. 485; see also *Southern New England Telephone Co.* v. *Dept. of Public Utility Control*, 64 Conn. App. 134, 142, 779 A.2d 817 (2001) ("[r]econsideration for purposes of § 4-166 [5] (C) is limited to a decision that was final before reconsideration because it was made in a contested case"), appeal

dismissed, 260 Conn. 180, 799 A.2d 294 (2002) (certification improvidently granted). Accordingly, the plaintiff, here, did not appeal from an agency decision made after reconsideration. See General Statutes § 4-166 (5) (C).

The record reflects that the parties and the court were well intentioned, and we acknowledge that this serpentine process resulted in an unfortunately prolonged journey to this court for the plaintiff. Nonetheless, "[i]f the available administrative procedure . . . provide[s] the [plaintiff] with a mechanism for attaining the remedy that [she] seek[s] . . . [she] must exhaust that remedy." (Internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Water Pollution Control Authority*, 262 Conn. 84, 101, 809 A.2d 492 (2002). That simply did not occur in the present case, and the parties were not at liberty to bypass the available administrative remedies. See *Peters* v. *Dept. of Social Services*, 273 Conn. 434, 441, 870 A.2d 448 (2005) (subject matter jurisdiction requirement may not be waived and court can question its jurisdiction at any time); see also footnotes 7 and 11 of this opinion.

We conclude by noting that, under the present circumstances, "[t]he legislature . . . has the primary and continuing role in deciding which class of proceedings should enjoy the full panoply of procedural protections afforded by the UAPA to contested cases, including the right to appellate review by the judiciary. Deciding which class of cases qualifies for contested case status reflects an important matter of public policy and the primary responsibility for formulating public policy must remain with the legislature." (Internal quotation marks omitted.) *Peters* v. *Dept. of Social Services*, supra, 273 Conn. 445.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KEZLYN MENDEZ (AC 41116)

Alvord, Prescott and Pellegrino, Js.

Syllabus

Convicted of the crimes of felony murder and robbery in the first degree, the defendant appealed to this court. Thereafter, the defendant's court-appointed appellate counsel filed a motion for leave to withdraw her appearance, pursuant to the relevant rule of practice (§ 62-9 [d]), on the ground that an appeal would be wholly frivolous. After the trial court granted counsel's motion, counsel sent the defendant a letter notifying him of the court's decision and, as required by § 62-9 (d), provided him with instructions on how to proceed with the appeal as a self-represented party, including instructions informing the defendant that he may file a motion for review of the trial court's decision on the motion for leave to withdraw. Instead of filing a motion for review, the defendant filed an appellate brief, claiming that the trial court violated his right to due process by improperly granting counsel's motion. The defendant did not pursue or brief any claim relating to the underlying judgment of conviction. *Held* that the defendant's claim that the trial court improperly granted his court-appointed appellate counsel's motion for leave to withdraw her appearance was not reviewable, the defendant having failed to comply with § 62-9 (d) (3), which required him to file a motion for review of the trial court's decision, and, instead, having raised the issue in his direct appeal, despite clear instructions from counsel that he could file a motion for review of the trial court's decision on appellate counsel's motion for leave to withdraw appearance; moreover, because the defendant did not raise or adequately brief any claim that directly challenged the judgment of conviction from which he took this appeal, this court deemed any possible claims abandoned.

(*One judge concurring separately*)

Argued May 29—officially released October 16, 2018

Procedural History

Information charging the defendant with the crimes of murder, felony murder, and robbery in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, and

of felony murder and robbery in the first degree; thereafter, the court vacated the verdict of guilty as to the lesser included offense of manslaughter in the first degree with a firearm; judgment of guilty of felony murder and robbery in the first degree, from which the defendant appealed; thereafter, the court, *Prats*, *J.*, granted the motion for leave to withdraw an appearance filed by the defendant's court-appointed counsel. *Affirmed.*

Kezlyn Mendez, self-represented, the appellant (defendant).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robin D. Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. In this direct criminal appeal, the self-represented defendant, Kezlyn Mendez, claims that the trial court violated his right to due process by improperly granting his court-appointed appellate counsel's motion for leave to withdraw her appearance in accordance with Practice Book § 62-9 (d). We affirm the judgment of the trial court.

Practice Book § 62-9 (d) (1) directs any appointed appellate counsel who concludes, in accordance with Practice Book § 43-34, that an appeal would be wholly frivolous to file under seal with the appellate clerk a motion for leave to withdraw his or her appearance along with a memorandum of law, commonly referred to as an *Anders*[1] brief, in accordance with Practice Book

[1] "In *Anders* [v. *California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)], the United States Supreme Court outlined a procedure that is constitutionally required when, on direct appeal, appointed counsel concludes that an indigent defendant's case is wholly frivolous and wishes to withdraw from representation. . . . Under *Anders*, before appointed counsel may withdraw, he or she must provide the court and the defendant with a brief outlining anything in the record that may support the appeal, and the defendant must be given time to raise any additional relevant points.

§ 43-35. "Counsel shall deliver a notice that a motion for leave to withdraw as appointed counsel has been filed, but shall not deliver a copy of the motion and supporting . . . memorandum of law to opposing counsel of record." Practice Book § 62-9 (d) (2). The motion, memorandum, and the transcripts of the relevant proceedings are then referred by the appellate clerk to the trial court for a decision. Practice Book § 62-9 (d) (3). If the trial court grants appointed appellate counsel's motion to withdraw, a copy of the court's decision is filed, under seal, with the appellate clerk, and counsel must notify his or her former client in writing of the trial court's decision, the current status of the appeal, and the defendant's responsibilities necessary to prosecute the appeal. Practice Book § 62-9 (d) (3). Section 62-9 (d) (3) further expressly provides that the trial court's decision "may be reviewed pursuant to [Practice Book §] 66-6."

A motion for review pursuant to Practice Book § 66-6 is the proper vehicle by which to obtain review of an order concerning the withdrawal of appointed appellate counsel after an appeal has been filed. See Practice Book § 62-9 (d) (3) ("If the trial court grants the motion to withdraw, counsel shall immediately notify his or her former client, by letter, of the status of the appeal

. . . Thereafter, the court, having conducted its own independent review of the entire record of the case, may allow counsel to withdraw, if it agrees with counsel's conclusion that the appeal is entirely without merit." (Citations omitted.) *State* v. *Francis*, 322 Conn. 247, 250 n.3, 140 A.3d 927 (2016). As our Supreme Court has recognized, "[t]here can be no question that equal justice requires that the right of appellate review cannot depend on the amount of money which the defendant has. . . . On the other hand, so long as an indigent defendant can prosecute an appeal at public expense and without any possible detriment to himself there is nothing to protect the public purse or save the appellate courts from a flood of baseless appeals by indigent defendants except a proper judicial determination as to whether a proposed appeal at public expense may have some merit or is in fact frivolous." (Citation omitted.) *State* v. *Pascucci*, 161 Conn. 382, 387, 288 A.2d 408 (1971).

and the responsibilities necessary to prosecute the appeal. . . . The trial court's decision shall be sealed and may be reviewed pursuant to Section 66-6.").

In the present case, the defendant's court-appointed appellate counsel sent the defendant a letter notifying him of the court's decision granting her motion to withdraw and, as required by Practice Book § 62-9 (d) (3), provided him with instructions on how to proceed with the appeal as a self-represented party. Significantly, the instructions explained: "You can try filing a [m]otion for [r]eview of the trial court's decision on the Anders motion. ([Practice Book] § 66-6) Remember that you only have [ten] days to file this from the date of the notice of the order. If you do, remember to ask for an extension of time to file your brief until [twenty] or [thirty] days after the motion is decided."

The defendant did not file a motion for review, but did file an appellate brief. Although the defendant could have pursued and briefed any appellate claim he deemed meritorious regarding the underlying judgment of conviction, he raised in his appellate brief only his claim that counsel should not have been permitted to withdraw. He did so, despite the clear instructions informing him that he could file, pursuant to Practice Book § 66-6, a motion for review of the trial court's decision on appellate counsel's motion for permission to withdraw her appearance. Because the defendant did not comply with Practice Book § 62-9 (d) (3) and, instead, raised the issue in his direct appeal, we decline to review his claim. In addition, because the defendant has not raised or adequately briefed any claim that directly challenges the judgment of conviction from which he took this appeal, we deem any possible claims abandoned. See *Joseph* v. *Commissioner of Correction*, 153 Conn. App. 570, 574, 102 A.3d 714 (2014), cert. denied, 315 Conn. 911, 106 A.3d 304 (2015).

The judgment is affirmed.

In this opinion PELLEGRINO, J., concurred.

PRESCOTT, J., concurring. Although I agree with the majority that the judgment of conviction should be affirmed, in the interest of justice, I would follow a different path to that conclusion. The sole claim raised by the self-represented defendant in this direct criminal appeal is that the trial court violated his right to due process by improperly granting court-appointed appellate counsel's motion for leave to withdraw her appearance in accordance with Practice Book § 62-9. As indicated by the majority, a motion for review pursuant to Practice Book § 66-6 is the proper vehicle by which to obtain review of an order concerning the withdrawal of appointed appellate counsel after an appeal has been filed. Nevertheless, for the reasons that follow, before turning to the merits of the appeal, I would treat the defendant's brief as a late motion for review, and would grant review but deny relief. Then, because the defendant failed to raise any claim challenging the merits of the judgment of conviction, I would, like the majority, affirm the judgment.

The criminal charges against the defendant arose out of the shooting death of a convenience store clerk. The defendant was represented throughout the underlying proceedings by Attorney R. Bruce Lorenzen, a public defender. The defendant confessed to shooting the clerk and, at trial, did not challenge that he was the shooter. Instead, the defendant argued that the firearm he used discharged accidently and that he committed the robbery under duress. A jury found the defendant guilty of felony murder in violation of General Statutes § 53a-54c and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2).[1] Following his

[1] The jury also found the defendant not guilty of murder, but guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a. In light of the felony murder conviction, the court properly vacated and dismissed without prejudice the manslaughter conviction. See *State* v. *Chicano*, 216 Conn. 699, 703, 584 A.2d 425 (1990) (conviction of both felony murder and manslaughter in first

conviction and sentencing, the defendant filed an application seeking a waiver of fees, costs and expenses for appeal and the appointment of appellate counsel. The Office of the Chief Public Defender initially was appointed to represent the defendant and filed a timely appeal to the Supreme Court[2] on his behalf raising such issues as may appear from an examination of the record. Attorney Lisa J. Steele later filed an appearance on behalf of the defendant in lieu of the public defender's office.

On September 14, 2015, pursuant to Practice Book § 62-9, Steele filed with the Office of the Appellate Clerk a motion for leave to withdraw her appearance. According to Steele, on the basis of her review of the record and discussions with both the defendant and trial counsel, she asserted that an appeal in this case would be wholly frivolous. Steele, in accordance with the procedures set forth in Practice Book §§ 62-9 and 43-34 thru 43-38, submitted an *Anders*[3] brief detailing the factual and legal basis for her conclusion. The motion and the *Anders* brief were forwarded to the trial court, *Prats*, *J.*, for a decision. On February 24, 2017, the trial court issued a memorandum of decision granting the motion to withdraw.

degree based on single homicide violates double jeopardy), cert. denied, 501 U.S. 1254, 111 S. Ct. 2898, 115 L. Ed. 2d 1062 (1991), overruled in part on other grounds by *State* v. *Polanco*, 308 Conn. 242, 261, 61 A.3d 1084 (2013) (holding vacatur, rather than merger, is proper remedy for cumulative homicide convictions). The defendant was sentenced to fifty-five years of incarceration on the felony murder count and received a concurrent sentence of twenty years of incarceration for the robbery. We note that in *State* v. *Gonzalez*, 302 Conn. 287, 312–13, 25 A.3D 648 (2011), our Supreme Court squarely rejected a claim that double jeopardy barred a defendant's conviction and punishment for both felony murder and the predicate felony of robbery in the first degree.

[2] The appeal was subsequently transferred to this court.

[3] See *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State* v. *Pascucci*, 161 Conn. 382, 288 A.2d 408 (1971) (adopting *Anders* requirements).

In accordance with Practice Book § 62-9 (d) (3), Steele sent the defendant a letter dated March 4, 2017, notifying him of the court's decision. Steele attached to the letter a three page, single spaced document titled "Filing a Pro Se Brief." That document contained numerous and detailed instructions on how to proceed with the appeal as a self-represented party. The following statement was included amidst other instructions describing the types of documents the defendant was permitted to file in prosecuting his appeal: "You can try filing a [m]otion for [r]eview of the trial court's decision on the *Anders* motion ([Practice Book §] 66-6). Remember that you only have [ten] days to file this from the date of the notice of the order." Here, ten days expired on March 6, 2017, or two days after the letter was dated. The letter did not inform the defendant that a motion for review was his exclusive remedy or that he could not raise in his appellate brief any issue regarding the court's decision to grant the motion to withdraw. The defendant did not file a motion for review of the trial court's ruling allowing Steele to withdraw.

On April 7, 2017, the defendant filed an appearance as a self-represented party in lieu of Steele. He successfully filed a motion for additional time to file his brief, which he submitted on November 3, 2017. On November 30, 2017, the Supreme Court transferred the appeal to this court pursuant to Practice Book § 65-1.

Practice Book § 62-9 (d) directs that any appointed appellate counsel who concludes in accordance with Practice Book § 43-34 that an appeal would be wholly frivolous to file under seal with the appellate clerk a motion for leave to withdraw his or her appearance along with a memorandum of law in accordance with Practice Book § 43-35. Copies are not provided to the state. Practice Book § 62-9 (d) (2). The motion, brief, and any supporting transcripts are then referred by the appellate clerk to the trial court for a decision. Practice

Book § 62-9 (d) (3). If the trial court grants the motion to withdraw, a copy of the court's decision is filed, under seal, with the appellate clerk, and counsel must notify his or her former client in writing of the trial court's decision, the current status of the appeal, and the defendant's responsibilities necessary to prosecute the appeal. Practice Book § 62-9 (d) (3). Section 62-9 (d) (3) further expressly provides that the trial court's decision "may be reviewed pursuant to [Practice Book §] 66-6."

Practice Book § 66-6 provides in relevant part that this court "may, on written motion for review stating the grounds for the relief sought, modify or vacate . . . any order concerning the withdrawal of appointed appellate counsel pursuant to Section 62-9 (d)." Generally, in those instances in which our rules provide for expedited relief pursuant to a motion for review filed in accordance with Practice Book § 66-6, we have required that parties follow that procedure and declined to review such issues when raised by way of a direct appeal. See *Hartford Federal Savings & Loan Assn.* v. *Tucker*, 192 Conn. 1, 8, 469 A.2d 778 (1984); *Clark* v. *Clark*, 150 Conn. App. 551, 575–76, 91 A.3d 944 (2014); *State* v. *Casiano*, 122 Conn. App. 61, 71, 998 A.2d 792, cert. denied, 298 Conn. 931, 5 A.3d 491 (2010); *Scagnelli* v. *Donovan*, 88 Conn. App. 840, 843, 871 A.2d 1084 (2005); *State* v. *Pieger*, 42 Conn. App. 460, 467, 680 A.2d 1001 (1996), aff'd, 240 Conn. 639, 692 A.2d 1273 (1997).

Because of the confidential nature of the attorney-client relationship and the required contents of an *Anders* brief, in which the attorney representing the defendant sets forth the legal and factual shortcomings of any potential appellate issues, the brief is not permitted to be disclosed to the state. Moreover, as provided in Practice Book § 62-9 (d) (4), the panel hearing the merits of any subsequent appeal is prohibited from

reviewing such materials.[4] Accordingly, although Practice Book § 62-9 (d) (3) does not expressly state that a motion for review is the exclusive remedy available to a defendant, that is unquestionably the clear intent of the rule. Accordingly, if a defendant wishes to challenge a ruling permitting the withdrawal of appointed counsel in accordance with Practice Book § 62-9, he or she must do so by filing a motion for review pursuant to Practice Book § 66-6, not by raising the issue as a claim in the pending appeal.

I do not disagree with the majority that, in the present case, although the defendant could have pursued and briefed any appellate claim he deemed meritorious regarding the underlying judgment of conviction, and, in fact, was instructed to do so by his former appellate counsel, he chose to raise in his brief to this court only his claim that counsel should not have been permitted to withdraw. For the following reasons, I would exercise this court's authority to supervise proceedings on appeal and to suspend the requirements or provisions of our appellate rules of practice and treat the defendant's brief as a late motion for review. See Practice Book §§ 60-1, 60-2, and 60-3[5]; see also *State* v. *Ayala*, 222

[4] Practice Book § 62-9 (d) (4) provides in relevant part: "The appellate clerk shall maintain all filings and related decisions pursuant to this subsection under seal. The panel hearing the merits of the appeal shall not view any briefs and materials filed under seal pursuant to this subsection."

[5] Practice Book § 60-1 provides: "The design of [our rules of practice] being to facilitate business and advance justice, they will be interpreted liberally in any appellate matter where it shall be manifest that a strict adherence to them will work surprise or injustice." Practice Book § 60-2 provides in relevant part that "[t]he supervision and control of the proceedings shall be in the court having appellate jurisdiction from the time the appellate matter is filed, or earlier, if appropriate . . . ." Practice Book § 60-3 provides: "In the interest of expediting decision, or for other good cause shown, the court in which the appellate matter is pending may suspend the requirements or provisions of any of [our rules of practice] on motion of a party or on its own motion and may order proceedings in accordance with its direction."

Conn. 331, 342, 610 A.2d 1162 (1992) (treating defendant's petition for certification under General Statutes § 51-197f as late petition for certification under General Statutes § 52-265a [a]).

First, I do not dispute that Steele's written notification and instructions to the defendant following the granting of the motion for leave to withdraw fully complied with the requirements of our rules and, although not expressly required, informed the defendant that he could "try" filing a motion for review of the court's decision to allow Steele to withdraw her representation.[6] That important and time sensitive instruction, however, was not addressed in the body of the letter informing the defendant that the motion for leave to withdraw had been granted but was buried amid a series of instructions that pertained not to the issue of representation but to procedures for prosecuting the appeal as a self-represented party. Furthermore, Steele's letter to the defendant was dated on March 4, 2017, a Saturday, and the time to file a motion for review of the court's February 24, 2017 decision by her instruction expired on March 6, the following Monday. It is thus reasonable to infer that the time to file a timely motion for review had expired on or before the date that the defendant received Steele's instructions. Moreover, neither the rules of practice cited by Steele nor the instructions themselves informed the defendant that if he

[6] I would encourage the Advisory Committee on Appellate Rules to consider making a recommendation that Practice Book § 62-9 (d) (3) be amended. Practice Book § 62-9 (d) (3) currently provides in relevant part: "If the trial court grants the motion to withdraw, counsel shall immediately notify his or her former client, by letter, of the status of the appeal and the responsibilities necessary to prosecute the appeal." It would seem no great additional burden on counsel to include in the required letter an instruction that if his or her former client wishes to challenge the court's decision to allow counsel to withdraw, the client must file a motion for review with the Appellate Court in accordance with Practice Book § 66-6 and that the issue is not reviewable by any other procedure.

wished to challenge the court's ruling on the motion to withdraw, he could do so only by filing a motion for review pursuant to Practice Book § 66-6.

Second, and somewhat related, although he received copies of the motion to withdraw and the court's decision, each of which referenced Practice Book § 62-9, which in turn references Practice Book § 66-6, the defendant nevertheless may not have understood that, as we clarify in this case, a motion for review was his exclusive remedy. See *Scagnelli* v. *Donovan*, supra, 86 Conn. App. 845 n.3 (sua sponte granting permission to file late motion for review "in consideration of the fact that the defendants' counsel did not have the benefit of this decision") Given the unique procedural posture of this case, and in the interest of justice, I would exercise our supervisory authority to treat the defendant's brief as a late motion for review of the trial court's ruling on the motion to withdraw. The state, in its appellate brief, anticipated the possibility that we might treat the defendant's brief in this manner, and it did not argue against that procedure, noting only that because it was not privy to the *Anders* brief or the court's ruling because they were sealed, it was not in a position to address the merits of the court's order granting the motion to withdraw.

My review of the record shows that Attorney Steele followed all required procedures necessary to seek permission to withdraw her appearance as the defendant's appointed counsel, including providing a thorough and well-reasoned brief in compliance with *Anders*. Her motion to withdraw and *Anders* brief were sent to the trial court for disposition. The defendant was granted several extensions of time in which to respond to the motion to withdraw. Although he did not file a written response directly with the court, he conveyed his arguments to Steele, who submitted a letter to the court

setting forth his belief that he had a viable double jeopardy claim. The court, following a full examination of the record, made an independent determination that there were no nonfrivolous appellate issues, and filed a thorough memorandum of decision setting forth its reasoning for granting the motion to withdraw. I have reviewed, on a plenary basis, the court's memorandum of decision and the underlying record on which the court relied. I do not find any errors in its conclusions.

The only argument the defendant advances in support of his claim that the motion to withdraw was improperly granted is that he has a nonfrivolous double jeopardy claim. Any potential double jeopardy violation was fully addressed by both Steele and the trial court, each of whom concluded that the claim lacked merit. The defendant has failed to demonstrate that a nonfrivolous double jeopardy claim exists; see footnote 2 of this concurrence; or that the court otherwise improperly granted the motion to withdraw. Having treated the defendant's brief as a motion for review of the court's granting of the motion to withdraw, I would have granted review, but would have denied the relief requested.

As previously indicated, the defendant has failed to raise or brief any challenge to the judgment of conviction itself. Because the defendant has advanced no claim regarding the merits of the judgment of conviction, he has effectively abandoned his direct criminal appeal. Accordingly, like the majority, I would affirm the judgment of conviction. Because that disposition does not involve the review of any claim pertaining to the merits of the appeal, my proposed disposition of this appeal would also not run afoul of Practice Book § 62-9 (d) (4).

DAVID MUCKLE *v.* RONALD PRESSLEY ET AL.
(AC 40582)

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

Syllabus

The plaintiff sought to recover damages from the defendants for the diminished value of his motor vehicle that was caused by the alleged negligence of the defendants. The plaintiff's motor vehicle had sustained significant damage when it was struck by a vehicle driven by the defendant P in the course of his employment for the defendant city of New Haven. The trial court awarded the plaintiff damages for the repair of the vehicle, for costs of a rental car for which he had not been reimbursed and for the diminished value of the vehicle. The court, however, rejected the plaintiff's claim for prejudgment interest. On appeal, the plaintiff claimed that the trial court, in awarding damages, improperly denied his claim for prejudgment interest and that the applicable statutes (§§ 37-3a and 37-3b) do not extinguish the common-law right to prejudgment interest in this type of civil action. *Held* that, given the present statutory framework, the trial court properly denied the plaintiff's request for prejudgment interest: under § 37-3a, prejudgment interest may be recovered and allowed in civil actions, but that general rule does not apply to actions to recover damages for injury to a person, or to real or personal property caused by negligence, § 37-3b provides for an award of postjudgment interest in negligence cases, and although, pursuant to statute (§ 52-192a), prejudgment interest is permitted in negligence cases where a plaintiff files an offer of compromise that is rejected by the defendant and the plaintiff recovers an amount equal to or greater than the offer of compromise, the damages awarded here were less than the amount of an offer of compromise filed by the plaintiff; moreover, the plaintiff, in support of his claim, relied on case law that predated the effective date of the current statutory framework, which now limits the automatic award of interest in negligence actions to postjudgment time periods, the plaintiff's claim that §§ 37-3a and 37-3b have not abrogated the common-law right to prejudgment interest was unavailing, as the plaintiff failed to establish that prejudgment interest in negligence cases existed under the common law, and there was no merit to the plaintiff's claim that he was entitled to prejudgment interest pursuant to § 37-3a, which does not apply to actions to recover damages to property caused by negligence.

Argued May 15—officially released October 16, 2018

Procedural History

Action to recover damages for the diminished value of the plaintiff's motor vehicle caused by the defendants'

alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the court, *Domnarski*, *J.*; judgment in favor of the plaintiff, from which the plaintiff appealed to this court. *Affirmed.*

Matthew Julian Forrest, for the appellant (plaintiff).

Roderick R. Williams, for the appellees (defendants).

Opinion

DiPENTIMA, C. J. The plaintiff, David Muckle, appeals from the judgment of the trial court denying his claim for prejudgment interest against the defendants, Ronald Pressley and the city of New Haven. On appeal, the plaintiff claims that the court improperly concluded that General Statutes § 37-3b permits only postjudgment interest in negligence actions. We disagree with the plaintiff and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history, as set forth in the court's March 30, 2017 memorandum of decision, are relevant to our discussion. On July 20, 2014, the plaintiff's 2013 Subaru XV Crosstrek vehicle was parked on a street in New Haven. Pressley, an employee of the city of New Haven, struck the plaintiff's vehicle while operating a motor vehicle in the course of his employment. The collision caused significant damage to the plaintiff's vehicle, which was repaired at a cost of $15,096.60. "According to the experts who testified at trial, the [plaintiff's] vehicle had a value between $20,037 and $23,500 prior to the accident. The experts also testified that the value of the vehicle after repairs was between $14,500 and $21,150."

The plaintiff sought damages for the diminished value of his vehicle following the postcollision repair work. After considering the evidence from the parties' experts, the court credited the defendants' expert that

the diminished value of the plaintiff's vehicle was $2350, which amounts to "a 10 percent reduction in the vehicle's valuation because of the accident." The court further found that the plaintiff had incurred damages for the repair of the vehicle and for a rental car for which he had not been reimbursed. The court awarded the plaintiff $1067.77 for these damages in addition to the $2350 for vehicle's diminished value, for a total of $3,417.77.

The court did not award the plaintiff damages "for the inconvenience of having to contend with submission of the claim to his insurance company, obtaining a rental car, and dealing with the auto body shop regarding the repair of his vehicle."[1] The court also rejected the plaintiff's claim of interest from the date of the accident, July 20, 2014, stating: "The plaintiff's claims are grounded in the negligence of the defendants. In negligence actions, interest is allowed only after judgment. General Statutes § 37-3b."

On April 17, 2017, the plaintiff filed a motion for reconsideration of the denial of prejudgment interest. In his motion, the plaintiff alleged that he was entitled to $915.77 in prejudgment interest.[2] In their objection, the defendants argued, inter alia, that the cases relied on by the plaintiff, *Hammarlund* v. *Troiano*, 146 Conn. 470, 152 A.2d 314 (1959), *Stults* v. *Palmer*, 141 Conn. 709, 109 A.2d 592 (1954), and *Littlejohn* v. *Elionsky*, 130 Conn. 541, 36 A.2d 52 (1944), predated the 1981 enactment of, and 1997 amendment to § 37-3b. Accordingly, the defendants claimed that these cases did not constitute good law on the issue of prejudgment interest in negligence cases. The court granted the plaintiff's

[1] Specifically, the court found that the plaintiff had failed to support this particular claim for damages with any evidence of monetary loss.

[2] In their appellate brief, the defendants also dispute the plaintiff's prejudgment interest calculation.

motion, but denied the relief requested. This appeal followed.

On appeal, the plaintiff claims that in diminished value cases, the court is required to include prejudgment interest in the damages award. He contends that General Statutes §§ 37-3a and 37-3b do not extinguish the common-law right to prejudgment interest in this type of civil action. The defendants counter that following the 1981 amendment to § 37-3a and the enactment of § 37-3b, only postjudgment interest is available in negligence cases. We agree that, under the present statutory framework, the court properly denied the plaintiff's request for prejudgment interest in the present case.

We begin with our standard of review. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject

matter . . . . In cases in which more than one [statutory provision] is involved, we presume that the legislature intended [those provisions] to be read together to create a harmonious body of law . . . and we construe the [provisions], if possible, to avoid conflict between them." (Citations omitted; internal quotation marks omitted.) *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 297 Conn. 105, 148–49, 998 A.2d 730 (2010); see also *Valliere* v. *Commissioner of Social Services*, 328 Conn. 294, 318, 178 A.3d 346 (2018). Our review is de novo. *Lagueux* v. *Leonardi*, 148 Conn. App. 234, 239, 85 A.3d 13 (2014).

We begin, therefore, with the text of the relevant statutes. Section 37-3a (a) provides in relevant part: "Except as provided in sections 37-3b, 37-3c and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions . . . ." Section 37-3b, titled[3] "[r]ate of interest recoverable in negligence actions" provides in relevant part: "(a) For a cause of action arising on or after May 27, 1997, *interest at the rate of ten per cent a year*, and no more, *shall be recovered and allowed in any action to recover damages for injury to* the person, or to real or *personal property, caused by negligence, computed from the date that is twenty days after the date of judgment or the date that is ninety days after the date of verdict, whichever is earlier, upon the amount of the judgment*." (Emphasis added.)

Finally, General Statutes § 52-192a (c) provides in relevant part: "After trial the court shall examine the record to determine whether the plaintiff made an offer

[3] We are mindful of our Supreme Court's direction that "[w]here there is ambiguity in the wording of a statute, the title of the legislation is an aid to statutory construction. . . . But if the language is clear and not subject to interpretation, titles are of less significance." (Citations omitted.) *Algonquin Gas Transmission Co.* v. *Zoning Board of Appeals*, 162 Conn. 50, 55, 291 A.2d 204 (1971).

of compromise which the defendant failed to accept. If the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount . . . . The interest shall be computed from the date the complaint in the civil action or application under section 8-132 was filed with the court if the offer of compromise was filed not later than eighteen months from the filing of such complaint or application. If such offer was filed later than eighteen months from the date of filing of the complaint or application, the interest shall be computed from the date the offer of compromise was filed."[4]

Thus, under the present statutory framework, prejudgment interest may be recovered and allowed in civil actions at a rate of 10 percent a year. General Statutes § 37-3a (a).[5] This general rule, however, does not apply to actions to recover damages for injury to a person, or real or personal property caused by negligence. See *Sikorsky Financial Credit Union, Inc.* v. *Butts*, 315 Conn. 433, 442 n.4, 108 A.3d 228 (2015). In negligence cases, interest at a rate of 10 percent a year, and no

[4] The plaintiff filed an offer of compromise on September 21, 2015, in the amount of $6000. The plaintiff ultimately recovered $3417.77 in damages, or approximately 57 percent of the offer of compromise. We, therefore, disagree with the comments of the plaintiff's counsel at oral argument that the damages awarded in this case were "just shy," "really close" and "almost right on" to the offer of compromise.

In addition to his misstatement at oral argument, the plaintiff's counsel failed to include a copy of the complaint in his appellate appendix and inaccurately quoted a Supreme Court opinion in his appellate brief, which we will address later in this opinion. We take this opportunity to remind *all counsel* who appear before this court to take all necessary and prudent steps to comply with our rules of practice and to ensure the accuracy of his or her representations, both oral and written, to this court.

[5] Our Supreme Court has stated that § 37-3a is not confined by its terms to prejudgment interest and has served as a source for postjudgment interest where § 37-3b does not apply. *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, 310 Conn. 38, 50 n.12, 74 A.3d 1212 (2013).

more, shall be recovered and allowed, computed from the earlier of twenty days after the judgment date or ninety days after the date of the verdict. See General Statutes §§ 37-3a (a) and 37-3b (a). Section 52-192a offers an opportunity for prejudgment interest in negligence cases, but requires the filing of an offer of compromise by a plaintiff, rejection of that offer by a defendant, and recovery by a plaintiff of an amount equal to or greater than the offer of compromise. See, e.g., *DiLieto* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 297 Conn. 152–53. Such an award is mandatory. Id., 153.

On appeal, as he did before the trial court, the plaintiff relies on case law that predates the current statutory framework for prejudgment interest. Specifically, he cites to *Littlejohn* v. *Elionsky*, supra, 130 Conn. 541. In that case, our Supreme Court stated that in a negligence action involving a car accident, "the measure of damages is the difference in value between the property before and after the loss, with interest from date of loss." Id., 543 (quoting *Hawkins* v. *Garford Trucking Co., Inc.*, 96 Conn. 337, 341, 114 A. 94 [1921]). The plaintiff also directs us to *Stults* v. *Palmer*, supra, 141 Conn. 712, where our Supreme Court explained: "The true rule is that the measure of damages is the difference between the fair market value of the car before the collision and its fair market value afterwards, plus interest from the date of loss." See also *Hammarlund* v. *Troiano*, supra, 146 Conn. 473 (noting that measure of recovery for damage to automobile stated in *Stults* v. *Palmer*, supra, 712, and that rule requires, inter alia, proof of difference between fair market value before accident and after accident).

All of the cases cited by the plaintiff were decided decades before the effective date of the present statutory scheme.[6] In the years following those cases, our

[6] The plaintiff cites to *Damico* v. *Dalton*, 1 Conn. App. 186, 187, 469 A.2d 795 (1984), where this court relied on the trilogy of *Hammarlund* v. *Troiano*,

legislature has limited the automatic award of interest in negligence actions to postjudgment time periods. See *DiLieto* v. *County Obstetrics and Gynecology Group, P.C.*, supra 310 Conn. 48 ("[t]his legislative genealogy leaves no doubt that the legislature, in amending [§ 37-3b in 1997], was seeking to convert § 37-3b from a statute that permitted an award of postjudgment interest in the discretion of the trial court into one that mandates such an award"); *Hicks* v. *State*, 297 Conn 798, 803–804, 1 A.3d 39 (2010) (interest pursuant to § 37-3b is computed only after judgment, upon amount rendered therein, and accrues only if judgment is not paid).

The plaintiff maintains, however, that §§ 37-3a and 37-3b have not abrogated the "common-law" right to prejudgment interest. The flaw in this argument is that the plaintiff has failed to establish that prejudgment interest in negligence cases existed under the common law. Contrary to the plaintiff's assertion, the right to this type of interest existed by virtue of our statutes.

supra, 146 Conn. 470, *Stults* v. *Palmer*, supra, 141 Conn. 709, and *Littlejohn* v. *Elionsk*, supra, 130 Conn. 541, in stating: "In the present case there can be no doubt that the measure of damages to the defendant's automobile [with respect to the defendant's counterclaim against the plaintiff] was the difference between its value immediately prior to the collision and its value immediately thereafter." Although in that case there was a verdict for the plaintiff with respect to the defendant's counterclaim, we note that this court did not address or discuss the issue of prejudgment interest. *Damico*, therefore provides no support to the plaintiff in this appeal.

We also note that in *Bombero* v. *Marchionne*, 11 Conn. App. 485, 494, 528 A.2d 396, cert. denied, 205 Conn. 801, 529 A.2d 719 (1987), we directly quoted the "true rule" of damages from *Stults* v. *Palmer*, supra, 141 Conn. 709, as "the difference between the fair market of the car before the collision and its fair market value afterwards, plus interest from the date of loss." (Internal quotation marks omitted.) The issue before this court in *Bombero*, however, was not whether the plaintiff was entitled to prejudgment interest; rather, whether the trial court improperly refused to take judicial notice of the 1981 sales tax as an element of the damages. Id. This court declined to consider the merits of this claim as a result of the plaintiff's failure to present an adequate record. Id., 495. Accordingly, as the issue of prejudgment interest was not present in *Bombero*, we conclude that *Bombero* does not support the plaintiff in the present appeal.

In *Paulus* v. *LaSala*, 56 Conn. App. 139, 147, 742 A.2d 379 (1999), cert. denied, 252 Conn. 928, 746 A.2d 789 (2000), we stated that "[n]oncontractual interest on money wrongfully detained was not sanctioned at common law; see K. Conway, 'Interest on Damages in Connecticut,' 30 Conn. B.J. 407 (1956); but has long been awarded pursuant to statute in Connecticut. General Statutes [1949 Rev.] § 6778; General Statutes (1902 Rev.) [§ 4600]; General Statutes (1888 Rev.) [§ 2942]." See also General Statues (1958 Rev.) § 37-3; General Statutes (1930 Rev.) § 4731; *Foley* v. *Huntington Co.*, 42 Conn. App. 712, 737, 682 A.2d 1026 (trial court correctly noted that there is no right to prejudgment interest in civil action unless statutes provide for such interest), cert. denied, 239 Conn. 931, 683 A.2d 397 (1996).

The plaintiff failed to support his assertion of a common-law right to prejudgment interest in this type of case.[7] The plaintiff having failed to establish the prerequisite that the right to prejudgment interest in negligence cases existed at common law, we need not

[7] In his brief, the plaintiff refers us to the concuring opinion in *Ballou* v. *Law Offices Howard Lee Schiff, P.C.*, 304 Conn. 348, 367, 39 A.3d 1075 (2012) (*Zarella, J.*, concurring). The quotation contained in the plaintiff's brief, however, does not appear, however, in this concurrence. Furthermore, in that case, Justice Zarella did not discuss whether the availability or right to prejudgment interest in a negligence action existed at common law. Finally, we note that a concurring opinion from our Supreme Court is not binding authority. See, e.g., *State* v. *DeJesus*, 91 Conn. App. 47, 58 n.4, 880 A.2d 910 (2005), rev'd in part on other grounds, 288 Conn. 418, 953 A.2d 45 (2008); see generally *United States* v. *Davis*, 825 F.3d 1014 (9th Cir. 2016).

The plaintiff's reliance on *Foley* v. *Huntington Co.*, supra, 42 Conn. App. 712, is equally unavailing. Specifically, he refers to language in that case that § 37-3a applies to only certain cases, and, therefore, claims that the common-law right to prejudgment interest in negligence actions survived the enactment of §§ 37-3a and 37-3b. *Foley* v. *Huntington Co.*, supra, 739. This analysis ignores the discussion in *Foley* that prejudgment interest was not permitted on awards for punitive damages or personal injury claims. See id. We conclude, therefore, that the plaintiff failed to support his claim of a common-law right to prejudgment interest and that such a right survived the enactment of §§ 37-3a and 37-3b.

consider the plaintiff's claim that §§ 37-3a and 37-3b abrogated such an entitlement. Simply stated, as aptly set forth by Judge Moore in a recent decision from the Superior Court, "[a]s a matter of law, prejudgment interest is not available on any damages that may be awarded by the court to the plaintiff. Prejudgment interest is only available by statute, and there is no statutory provision for prejudgment interest on a claim of negligence. General Statutes § 37-3a allows prejudgment interest, but does not apply to negligence claims. General Statutes § 37-3b applies to negligence claims, but allows only postjudgment, and not prejudgment interest. Further, while a party can be awarded prejudgment interest if damages awarded exceed its offer of compromise under General Statutes § 52-192a, the plaintiff did not file an offer of compromise with the court prior to trial." *Sun Val, LLC* v. *Commissioner of Transportation*, Superior Court, judicial district of Litchfield, Docket No. CV-14-6010907-S (August 19, 2016). Accordingly, the plaintiff's claim must fail.

The plaintiff also contends that he is entitled to prejudgment interest pursuant to § 37-3a. As we have indicated in this opinion, § 37-3a, by its explicit reference to § 37-3b, does not apply to actions to recover damages to property caused by negligence. Additionally we previously have concluded: "Prejudgment interest pursuant to § 37-3a is appropriate only where the essence of the action itself involves the wrongful withholding of money due and payable to the plaintiff. *The prejudgment interest statute does not apply when the essence of the action is the recovery of damages to compensate a plaintiff for injury, damage or costs incurred as a result of a defendant's negligence.* . . . The prejudgment interest statute does not apply to such actions because they do not advance claims based on the wrongful withholding of money, but rather seek damages to compensate for losses incurred as a result of

a defendant's negligence. Moreover, such damages are not considered due and payable until after a judgment in favor of the plaintiff has been rendered." (Emphasis added.) *Tang* v. *Bou-Fakhreddine*, 75 Conn. App. 334, 349, 815 A.2d 1276 (2003); see also *Foley* v. *Huntington Co.*, supra, 42 Conn. App. 739 (§ 37-3a does not apply to claims not involving wrongful detention of money such as personal injury claims). Accordingly, we conclude that this claim is without merit.

The judgment is affirmed.

In this opinion the other judges concurred.

SEASIDE NATIONAL BANK AND TRUST *v.* GERALD LUSSIER (AC 39040)

Keller, Elgo and Beach, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant. After the plaintiff filed a motion for summary judgment as to liability, the defendant filed a motion for a thirty day extension of time to respond, which the trial court granted. On the day of a hearing on the motion for summary judgment, the defendant filed an objection, stating that he needed more time to conduct discovery, and requested a continuance pursuant to the applicable rule of practice (§ 17-47), claiming that he needed to depose the affiant on whose testimony the plaintiff relied to support its summary judgment motion. The trial court granted the defendant one week to respond to the plaintiff's motion for summary judgment, and three weeks later, the defendant filed an affidavit in opposition. Subsequently, the trial court granted the plaintiff's motion for summary judgment as to liability, and also granted the plaintiff's motion for a protective order to prohibit the deposition of the affiant. The plaintiff then moved for a judgment of strict foreclosure, and on the day of that hearing, the defendant filed an objection, claiming that he needed to depose the plaintiff's affiant before the court entered final judgment. The trial court overruled the defendant's objection and rendered a judgment of strict foreclosure. On the defendant's appeal to this court, *held*:

1. The trial court properly granted the plaintiff's motion for summary judgment as to liability; the affidavit submitted by the defendant in opposition

to the motion for summary judgment recited a history of the course of dealing and suggested amounts by which he reportedly believed he was overcharged, but provided no evidence supporting the conclusion of overcharge or showing the allegedly correct amount, the defendant admitted in his affidavit that he stopped paying his mortgage in its entirety, and evidence showing that the defendant believed that he was not in default was not sufficient to create a genuine issue of fact regarding liability in light of his admission that he stopped making payments and the evidence submitted by the plaintiff showing that he defaulted under the terms of his note.

2. The trial court did not abuse its discretion by denying the defendant the opportunity to depose the plaintiff's affiant; where, as here, the defendant had an opportunity to conduct discovery but failed to take advantage of that opportunity and requested more time, the issue is whether the court's action as to any requested continuance constituted an abuse of discretion, and the court here, in denying the defendant's requests for further continuances, did not abuse its discretion and found that because the defendant had over a year and a half to conduct discovery and had not done so, he could not defeat the motion for summary judgment by asserting that he needed an opportunity to conduct discovery.

3. The defendant's claim that the trial court abused its discretion in denying his request for a continuance was unavailing; given that the defendant had had over a year and a half to conduct discovery and had not done so, that court did not abuse its discretion in granting the defendant only one week to respond to the plaintiff's motion for summary judgment, and it did not abuse its discretion in overruling the defendant's objection to the plaintiff's motion for a judgment of strict foreclosure, which was predicated on the defendant's stated need to depose the plaintiff's affiant.

Argued May 17—officially released October 16, 2018

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the court, *Aurigemma, J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant appealed to this court. *Affirmed.*

Michael J. Habib, for the appellant (defendant).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

BEACH, J. The defendant, Gerald Lussier, also known as Gerald J. Lussier, appeals from the judgment of strict foreclosure rendered in favor of the plaintiff, Seaside National Bank & Trust. On appeal, the defendant claims that the trial court (1) improperly granted the plaintiff's motion for summary judgment as to liability, (2) violated his constitutional right to procedural due process by denying him the opportunity to depose the plaintiff's affiant upon whose testimony the court relied in rendering judgment, and (3) abused its discretion in denying his request for a continuance pursuant to Practice Book § 17-47 and in granting the plaintiff's motion for a protective order. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our discussion. The defendant executed an adjustable rate note, dated July 16, 2009, in favor of Taylor, Bean & Whitaker Mortgage Corporation (Taylor Bean) in the principal amount of $318,131. To secure the note, the defendant executed and delivered a mortgage to Mortgage Electronic Registration System, Inc. (MERS), as nominee for Taylor Bean, on property located at 9 Patterson Place in Old Saybrook, which mortgage was duly recorded. The note was endorsed twice, first by Taylor Bean to the plaintiff and second by the plaintiff in blank. MERS assigned the mortgage to the plaintiff; this assignment was recorded on April 2, 2015.

Following a dispute over the amount of monthly mortgage payments and the defendant's decision to stop making payments, the plaintiff commenced the underlying foreclosure action on January 14, 2014. After unsuccessful mediation, the plaintiff filed a motion for summary judgment as to liability on July 17, 2015. The defendant filed a motion for a thirty day extension of time to respond to the motion. The court granted the

defendant's motion and the motion for summary judgment was marked ready for a hearing for August 31, 2015. On that day, the defendant filed an objection to the plaintiff's motion for summary judgment, stating that he needed more time to conduct discovery. The defendant also filed a request for a continuance pursuant to Practice Book § 17-47, claiming that he needed to depose the affiant upon whose testimony the plaintiff was relying in support of its motion for summary judgment. On the same day, the defendant's counsel sent a notice of deposition to the plaintiff. The plaintiff subsequently filed a motion for a protective order to prohibit the deposition of the affiant, which the court granted on October 5, 2015.

The court granted the defendant one week to respond to the plaintiff's motion for summary judgment. On September 21, 2015, the defendant responded by filing an affidavit in opposition to the plaintiff's motion for summary judgment. On September 25, 2015, the court granted the plaintiff's motion for summary judgment as to liability. The plaintiff subsequently moved for a judgment of strict foreclosure. On March 7, 2016, the day of the hearing for the motion for a judgment of strict foreclosure, the defendant filed an objection to that motion, claiming that he needed to depose the plaintiff's affiant before the court entered final judgment. After hearing argument, the court overruled the defendant's objection and rendered a judgment of strict foreclosure. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly granted the motion for summary judgment as to liability. Specifically, the defendant argues that there was a genuine issue of material fact as to whether the defendant had defaulted on his mortgage. We disagree.

"Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . [I]n seeking summary judgment, it is the movant who has the burden of showing . . . the absence of any genuine issue as to all the material facts [that], under applicable principles of substantive law, entitle him to a judgment as a matter of law. . . .

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly grant summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense. . . .

"A party opposing summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . In other words, [d]emonstrating a genuine issue of material fact requires a showing of evidentiary facts or substantial evidence outside the pleadings from which material facts alleged in the pleadings can be warrantably inferred. . . . A material fact is one that will make a difference in the result of the case. . . . To establish the existence of a [dispute as to a] material fact, it is not enough for the party opposing summary judgment merely to assert the existence of a disputed issue. . . . Such assertions are insufficient regardless of whether they are contained in a complaint or a brief. . . . Further, unadmitted allegations in the pleadings do not constitute proof of the existence of a genuine issue as to any material fact . . . . The issue

must be one which the party opposing the motion is entitled to litigate under [its] pleadings and the mere existence of a factual dispute apart from the pleadings is not enough to preclude summary judgment." (Citations omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, 182 Conn. App. 417, 435–36, 190 A.3d 105 (2018).

In support of its motion for summary judgment, the plaintiff submitted an affidavit stating that it was the holder of the note prior to commencing the foreclosure action against the defendant. The affidavit stated further that the defendant "failed to make monthly mortgage payments as required by the loan documents since the payment due July 1, 2013, and for each and every month thereafter" and that the defendant was "in default under the loan documents for failure to make payments as required by the terms of the note and mortgage."

The defendant filed an objection to the plaintiff's motion for summary judgment, stating that he intended to file a memorandum of law in opposition to the motion after he completed discovery, for which he needed more time. The defendant did not subsequently file a memorandum, but rather filed an affidavit, in which he was the affiant, in opposition to the plaintiff's motion for summary judgment. The affidavit recited in relevant part that in January, 2012, the mortgage servicer (servicer) increased the amount of his monthly mortgage payments, and attributed the increase to changes in required escrow payments for taxes and insurance. The affidavit stated further that the defendant paid the increased amounts for more than a year, but he stopped making payments because he didn't believe that the servicer properly could account for the increased escrow amount. The defendant sought explanations from the servicer, who did not satisfactorily respond. The defendant stated in the affidavit that he then

stopped making what he believed to be overpayments. He offered instead to pay the lower monthly amount that he had paid in the past, but the servicer refused to accept the lower amount.

The defendant presented evidence showing that he disputed the calculation of his escrow payments, but the defendant's insistence in his affidavit that he did not consider himself to be in default, even though he stopped making payments, was not sufficient to create a genuine issue of material fact as to his default under the terms of the note and mortgage. There were no *facts* in the affidavit tending to show the allegedly correct amount, or, more critically, to show that he had paid the correct amount. "A party opposing summary judgment must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment. . . . A material fact is one that will make a difference in the result of the case." (Citation omitted; internal quotation marks omitted.) *Bank of New York Mellon* v. *Horsey*, supra, 182 Conn. App. 436; see also *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 715–16, 807 A.2d 968 (no genuine issue of material fact despite timely payments for nine years but subsequent failure to make timely tax payments), cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002).

We carefully have reviewed the affidavit submitted by the defendant in opposition to the motion for summary judgment. It recites a history of the course of dealing and, together with an attached copy of an email, suggests amounts by which the defendant reportedly believed he was overcharged. There is, however, no *evidence* supporting the conclusion of overcharge, and *the defendant admitted in his affidavit that he stopped paying his mortgage in its entirety*. Evidence showing that the defendant believed that he was not in default

was not sufficient to create a genuine issue of fact regarding liability in light of his admission that he stopped making payments and evidence submitted by the plaintiff that he defaulted under the terms of the note. Accordingly, we conclude that the court properly granted the plaintiff's motion for summary judgment.

II

The defendant next claims that the trial court violated his constitutional right to procedural due process by denying him the opportunity to depose the plaintiff's affiant upon whose testimony the court relied in rendering judgment.[1] Specifically, the defendant argues that a deposition of the plaintiff's affiant was necessary to rebut the facts tending to show that he was in default and to rebut the presumption that the plaintiff was in possession of the note at the time it commenced this foreclosure action.[2] We disagree.

The defendant's due process claim presents an issue of law over which our review is plenary. *In re Shaquanna M.*, 61 Conn. App. 592, 600, 767 A.2d 155 (2001). "Our due process inquiry takes the form of a two part analysis. [W]e must determine whether [the defendant] was deprived of a protected interest, and, if so, what process was [he] due. . . . The fundamental requisite of due process of law is the opportunity to be heard.

[1] The defendant claims a due process violation under both the fifth amendment to the the United States constitution and article first, § 8, of the Connecticut constitution. Because the defendant does not supply a "state constitutional analysis of [his] claim pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we deem that claim abandoned and analyze [his] . . . arguments under the requirements of the United States constitution." (Internal quotation marks omitted.) *Pagan* v. *Carey Wiping Materials Corp.*, 144 Conn. App. 413, 417 n.10, 73 A.3d 784, cert. denied, 310 Conn. 925, 77 A.3d 142 (2013).

[2] "[A] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage . . . ." *Countrywide Home Loans Servicing, LP* v. *Creed*, 145 Conn. App. 38, 48, 75 A.3d 38, cert. denied, 310 Conn. 936, 79 A.3d 889 (2013).

. . . The hearing must be at a meaningful time and in a meaningful manner. . . . [T]hese principles require that a [party] have . . . an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." (Citations omitted; internal quotation marks omitted.) *Pagan* v. *Carey Wiping Materials Corp.*, 144 Conn. App. 413, 418–19, 73 A.3d 784, cert. denied, 310 Conn. 925, 77 A.3d 142 (2013). "Inquiry into whether particular procedures are constitutionally mandated in a given instance requires adherence to the principle that due process is flexible and calls for such procedural protections as the particular situation demands. . . . There is no per se rule that an evidentiary hearing is required whenever a liberty [or property] interest may be affected. Due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances." (Internal quotation marks omitted.) Id., 418.

The defendant relies primarily on *In re Shaquanna M.*, supra, 61 Conn. App. 592, and *RKG Management, LLC* v. *Roswell Sedona Associates, Inc.*, 142 Conn. App. 366, 68 A.3d 1169 (2013), for the proposition that a denial of the right to cross-examine the affiant who signed the plaintiff's affidavit in support of its motion for summary judgment violated his right to due process. His reliance is misplaced.

The facts of the cases relied on differ markedly from those of the present case. *In re Shaquanna M.*, supra, 61 Conn. App. 593–94, was a case in which the respondent's parental rights were terminated. During trial, the lawyer serving as the attorney for the minor children and as guardian ad litem died, and the replacement was denied the opportunity to obtain and read a transcript of prior testimony in the trial which he had not heard. Id., 595–96. This court held that, in light of the constitutional interest inherent in the parental relationship, the

denial of the continuance for the purpose of obtaining the transcripts affected the ability to defend a constitutionally protected right, and, following a *Mathews* v. *Eldridge*[3] analysis, held that the respondent's right to due process had been violated. Id., 608.

RKG Management, LLC v. *Roswell Sedona Associates, Inc.*, supra, 142 Conn. App. 367, involved the foreclosure of a mechanic's lien. A witness for the plaintiff testified at trial about the work done on the subject premises but refused to return to court to be cross-examined. Id., 370–71. Despite a request, the trial court refused to strike the witness' testimony and, rather, relied on information provided by the errant witness. Id., 376–77. On these facts, this court held that the defendant's constitutionally protected right to cross-examination had been violated. Id., 378–79.

It is undoubtedly correct, then, that the denial of the opportunity to cross-examine, as in *RKG Management*, or the denial of the opportunity to prepare for trial, as in *In re Shaquanna M.*, may implicate constitutionally protected rights. Where the party has such an opportunity, but fails to take advantage of that opportunity, the considerations are different.

Due process requires the *opportunity* to be heard; where a party has the opportunity to pursue due process but requests more time, the issue is whether the court's action as to any requested continuance constitutes an abuse of discretion. *State* v. *Bethea*, 167 Conn. 80, 83–84, 355 A.2d 6 (1974); see also *Glastonbury Coalition for*

[3] See *Matthews* v. *Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). "The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government's interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements." *In re Shaquanna M.*, supra, 61 Conn. App. 606.

Sensible Growth v. *Conservation Commission of Glastonbury*, Superior Court, judicial district of Hartford, Docket No. CV-02-0820726 (Feb. 10, 2004); *Spilke* v. *Spilke*, Superior Court, judicial district of New Haven, Docket No. FA-00-0440636S (March 15, 2002); Practice Book § 17-47 ("the judicial authority *may* deny the motion for judgment or *may* order a continuance to permit affidavits to be obtained or discovery to be had or *may* make such other order as is just" [emphasis added]).

As we previously recited, the court denied the defendant's requests for further continuances to depose the affiant. The court's entire ruling in its memorandum of decision is: "Where, as in the present case, the defendant has had over a year and a half to conduct discovery and has done none, he cannot defeat a motion for summary judgment by asserting that he now needs an opportunity to conduct discovery."

III

The defendant's final claim is that the trial court abused its discretion in denying his Practice Book § 17-47 request for continuance and in granting the plaintiff's motion for a protective order. Specifically, the defendant argues that in denying his request the court focused on "improper and irrelevant considerations," such as the time spent in mediation and the time granted to the defendant after a previous motion for a continuance he had filed under Practice Book § 17-45. Instead, the defendant argues, the court should have specifically addressed the "merits of [his] request" and considered the importance of the discovery sought, namely, the need to rebut the presumption that the plaintiff had standing. The defendant essentially makes the same arguments in support of his claim that the trial court abused its discretion in granting the plaintiff's motion for a protective order. We are not persuaded.

"In the absence of an abuse of discretion, a trial court's decision to deny a motion for continuance pursuant to Practice Book § 382 [now Practice Book § 17-47] will not be interfered with by an appellate court. . . . If a party opposing summary judgment has had ample opportunity to procure the information necessary to defeat the motion, a trial court properly may deny a continuance. . . . Furthermore, [u]nder [Practice Book § 17-47], the opposing party must show by affidavit precisely what facts are within the exclusive knowledge of the [party to be deposed] and what steps he has taken to attempt to acquire these facts." (Citations omitted; internal quotation marks omitted.) *Great Country Bank* v. *Pastore*, 241 Conn. 423, 437–38, 696 A.2d 1254 (1997).

After unsuccessful mediation and in response to the plaintiff's demand for a disclosure of defense, the defendant, on May 20, 2015, filed a disclosure of defense stating in relevant part that he "intend[ed] to challenge the plaintiff's alleged right and standing to foreclose upon the subject mortgage in a manner that is consistent with [our] Supreme Court's holding in *J.E. Robert Co.* v. *Signature* [*Properties*], *LLC*, 309 Conn. 307, [71 A.3d 492] (2013)."[4] The defendant also filed an answer that same day. Nearly two months later, on July 17, 2015, the plaintiff filed its motion for summary judgment. On July 22, the defendant, pursuant to Practice Book (2015) § 17-45,[5] filed a request for a continuance for thirty days,

[4] Although the defendant's disclosure of defense states that "[t]he *plaintiff* intends to challenge the plaintiff's alleged right and standing"; (emphasis added); we understand this to be a typographical error and read it to mean that the defendant intended to challenge the plaintiff's standing.

[5] Practice Book (2015) § 17-45 provided that "[a] motion for summary judgment shall be supported by such documents as may be appropriate, including but not limited to affidavits, certified transcripts of testimony under oath, disclosures, written admissions and the like. The motion shall be placed on the short calendar to be held not less than fifteen days following the filing of the motion and the supporting materials, unless the judicial authority otherwise directs. Any adverse party may, within ten days of the filing of the motion with the court, file a request for extension of time to

which the trial court granted, continuing the hearing for the motion to August 31. On August 31, the defendant filed an objection to the motion for summary judgment, along with his request for a continuance under Practice Book § 17-47. The defendant's objection stated simply that he needed time to complete discovery necessary to oppose the motion for summary judgment. Alternatively, the objection asked that the trial court deny the plaintiff's motion pursuant to Practice Book § 17-47.[6] At the conclusion of a colloquy with counsel, the court extended a week in which to file "whatever you want to file . . . ."

The issue of whether a court has abused its discretion in denying a continuance is not novel. In *Great Country Bank* v. *Pastore*, supra, 241 Conn. 437–38, our Supreme Court noted specifically that a trial court has the discretion to deny a Practice Book § 17-47 request where the proponent of the request has had ample opportunity to procure the information necessary to contest a motion for summary judgment. In *Altfeter* v. *Naugatuck*, 53 Conn. App. 791, 805–807, 732 A.2d 207 (1999), this court concluded that the trial court did not abuse its discretion in denying a continuance when the plaintiffs' request for time to gather information to oppose a

respond to the motion. The clerk shall grant such request and cause the motion to appear on the short calendar not less than thirty days from the filing of the request. Any adverse party shall at least five days before the date the motion is to be considered on the short calendar file opposing affidavits and other available documentary evidence. Affidavits, and other documentary proof not already a part of the file, shall be filed and served as are pleadings."

[6] Practice Book § 17-47 provides: "Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present facts essential to justify opposition, the judicial authority may deny the motion for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just."

motion for summary judgment was untimely and the plaintiffs had known for more than three months that they would need time to respond to the motion. The court cited *Plouffe* v. *New York, N.H. & H.R. Co.*, 160 Conn. 482, 490, 280 A.2d 359 (1971), as follows: "Where, however, the party opposing summary judgment timely presents his affidavit . . . stating reasons why he is presently unable to proffer evidentiary affidavits he directly and forthrightly invokes the trial court's discretion. Unless dilatory or lacking in merit, the motion should be liberally treated. Exercising a sound discretion the trial court then determines whether the stated reasons are adequate. And, absent abuse of discretion, the trial court's determination will not be interfered with by the appellate court." (Internal quotation marks omitted.) *Altfeter* v. *Naugatuck*, supra, 806. Similarly, in *Bank of America, N.A.* v. *Briarwood Connecticut, LLC*, 135 Conn. App. 670, 676–77, 43 A.3d 215 (2012), this court upheld the trial court's denial of a Practice Book § 17-47 continuance because the defendant had had more than two months to file an affidavit and obtain a continuance. In the present case, the trial court observed that the defendant had had since February, 2015, after the mediation terminated, to attempt discovery.

As noted in the court's September 25, 2015 memorandum of decision, "the defendant has had over a year and a half to conduct discovery and has done none . . . ." Under these circumstances, the court did not abuse its discretion in granting the defendant only one week to respond to the plaintiff's motion for summary judgment after his Practice Book § 17-47 request. We also conclude that the trial court did not abuse its discretion in overruling the defendant's objection to the motion for a judgment of strict foreclosure, which was

predicated on the defendant's stated need to depose the plaintiff's affiant.[7]

The judgment is affirmed.

In this opinion the other judges concurred.

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[7] The following exchange is pertinent to the trial court's denial of the defendant's objection to the plaintiff's motion for a judgment of strict foreclosure:

"[The Defendant's Counsel]: The objection, Your Honor, is that we had requested a deposition of the plaintiff's affiant which it relied upon to seek a judgment on liability with the court. When we set up that deposition, the plaintiff filed a motion for protective order which was granted by the court.

"Your Honor, we think the recent case cited from the Appellate Court in which the Appellate Court overturned a judgment for foreclosure on the basis that the defendant was denied the right to cross-examine a key witness in the case, which we believe we have here, Your Honor. The plaintiff's affiant was necessary for its claim for judgment in this case and to enter a final judgment without . . . having the opportunity to cross-examine, Your Honor, we believe violates due process protections under both the federal and state constitutions.

"The Court: Well . . . there were eleven mediations here. There was no trial. So there was no inability to cross-examine anyone. There was no defense disclosed. Summary judgment was granted. So I'm going to have to overrule your objection."